REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW, CONSTITUTIONAL

AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NUMBER 88 OF 2010

IN THE MATTER OF ARTICLES 22, 23 40, 47 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CHAPTER 281 OF THE LAWS OF KENYA

BETWEEN

MULTIPLE HAULIERS EAST AFRICA LIMITED.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

THE MINISTER, MINISTRY OF ROADS.....3RD RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS.....4TH RESPONDENT

THE MINISTER, MINISTRY OF LANDS.....5TH RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF LANDS.....6TH RESPONDENT

THE MINISTER, MINISTRY OF

LOCAL GOVERNMENT.....7TH RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF LOCAL GOVERNMENT.....8TH RESPONDENT

THE DIRECTOR OF CITY PLANNING,

CITY COUNCIL OF NAIROBI.....9TH RESPONDENT

THE CITY COUNCIL OF NAIROBI.....10TH RESPONDENT

RULING

Introduction

1. The petitioner filed an application brought by way of Notice of Motion dated 10th March 2014 seeking orders to review the judgment of this Court delivered on 19th December 2013 and the order issued on 11th February 2014. The orders of review are sought to the extent that the Court found that the petitioner's ownership of LR. No. 9042/607 (Grant No. I. R 70209) is unclear and that the petitioner cannot therefore make any claim in regard to that parcel of land. The application is premised on the grounds set out in the application and is supported by the affidavit sworn by the petitioner's Counsel, Mr. Kiragu Kimani, on the same day.

Submissions by the Applicant

2. The applicant argues that there is an error or mistake occasioned by the advocates formerly on record for the applicant who produced an incomplete and inaccurate title document in respect of the property in issue. It therefore argues that there is an error or mistake on the face of the record.
3. The applicant further argues that the authenticity of the title document was never raised at the hearing of the petition by any party, and the petitioner did not therefore have an opportunity to address the issue at the hearing of the petition. It further contends that no-one else has claimed ownership of the property, and there is therefore sufficient cause to grant the order for review.
4. With regard to the factual background to the application, the applicant submits that the petition was filed on 8th December 2010 by the firm of Lumumba Mumma & Kaluma Advocates. Its current lawyers, the firm of Hamilton Harrison and Mathews Advocates, took over conduct of the matter on 8th February 2013, and conducted the hearing of the petition on behalf of the applicant. Judgment in the petition was delivered on 19th December 2013.
5. The applicant notes that at paragraph 11 on page 26 of its judgment, the Court held that the basis of ownership by the petitioner of the property known as L.R No.9042/607 was unclear and therefore the petitioner could not make any claim to it. Mr. Kimani avers on behalf of the applicant that immediately after judgment and while he was discussing the matter with his partner, Richard Omwela, who works in the firm's Commercial Department, it transpired that the copy of the title to certificate of title to L.R No. 9042/607(Grant No I.R 70209) that had been attached to the petition was not the correct title. He avers that this is what led to the finding of the Court that the petitioner was not the registered owner of the property.
6. According to the applicant, Mr. Omwela compared the copy of the title that had been produced in Court with the copy that he had in his custody and that he had used to prepare the charge document to secure financing for the petitioner from NIC Bank; that Mr. Kimani caused a search to be carried out on the suit property on 8th January 2014 using the title that was attached to the petition; that on 16th January 2014, the copy of title to L.R No. 9042/607 that was submitted to the Lands Registry was rejected by the Lands Registry which asked that the correct title to the

property be submitted.

7. Mr. Kimani avers that on 6th February 2014, an application for an official search using the copy of the title obtained from Mr. Omwela was submitted and results were obtained on 13th February 2014, which confirmed that the petitioner is the registered owner of the property.
8. The applicant submits that it was then that it came to its attention that a mistake occurred when the petition was being filed, and that the copy of the certificate of title to the property attached to the petition at the time of filing was incomplete and inaccurate. It is on this basis that the applicant avers that there is an error on the record, and prays for review of the judgment of the Court.

The Attorney General's Response

9. The office of the Attorney General, (AG) representing the 1st to 8th respondents, opposed the application and filed grounds of opposition dated 8th September 2014. They contend in the said grounds that the applicant has not demonstrated an error apparent on the face of the judgment, or that it has discovered new or important matter or evidence which, after the exercise of due diligence, was not within it's knowledge. It is also their contention that the application has been brought under laws and procedures unknown and foreign to the realm of constitutional petitions in Kenya.
10. The respondents further argue that what is being sought in a back hand manner is an appeal, not a review. Their case is that to entertain the application is tantamount to the Court sitting on appeal on its own judgment, and they ask the Court to dismiss the application with costs.
11. The 9th and 10th respondents did not file any grounds in opposition to the application, while the interested party indicated to the Court that it was not opposed to the application.

