REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 187 OF 2005

PETER MUCHIRI MWANGI.....PLAINTIFF

VERSUS

MOLOLINE SERVICES LIMITED.....1ST DEFENDANT

MUNICIPAL COUNCIL OF NAKURU.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 13th August 2013 brought under Order 45 Rule 1 of the Civil Procedure Rules, the Plaintiff (Applicant) sought, inter alia, the following orders, that-

> ***a. the court be pleased to review the judgment and decree delivered and issued on 8th February 2013 and upon such review this case be re-opened and the applicant be allowed to present evidence to challenge the purported letter of allotment issued in compensation for the parcel of land repossessed by the Commissioner of Lands at the behest of the 2nd defendant,***
>
> ***b. in the alternative, upon allowing such review, the court makes a finding that the decree and judgment be varied and set aside and judgment be entered in favour of plaintiff/ applicant.***

2. The Application was supported by the Affidavit of Peter Mwangi Muchiri sworn on 13th August 2013 and is premised on the grounds that the judgment and decree of the court was made pursuant to evidence that was not availed to the Applicant before the hearing date, that the judgment was based on an error of the rule of evidence to the extent that the court required the applicant to discharge a negative burden of proof and that the judgment was based on an error of law to the extent that it was based on a case which was neither pleaded nor proved by the defendant.

3. In response to the Application, the first and second defendants filed Grounds of Opposition dated 4th November 2013 and 6th November 2013 respectively wherein they raised similar grounds that: the application is incompetent, legally unsustainable and amounts to an abuse of the court process, that the application does not comply with or satisfy the mandatory requirements of the applicable rules, that the applicant has filed an appeal in the superior court yet he seeks an order of review and that the application is untenable and lacks merit.

4. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 4th December 2013, while the first and second defendant's submissions were filed on 11th December 2013 and 16th December 2013 respectively. I have considered the application, the affidavit sworn in support thereof, the Grounds of Opposition filed, the submissions of the parties and authorities annexed by the parties and I find the issues for determination in this application to be as follows-

> ***(1) Whether the application herein is incompetent,***
>
> ***(2) Whether the Applicant has satisfied the grounds for review of the judgment of the court,***

Whether the application herein is incompetent

5. The Application herein has been brought under Order 45 Rule 1 of the Civil Procedure Rules which 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 and 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.

6. It is clear from the above that once an appeal is filed against a judgment or decree, the order of review is no longer available. In the instant case, the Applicant had filed a notice of appeal on 14th February 2013. According to the Defendants, this amounted to filing an appeal, and having not withdrawn this notice or indicated whether he had abandoned the appeal the remedy of review was not available to him.

7. The Applicant acknowledged having filed the Notice of Appeal but argued that as he had not filed a Memorandum of Appeal, he was not barred from applying for for review of the judgment. He referred this court to the holding in ***ANDERS BRUEL T/A QUEENCROSS AVIATION Vs. KENYA CIVIL AVIATION AUTHORITY & ANOTHER [2013] eKLR-*** *where the court considered whether it could entertain an application for review after a Notice of Appeal had been filed. It held that the application was properly before it because a Notice of Appeal simply shows an intention to appeal and is not an appeal.*

8. In light of the clear provisions of Rule 82 that an appeal shall be lodged within sixty days from the date when the Notice of Appeal was lodged, I concur with the above findings in their entirety. A notice of appeal is only a manifestation of an intention to prefer or put forward an appeal against the decision of this court and does not itself amount to an appeal. The actual appeal is preferred once the Memorandum of Appeal is filed. Consequently I find that the application is properly before the court.

9. It was also contended that the application herein is incompetent as the decree sought to be reviewed has not been extracted and annexed to the application. In my view this is a technical objection that does not go to the root of the issues before the court. A decree is only a formal expression of the judgment of the court. The copy of the judgment from which such decree would be extracted forms part of the court record and is therefore available. I therefore find that failure to extract the said decree is a curable defect which I will disregard and determine the matters raised in the application on their merit.

Whether the applicant has satisfied the conditions for review of the judgment of the court

9. The Applicant herein is seeking to review the judgment of this court which was delivered on 8th February 2012 wherein the court found that the plaintiff's suit lacked merit and dismissed the same with costs. It was the Applicant's case that there was an error on the face of the record as the court made its findings on matters that had not been pleaded and on evidence that was not produced during discovery.

