**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NUMBER 127 OF 2010**

**SALEH AWADH SALIM (administrator**

**of the estate of HASSAN AWADH**

**(Deceased)… ……PLAINTIFF/APPELLANT**

**VERSUS**

**1. ABDALLA SAID BARAKAT**

**2. BARAKAT SAID BARAKAT.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

1. This is an application by the Appellant/Applicant brought by way of Notice of Motion dated 3rd January, 2012. It seeks in the main the following orders:

**"2. That the Honourable court be pleased to review and/or set aside its order of 15th December, 2011, even in terms, so as to maintain the *status quo* relative to the suit premises pending disposal of the appeal herein.**

**3. That meantime, pending hearing of this application *inter partes* there be a stay of execution of**

**the order of the business Premises Rent Tribunal of 24th June, 2010 issued at Mombasa.**

**4. That costs of the Application be provided for."**

2. The application is based on the following grounds:

**"1. That the honourable court has, in its order of 15th December, 2011 made final orders on the application for stay (of execution) pending appeal which orders are not wholly reconcilable with the body of the ruling.**

**2. That there would seem to be such errors on the face of the record and/or other sufficient reasons as would warrant review of the order of 15th December, 2011.**

**3. That the interest of justice would favour a reconsideration of the final orders made, as, plainly, the appeal would be rendered nugatory once execution is now imminent.**

**4. That there is no appeal from the orders herein. This application represents the last recourse to the applicant, and is, in the peculiar circumstances, warranted.**

**5. That sufficient reasons exist for grant of the orders sought herein.**

3. The application is supported by the affidavit of Saleh Awadh Salim, the Appellant herein, deponed on 3rd January, 2012. Annexed to the affidavit are, *inter alia,*

- An order of the court issued on 22nd December, 2011 extracting the orders of Hon. Justice J.B. Ojwang emanating from his Ruling dated 15th December, 2011.

- The Ruling of Justice J.B. Ojwang dated 15th December, 2011 on which the application for review herein is sought.

4. The Respondent filed a Notice of Preliminary objection dated 13th January, 2012 on the ground that:

***"the Appellant's/Applicant's application is misconceived, frivolous and vexatious and totally devoid of merit and mala fides for the reason, inter alia, that the Appellant/Applicant has not shown that there is any new and important matter or evidence found after diligent search.***

***That Honourable Justice Ojwang on 16th July, 2010 ordered a stay of execution of the Tribunal order of 24th June 2010 pending the purported intended appeal;***

***That the matter is now Res Judilala [sic Res Judicata] and … that the Appellant/Applicant is vexatious."***

5. The Respondent also filed a Replying Affidavit deponed on 13th January, 2011 (sic) in which he avers that on 31st May, 2010 vide Business Premises Rent Tribunal case Number 142 of 2008, the BPR Tribunal granted the Respondent vacant possession on 1st July, 2010; that that order was stayed and the stay has been in place up to 15th December, 2011 when Hon. Justice J.B. Ojwang gave his Ruling; that the application before the court:

***" a) Is Res judicata, and/or***

***b) Is vexations and frivolous***

***c) Is made under wrong proposition[s] of the procedure***

***d) The court has no jurisdiction to try the application."***

6. The parties filed written submissions to dispose of the application. The Appellants' were filed on 31st March, 2012 and the Respondents' on 22nd February, 2012.

The Applicant adverted to several paragraphs in the Ruling now sought to be reviewed, indicating that such portions were erroneous or came to wrong conclusions; argued, in reliance on **Mbogo –vs- Micora** HCCA 109/94 and **Kanji vs Hirji** 21 EACA 66, that in suits for possessionstay ought to be granted as otherwise a successful appeal would be rendered nugatory.

In addition, the Applicant argued that there was the glaring error on the face of the record in the Honourable Judges **"finding that the Applicant's business interests are not all threatened by the present circumstances"**, because it overlooked the fact that the threat facing the Applicant was **"an eviction which would put the Applicant out of the premises and not of business."**

Counsel relied on the following authorities:

a) **SoniaArts Limited vs Safari Lodge Properties of Kenya Limited** HCCA 48/96

b) **Kanji vs Hirji & Co. & Another** 21 EACA 66

c) **Mbogo vs Mucora** HCCA 106/94

d) **Nyamogo & Nyamogo Advocates vs Kogo (2011) EA 170**

7. Referring to the **Nyamogo** case, counsel for the Applicant pointed out that what constitutes an error apparent on the face of the record is not defined in closed categories, but however, that an error on a substantial point of law stares one in the face when there reasonably could be no two opinions. In this case, the possible eviction of the Applicant was a glaring issue for which redress by way of stay should have been granted.

