REVIEW

1. **Mistake/Error on the face of the record**
2. **For any other sufficient reason**

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.170 OF 2009

KISHOR KUMAR DHANJI.....PLAINTIFF/ APPLICANT

VERSUS

NDEFFO LIMITED.....1ST DEFENDANT/RESPONDENT

RAMMJI NARAN PATEL.....2ND DEFENDANT/RESPONDENT

BOAZ OKELLO.....3RD DEFENDANT/RESPONDENT

KENNETH NDUNGU.....4TH DEFENDANT/RESPONDENT

SINGH KALVENDER SINGH.....5TH DEFENDANT/RESPONDENT

RULING

On 19th November, 2009, this court dismissed the applicant's application for injunction after finding that it did not disclose a *prima facie* case with a probability of success; that the loss that may be suffered by the applicant if the injunction was not issued was capable of being compensated by an award of damages. The court further found that the balance of convenience was in favour of the estate of Amolak Singh.

The applicant has subsequently approached the court with the present application for orders that the ruling of 19th November, 2009 dismissing the application for injunction be reviewed and/or set aside; and that pending the hearing of this application, the orders of temporary injunction be reinstated. The grounds upon which this application is premised may be summarized as follows:

i) that there is some mistake or error apparent on the face of the record

ii) that there is sufficient reason to review the orders dismissing the application

Although during the hearing of the application, learned counsel for the applicant indicated that he was only relying on the second (ii) ground, he seemed to have argued both grounds. The mistake or error apparent on the face of the record was that the relief sought in the dismissed application was the subject of the other matters before the court, e.g.:

i) that in Nkr. CMCC No.583 of 2008, the applicant obtained an injunction against the respondents and an application to join three persons was dismissed by the Chief Magistrate

ii) that the constitutional reference in H.C. Constitutional Applications No.1 of 2008 and No.1 of 2009 were dismissed

iii) that Nkr. HCCC No.247 of 2002 abated after the death of Amolak Singh

Secondly, it was averred that there was a mistake or error on the face of the record in that:

i) no evidence on the sale agreement, consent or on the mode of payment was required at the stage of seeking interlocutory relief

ii) the documents annexed to the supporting affidavit constituted hearsay and their veracity could only be established at the hearing

iii) the applicant has receipts and cheque counter foil as proof of payment which he intended to rely on at the trial

iv) Bahati/Kabatini Block 1/2806 ceased to exist

v) 1st defendant did not have the capacity to renew the lease of Kaur Balbir as the initial lease had expired.

The third mistake or error was that the court relied on the affidavit of Charles Chiira who did not demonstrate his legal capacity to swear the replying affidavit on behalf of the 1st defendant.

Regarding the ground *"for any other sufficient reason"*, the court has been asked to review its orders of 19th November, 2009 for the reasons that:

i) there was a binding/valid contract for the sale of the suit land

ii) the Land Control Board consent was duly obtained and transfer effected

iii) the 1st defendant initiated the rectification of Bahati/Kabatini Block 1/2806 and title issued

The 1st respondent through Charles Chiira, described as a director and the secretary of the 1st respondent has sworn an affidavit in opposition stating that the application is misconceived, incompetent and bad in law; that it raises no grounds for review; that no mistake or error on the face of the record has been disclosed.

It is further averred that the applicant did not buy the suit land from the 1st respondent; that the alleged sale was fraudulent. Likewise the 2nd to the 5th respondents through the 2nd respondent have opposed the application arguing that the same is an abuse of the court process; that the application seeks to introduce new evidence; that the conditions for the review of orders have not been satisfied; that Nkr. HCCC No.247 of 2002 has not abated; that even if the new evidence sought to be adduced by this application were to be admitted, an injunction will still not issue.

I have considered these arguments and the authorities cited. A mistake or error on the face of the record must be one that stares one in the face, as it were, and on which there cannot be two opinions. In **Nyamogo and Nyamogo Advocates** Vs. **Kago** (2001) 1EA 173, the Court of Appeal reiterated that:

"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 merely erroneous decision and an error apparent on 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 review although it may be for an appeal."

The issues raised in this application to demonstrate the existence of mistakes or errors on the face of the record are highly contentious and there are two or more opinions on each of them.

In **National Bank of Kenya** Vs. **Ndungu Njau**, Civil Appeal No.211 of 1996, it was emphasized that the error or mistake must be self evident and should not require an elaborated argument to be established; that 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.

The question whether or not to grant an interlocutory injunction is a discretionary matter in which the court is guided by three long established principles, considered sequentially – namely, whether there is a *prima facie* case; whether an award of damages would be adequate compensation; and where the court is in doubt the matter is decided on a balance of convenience.

In dismissing the appellant's application for injunction, the court was duly guided by these principles. If the court misapplied the law thereby reaching an erroneous conclusion, in the opinion of the applicant, that cannot be corrected by an application for review but by an appeal.

Turning to the ground *"for any other sufficient reason"*, it has been stated that that phrase contained in **Rule 1(l)** of **Order 44** of the revoked **Civil Procedure Rules**, now **Order 45 rule 1(l)** need not be analoguos to the grounds specified in the rule, namely, discovery of new and important matter or mistake or error on the face of the record.

In my considered view, the grounds advanced in support of the exercise of my discretion under this rubric amounts to re-arguing the application afresh or introducing new evidence. Indeed some of the arguments border being *res judicata*.

For the reasons stated, the two related prayers sought cannot be granted. The application is dismissed with costs. In conclusion, it will be in the interest of the parties involved in the litigation involving the suit land herein and consequently save judicial time if the various matters in this (High) court could be identified, consolidated, if possible, and heard on merit with finality.

Dated, Delivered and Signed at Nakuru this 10th day of February, 2011.

W. OUKO

JUDGE