Determination

12. The applicant has identified and addressed itself to three issues as falling for determination in this application:
    a. ***Whether the court has jurisdiction to hear and determine this application***
    b. ***Whether there was an error apparent on the face of the record***
    c. ***Whether there is sufficient cause to warrant the grant of the prayers sought.***

Whether the Court has Jurisdiction to hear and determine this Application

13. The application is opposed by the AG on the grounds that it has been brought under laws and procedures unknown to constitutional petitions. The applicant responds that despite there being no specific provision that provides for an application for review in a constitutional petition, the Court has jurisdiction to review its own decisions should it find that a case has been made out for review. It relies on the provisions of Article 22 of the Constitution as read together with Article 159(2)(d) of the Constitution.

14. It is its submission that the ends of justice ought not to be restricted by procedural technicalities, and that the Court should not give undue regard to technicalities relating to matters of procedure but should endeavour to do justice based on the substance of the case. It has relied on the decision in **Iron & Steel Wares Limited –vs- C. W. Martyr & Company [1956] 23 EA CA 175** in which the Court held that:-

> ***"Procedural rules are intended to serve as handmaidens of justice, not to defeat it, and we think the High Court in its inherent jurisdiction to control its own procedure has a discretion to waive strict application of Order XVI rule 2 (similar to order XVII) and has a duty to ensure that each party is given a fair opportunity to state its case and to answer the case made against it.***

15. It further relies on the decision in **Anders Bruel t/a Queencross Aviation -vs- Kenya Civil Aviation Authority & Another** [2013] eKLR in which the Court held that it has power to

entertain applications for review.

16. I agree with the applicant's submissions on this point. As I held in the case of **Anders Bruel:**

> ***"My understanding of these provisions is that even if there is no specific provision in the Rules allowing the court to review its decision, should the court find that a case has been made out for review of its decision, then it would be duty bound to review its decision."***

17. To the AG's opposition to the application on the basis that what the applicant is seeking is an appeal and not review, the applicant argues that it has filed a notice of appeal, not an appeal. It again relies on the decision in the **Anders Bruel** case (supra) in which it was held that a notice of appeal merely discloses an intention to appeal but does not amount to an appeal and it is its contention therefore that this Court has jurisdiction to review its decision.

18. I agree with the applicant on both these points. In **High Court Petition No. 98 of 2012 - Wananchi Group Limited –vs- Communication Commission of Kenya and Others,** I reiterated my observations in the **Anders Bruel** case as follows:

> ***[17.] "It is indeed true that the court held in the Anders Bruel case that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159(2) (d), the court is duty bound, should sufficient reasons be established, to review its decision."***

19. With regard to whether a party can file an application for review after having filed a notice of appeal, I observed in the **Wananchi Group** case that in light of the conflicting decisions with regard to the point, I was inclined to follow the holding in the Court of Appeal decision in **Yani Haryanto -vs- E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** in which the Court took the view that:

> ***"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".*** (Emphasis added)

20. Consequently, I am satisfied that in the present matter, should the facts merit a review, this Court would be entitled to review its decision.

Whether There was an Error Apparent on the Face of the Record

21. The applicant has further relied on the **Anders Bruel** case to submit that the principles set out in

Order 45 of the Civil Procedure Rules would apply in applications for review of decisions made pursuant to constitutional petitions. It submits that applications for review are largely governed by Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Order 45 rule 1 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 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."*** (Emphasis added)

22. It is the applicant's submission that the use of the word ***or*** in Order 45 rule 1 signifies that a party can apply for review if it establishes any of the conditions set out. It is not a requirement that all conditions must exist for an application for review to be granted. I fully agree with the applicant on this.

23. The application is premised on the ground that there is an error apparent on the face of the record. According to the applicant, there was a mistake when its advocates previously on record produced an incomplete and inaccurate title document, which was only discovered after the applicant's advocates now on record conducted and received an official search of the title. The applicant submits that the record that was placed before the Court had a mistake.
24. The applicant further submits that none of the parties has controverted Mr. Kimani's averments contained in his affidavit sworn on 11th March 2014 with respect to the mistake in respect of the title document placed before the Court. It is also its submission that no party has disputed the ownership of the property in issue. It submits, further, that no evidence was led questioning the authenticity of title at the hearing of the petition, and the petitioner therefore had no opportunity to set the record straight at that point in time.