8. I have carefully considered the parties' submissions and the documents and authorities cited. Order 45 Rule 1 under which the application herein is made 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 or 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 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 the judgment to the court which passed the decree or made the order without unreasonable delay."***

The Appellant's Motion prays for review and/or setting aside of the court's order of 15th December, 2011 so as to maintain the *status quo* on the ground that, as per the schedule in the motion:

***"[the orders of 15th December, 2011] are not wholly reconcilable with the body of the ruling,"*** and

***" There would seen to be such errors on the face of the record and/or sufficient reasons as would warrant review of the order…"***

9. The Applicant's supporting affidavit at paragraph 4 and 5 sets out the alleged errors on the face of the record to be:

**a) the facts that the court made certain assumptions of a factual nature and/or drew incorrect conclusions on vital aspects of the matter; (Paragraph 4); and,**

**b) the fact that the court has erred on the effect of an execution of the BPRT which execution is now possible in absence of a stay sought, notwithstanding the pendency of the appeal.**

The two questions that arise are:

**(1) Whether the position taken by the court on facts assumed amounts to an error on the face of the record, and**

**(2) Whether the court committed an error on the face of the record in its refusal to grant stay of execution by not appreciating that eviction of the Appellant would follow pending appeal.**

10. In the **Nyamongo case** the Court of Appeal stated:

***"There is a real distinction between 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 on the face of the record…. A mere error or wrong view is certainly no ground for a review although it may be for an appeal."***

11. In **Stephen Mugo Mutothori and Another vs Kenya Commercial Bank Limited and Another, Civil Application Number Nairobi 181 of 2000** the Court of Appeal was faced with a situation where the Commissioner of Assize in the superior court had essentially been told during a review application:

***"…that she had not correctly appreciated the facts relating to the issue of limitation. Was she entitled to review her earlier orders on that basis?"***

On this, the Court of Appeal then cited its previous decision in the case of **National Bank of Kenya Limited Vs Ndungu Njau Civil Appeal Number 211 of 1996**, where the court remarked:

"***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 sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the 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 cannot be reviewed by the same court which had adjudicated upon it."***

12. The authorities cited above are clear on review for error on the face of the record. The principles which govern error on the face of the record that can be reviewed on that ground, may be summarized as follows:

- the error must be one that is "glaring" or "stares one in the face "or is "self – evident" or an "obvious mistake" and there could reasonably be no two opinions on it;

- the error must be one which does not require an elaborate reasoning process to establish;

- it is not a ground of review that the court proceeded on an incorrect conclusion on or wrong exposition of, the law, or a misconstruction of a statute;

- It is not sufficient that there is an incorrect appreciation of the facts relating to a contested issue;

- If it is an issue that is a good ground of appeal it is unlikely to be suitable for a review.

13. Applying these principles to the present case, I find as follows. The first main complaint by the Applicant is that the court failed to appreciate the facts. The Applicants' supporting affidavit at paragraph 4 states that:

***"the court made certain assumptions of a factual nature and/or drew incorrect conclusions on vital aspects of the matter…"***

I do not think that these are 'glaring' errors, of a type that are **"self evident.**" Where, as here, the court has allegedly proceeded on an incorrect conclusion, that does not meet the criteria for review on the grounds of error on the face of the record. Admittedly, that may make a good ground of appeal, but there is no appeal here.

14. The second main complaint by the Applicant is that stated at paragraph 5 of the supporting Affidavit, that:

***" …. It is apparent from the record that the court has erred on the effect of an execution of the Business Premises "Rent Tribunal, which execution is now possible in the absence of the stay sought notwithstanding the pendency of the appeal…."***

This is clearly a direct impugnment of the court's decision on the application for stay which the honourable judge declined, and on the consequential effects of such decline. It, however, does not fit into the category of glaring, self-evident, errors on the face of the record, on which there could be no two opinions. Instead, it satisfies the criteria for a ground of appeal, a challenge to the decision reached.

15. For the foregoing reasons, none of the grounds cited persuade me to review the decision on error on the face of the record. Accordingly, I am unable to grant the Applicant's application, and it is hereby dismissed with costs to the Respondent.

**Dated and delivered this …23rd.Day of March, 2012**

**R.M. MWONGO**

**JUDGE**

**Read in open court**

**Coram**:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

a) ……

b) ……

c) ……

d) ……