10. He contended that the case before the court was on ownership of the suit land and the issue of compulsory acquisition of land was not raised by any party and no evidence was adduced to prove that there was in deed compulsory acquisition or that the Applicant had been compensated with another parcel of land. He relied on the holding in the case of ***ABDULLAHI IBRAHIM AHMED (Suing as the Personal Representative of The Estate of Anisa Sheikh Hassan (deceased) Vs. LEM LEM TEKLUE MUZOLO [2013] eKLR-*** *where the court cited the following passage from the case of* ***GANDY Vs. CASPAIR [1956] 23 EACA 139-***

"unless pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record.

11. He also submitted that the court erred when it relied on evidence which had not been availed to the applicant before hand and was not proved. In particular the court relied on a resolution made by the second Defendant to the effect that the suit parcel of land ought to be acquired whereas the minutes of that meeting were not produced in court and therefore could not be challenged. In addition the court relied on a letter of allotment which was not produced during discovery.

12. The Court of Appeal attempted to define what amounts to an error on the face of the record in the case of ***NYAMOGO and NYAMOGO ADVOCATES –VS- KAGO [2001]1 E.A. 173****. In that case their Lordships stated as follows:-*

"An error apparent on the face of the record cannot be defined precisely and 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 is possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

13. This holding was also relied on in MUYODI V INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER E.A.L.R [2006] 1 EA 243 at:-, cited with approval by the court in MICHEAL MUNGAI v FORD KENYA ELECTIONS AND NOMINATIONS BOARD AND ANOTHER, NAIROBI HIGH COURT JR MISC. APPLICATION NO. 53 OF 2013 the Court, *and the court further stated thus-*

"For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The Applicant before us has not established

that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the Court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."

14. On whether interpretation of evidence or law could be a ground for review the court in the case of ***SILVIA WANGUI WANDETO Vs. FRANCIS WANDETO KAHOI [2007] eKLR*** *observed as follows-*

"In the AIR commentaries on the Code of Civil Procedure by Chitaley and Rao (4th ed) Vol. 3 at 3227 it is stated:

"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of the evidence or of law is no ground for a review though it may be a good ground for an appeal."

15. In the instant case, it was alleged that the court considered matters that were not pleaded and in particular the question of compulsory acquisition of the land. I do agree that considering a matter that was not pleaded by the parties constitutes an error of law. However such an error would not be remedied by way of review but only by appeal where it can be considered whether although not pleaded, the question was one which flowed directly from the pleadings or that by the nature of evidence adduced by the parties during the trial it was one which was presented before the court for determination. If the court were to consider this question, it would have to re-evaluate the evidence before it and its decision which in my view, it does not have jurisdiction to do at this point. In deed in the case of ***GANDY Vs. CASPAIR,*** *(supra) which I have had the opportunity to peruse, the court was determining an appeal from the judgment of the court where it had decided a question that had not been pleaded. That definition therefore was not made, in my view, in relation to an application for review of a judgment.*

16. This is more so in the instant case where the question of determination was whether the Applicant was the legal owner of the suit premises and therefore entitled to exclusive possession and use thereof, which allegation had been challenged by the second defendant on the grounds that the allocation had been canceled once a directive was passed by the president that a public park should be constructed on that land.

17. It was further alleged that the court relied heavily on minutes of a resolution by the second defendant in which it was resolved that the Applicant's premises would be compulsorily acquired which were not produced in court. This, again is a question of evidence that goes to the merits of the decision of the court. In any event, the court's decision was based on the legality of the allotment of the suit premises to the Applicant in light of the fact that the allotment had been canceled and a subsequent letter of allotment issued. Although it was alleged that the said letter which was relied on by the second defendant had not been served upon the Applicant during discovery, and as a result, he was unable to challenge its contents, its production during the hearing was not objected to and this cannot now be a ground upon which the court can review its decision.

18. For the above reasons, I find that the Applicant has failed to demonstrate that there is an error or mistake apparent on the face of the record or any other sufficient reason for this court to review the judgment delivered on 8th February 2012. I therefore dismiss the application dated 14th August 2013 with costs to the first and second defendants.

Dated, signed and delivered at Nakuru this 28th day of February, 2014

M. J. ANYARA EMUKULE

JUDGE