25. In determining whether there was an error apparent on the face of the record, I must ask myself two additional questions. The first is what amounts to an error apparent on the face of the record. The second is whether erroneous, incorrect, in complete or inaccurate evidence placed before the Court by a party or its Counsel amounts to an error apparent on the face of the record.

26. I have noted the applicant's averments through Mr. Kimani that it only came to be aware of the incorrect and/or incomplete title document upon reading the decision of the Court to the effect that it was unclear whether the petitioner owned the property, and that the result of this mistake is that the Court gave orders that fetter the applicant's right to ownership of the property.
27. With the greatest respect to Learned Counsel for the applicant, one must ask whether the Court was required to issue orders in favour of the petitioner on the basis of documents that, on its own admission, were incorrect and inaccurate. As is apparent from the pleadings in the petition, the petitioner was claiming a violation of his right to property by the respondents. In order to make a determination on whether or not there had been a violation of this right, the petitioner's entitlement to the property had to be established. The evidence presented to the Court with respect to the petitioner's title were the copies of the titles to the two properties.

28. It is important to set out the portions of the judgment that deal with the property in question that have given rise to this application. At paragraph 26, the 1st - 8th respondents' closing submissions

are set out as follows:

> ***[26.] Finally, with regard to the prayers sought by the petitioner, it is their contention that the orders sought are premised on the presumption that the land in question belongs to the petitioner; which is erroneous as the portions have been existing as a road reserve since 1980; that the valuation report is also unreliable as it is based on several untenable presumptions viz. that the suit property has good title; that it is free from burdens and restrictions; and that all requisite consents and plans were obtained by the petitioner. They allege that the petitioner's valuers admit that they do not know the boundaries of the petitioner's property, and whether the demolished structures were constructed beyond the surveyed boundary. They therefore ask the court to dismiss the petition."***

29. At paragraph 35 and 36, the Court observes as follows:

> ***"[35.]<u>The petitioner states that it is the registered owner of the suit property</u>. It has annexed to the affidavit in support of the property two grants in respect of the two properties, namely L.R. No. 9042/607 and L.R. No. 9042/608.***
>
> ***[36.] <u>With respect to L. R. No. 9042/607, the basis of the ownership of the property by the petitioner is unclear.</u> Grant No. I.R. 70209 dated 16th August 1996 (Annexure SD1) is made to Realty Brokers Limited. The entries in the grant do not indicate a transfer to the petitioner: entry no. 2 is a charge to Giro Bank and Credit and Commerce Finance Company Limited. Entry no. 3 is a discharge of that charge made on 31st October 2003; entry no. 4 is a further charge to the Interested Party, NIC Bank, dated 6th October 2006 while entry No. 5 is a charge to the Interested Party dated 18th June 2008. The final entry is entry no. 6, a fourth further charge to the Interested Party. I can therefore find nothing in the entries in respect of L.R. No. 9042/607 (Grant No. I.R. 70209 dated 16th August 1996) that identifies the petitioner as the registered owner of this property, and I must therefore agree with the 1st -8th respondent in their submission that the petitioner cannot make any claim with regard to this property."***

30. As observed above, the applicant's claim in the petition was for violation of the right to property under Article 40 of the Constitution. In order to make a finding that there had been a violation of this right, the Court must be satisfied that the petitioner was the registered owner of the property, for how else could it claim violation of a right in respect of the property if it had not established its ownership thereof?
31. If I understand the applicant correctly, the Court should accept blindly whatever the parties place before it; that if what is placed before it is not challenged by the opposing party, then the Court must find in favour of the petitioner. In this case, according to the applicant, even though the title to the property that was before the Court showed no transfer to the petitioner the Court should still have found that the petitioner had a claim to the property.
32. A second ingenious, but clearly untenable argument, is that the reference to "***<u>some mistake or error apparent on the face of the record…"</u>*** includes a mistake made by a party in presenting evidence before the Court. In the present case, the applicant placed wrong evidence before the Court. It submits, however, that the mistake of its advocate of failing to place the proper documents before the Court, or make proper copies of the title document, should not be visited on it.
33. However, such a mistake is not a mistake or error on the face of the record. The Court did not make any error or mistake. It made its decision, properly so, on what was placed before it. The question of title to the properties in question was properly before it, and in order to make a finding on whether or not the respondents had violated the petitioner's right to property, the Court needed to be satisfied that the petitioner was indeed, as it had pleaded in its petition, the registered owner of the two properties.
34. The applicant seems to want to advance a rather novel proposition: that an error or mistake made

by a party or his advocate in presenting documentary evidence to the Court is the kind of error or mistake contemplated under Order 45 Rule 1.

