



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 39 of 1997

(Being an appeal from a ruling by Senior Resident Magistrate Mr. Gichuki in CMCC No. 156 of 1992 delivered on 28/5/97)

EUGENIO KITHINJI.....APPELLANT

VERSUS

JOHN GITONGA.....RESPONDENT

CIVIL PROCEDURE and PRACTICE - Review - application for review - factors to be considered in an application for review whether an erroneous decision constitutes an error on the face of the record sufficient to permit review.

RULING

This Ruling relates to an application by way of a Notice of Motion dated 10th January 2003 and first commenced by an Amended Notice of Motion dated 8th April 2005, and similarly amended by an Amended Notice of Motion dated 28th March 2007. Both Motions (*of 10/01/2003, and 28/03/2007*) are identical in their prayers. They both seek a review of the court's judgment dated 23rd January 2003, and that costs be provided for.

The original Motion (*of 8th April 2005*), was opposed by the Appellant (*Respondent*), per his Advocates (*Maitai Rimita & Co.*) submissions dated 25th May 2009. From the nature of the prayers in the Amended Notice of Motion of 28th March 2007, those submissions do apply to the latter said Amended Motion.

The Motion is, among other provisions, brought under the provisions of Order XLIV rules 1, 2 and 3 of the Civil Procedure Rules, the grounds on the face thereof and the Supporting Affidavit of the Applicant, John Gitonga Nkanata sworn on 30th January 2003.

Under Order XLIV of the Civil Procedure Rules an order or decree of court is amenable to review on the following grounds -

(i) *discovery of new and important matter or evidence,*

(ii) *that evidence, after exercise of due diligence was not within the knowledge of the applicant, and could not be produced by the applicant at the time when the decree was passed.*

(iii) *mistake or error apparent on the face of the record, or*

(iv) *other sufficient cause;*

All the above conditions are conditional upon either there being no appeal or no appeal is allowed. The subject of the application herein is in fact, the judgment of this court arising from an appeal by the Respondent in this application, but the appellant in Civil Appeal No. 39 of 1997, the subject matter of the application for review.

In my very humble view, unless it is a question of mere correction of figures or dates under Section 80 of the Civil Procedure Act (*Cap 21 Laws of Kenya*), no application for review should lie from a judgment on an appeal. The reason for this is both clear and obvious from the provisions of Order XLIV rule 1 - above - cited - the discovery of a new and important matter, or evidence, which even upon the exercise of due diligence will not be discovered at the time when the decree was passed or order made. Any mistake or error on the face of the record, means, error or mistake from that original decree or order, not a matter after an appeal.

In this case the applicants own grounds for review support not the application, but a second appeal -

- *that the court never put into consideration the original judgment of this case*

- *that the court ignored the judicial discretion of the court that heard the CMC No. 156 of 1997*

- *that the court failed to find as a matter of fact that the lands were sold in a public auction which was not fraudulent at all;*

- *that the judgment of the original suit was frivolous and the court should have found so.*

- *judgment has errors on the face of the record in that -*

· *it gave relief not sought in the application in which the appeal arose from not in the appeal.*

· *the court found that the application which prompted the appeal was incompetent in that the same was amended without leave and its affidavit was purportedly amended and did not annex the order sought to be reviewed;*

· *the same was undated nor did it contain grounds it was based on.*

- *The court made an illegal award which was not based on any fact or law and contrary to rules of natural justice;*

All or any of these grounds are reasons for appeal, not review as prescribed under rule 1, Order XLIV of the Civil Procedure Rules.

In the case of **EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK vs. AFRICAN GREEN FIELDS LTD & OTHERS**, [2002] 2 E.A. 371, Ringera J. held -

"An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further, it could not be reviewed on the ground that other judges of coordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue.

Among the grounds stated above for the review, is that the court made an illegal award - which was not based on any fact or law and was contrary to rules of natural justice. This is a ground for an appeal not of review. In the circumstances the application herein is misconceived and incompetent.

The Applicant's Amended Notice of Motion variously dated 8th April 2005, and 28th March 2007 is hereby dismissed with costs to the Respondent thereto.

It is so ordered.

Signed at Nakuru this ...11th .. day of ...may.....2010

M. J. ANYARA EMUKULE

JUDGE

Delivered at Meru this ...28th day of ...may.....2010

MARY KASANGO

JUDGE