35. The applicant relies on various decisions to submit that there is no clear definition of what amounts to an error apparent on the face of the record and the Court will have to look at the facts of the case. It cites in particular **Muyodi -vs- Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** in which the Court held as follows:-

> ***"An error on the face of the record could not be defined precisely or exhaustively, as there was an element of indefiniteness inherent in its very nature to be determined judicially on the facts of each case...."***

36. Reliance is also placed on the case of **Serengeti Road Services -vs- CRDB Bank Limited [2011] 2EA 395** in which the Court stated that:

> ***"There is no clear definition of what amounts to an error on the face of the record since it would vary on the facts of every case. An error on the face of the record, however, is one that must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something that can be established by a long drawn process of reading on points on which there may be conceivably two opinions."***

37. However, in my view, an error by a party in ***its pleadings*** cannot be described as an error on the face of the record. I believe that it goes without saying that the *"record"* in order 45 refers to the Court record, not what parties file in their pleadings. As the Court of Appeal held in the case of **National Bank of Kenya Ltd -vs- Ndungu Njau Nairobi Civil Appeal No 211 of 1996** (unreported) (cited by Visram J (as he then was) in **Elijah Githinji Wachira -vs- Gerald Gikonyo Kanyuira & Another [2004]eKLR):**

> ***"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."***

38. In this case, the petitioner presented a claim for violation of its right to property. It presented in evidence documents in support of its claim to the property in support of its case. The Court examined the claim against the documents before it, and in respect of one of the properties, found that the documents adduced in evidence did not support the petitioner's claim. If the Court was wrong in reaching this conclusion, reached on the basis of documents which the applicant admits were wrong and inaccurate, then that cannot be a matter for review.

39. The applicant submits that it is only fair and just that it should be allowed to set the record straight in as far as the title to the property in issue is concerned. It further submits that the search that it obtained subsequent to the decision of the Court confirms that it has a basis for its claim to the

property, and that the search is likely to alter/affect the decision of the Court.

40. As I understand it, what the applicant seeks to do is to present "fresh' evidence, in the form of another title, alleged to be the "correct" title to the subject property (which then raises the question whether there were several titles to the same property, and which is the correct title to the property), and thereby ask the Court to reconsider its decision.
41. In my view, the Court has no jurisdiction to do that. However wide and unfettered the discretion of the Court is, it cannot be proper exercise of discretion to review a matter in order, as it were, to give a party who did not exercise care in its pleadings to have a second bite at the cherry. I believe that the maxim of law is that a party is bound by its pleadings, and it cannot seek to adduce evidence, which was in its possession at the time of filing its case, long after judgment, and somehow try to twist its error to make it the error of the Court.
42. It is noteworthy that the applicant submits that the Court *"made an erroneous conclusion of fact based on an incorrect and/or incomplete documentary evidence"*. The incorrect or inaccurate documentary evidence was presented by the applicant. The applicant was represented by Counsel who had a duty to ensure that it presented the correct documents to the Court. The error of the first firm of advocates in filing an erroneous document, and that of the second firm of advocates in failing to detect this mistake prior to the hearing of the petition, cannot, by any stretch of the imagination, be termed an error on the face of the record.
43. If, however, as the applicant submits, it is asking the Court to review its decision based on an erroneous finding of fact, a submission that is not supported by the applicant's own averments and submissions, that, as argued by the Attorney General, is a matter for appeal, not review.
44. In the circumstances, I cannot find any merit in this application, and it is hereby dismissed with costs to the 1st - 8th respondents.

Dated, Delivered and Signed at Nairobi this 27th day of May 2015

MUMBI NGUGI

JUDGE

Mr. Murugara instructed by the firm of Hamilton Harrison & Mathews Advocates for the applicant/petitioner

Mr. Obura holding brief for Mr. Moimbo instructed by the State Law Office for the 1st – 8th respondents

No appearance for the 9th and 10th respondents