



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 196 OF 2013**

**ROMANO MASSACESI**

**DELFINA FERRARI.....PLAINTIFFS**

**VERSUS**

**GAETANO GRASSO aka ENNIO GRASSO.....DEFENDANT**

**RULING**

1. By their Notice of Motion application dated 28<sup>th</sup> November 2019, Romano Massaccesi and Delfina Ferrari (the Plaintiffs) urge this Court to be pleased to review its Judgment dated 22<sup>nd</sup> November 2019 and enter Judgment in terms of Prayers in **ELC No. 4 of 2015**.

2. The application which is supported by an affidavit sworn by the Plaintiffs' Learned Counsel on record Stephen Obaga Muriuki is premised on the grounds: -

*a) That the Plaintiffs filed two suits against the Defendant being this suit and ELC No. 4 of 2015;*

*b) That after directions at the pre-trial stage, the two matters were consolidated; and the same proceeded to full trial with Judgment being delivered on 22<sup>nd</sup> November 2019 in this suit;*

*c) That a perusal of the Judgment reveals that the Court failed to consider the claim in ELC No. 4 of 2015 and thus failed to grant the prayers sought therein; and*

*d) That this was an error apparent on the face of the Judgment and it is in the interest of justice that the order be reviewed to avoid an injustice being occasioned to the Plaintiffs.*

3..The application is opposed by the Defendant- Gaetata Grasso also known as Ennio Grasso. In a Replying Affidavit sworn and filed on his behalf on 29<sup>th</sup> January 2020 by his Learned Counsel on record Tukero Ole Kina, he avers that the title of the suit as shown in the application is misleading as it ignores the fact that the two actions were consolidated and heard together.

4. The Defendant concedes that the two suits were indeed consolidated on 3<sup>rd</sup> February 2015 and that the hearing was conducted with that fact in mind. The Defendant however asserts that he was dissatisfied with the Judgment of this Court and that he has since lodged an appeal against the same. Arising from the fact that the appeal touches on both cases, the Defendant avers that it is in the interest of justice that this Court does not take any further action in the matter and instead await the outcome of the appeal.

5. I have perused and considered the Motion and the response thereto. The application is expressed to be brought under Order 45 of the Civil Procedure Rules. A perusal of that Order reveals that a Court can only review its orders if the following grounds exists: -

*a) There must be discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed or the order was made; or*

*b) There was a mistake or error on the face of the record; or*

*c) There were other sufficient reasons; and*

**d) The application must have been made without undue delay.**

6. In the instant matter, the Plaintiff assert that there was an error apparent on the face of the record in that the Court failed to consider the claim made in *Malindi ELC No. 4 of 2015* as consolidated with this suit. In *Muyodi – vs- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243*, the Court of Appeal described an error apparent on the face of the record as follows:

**“.....In *Nyamogo & Nyamogo –vs- Kogo (2001) EA 174*, this Court said 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 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 options, 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 for a wrong view is certainly no ground for a review although it may be for an appeal....”**

7. Taking those laid down principles into consideration, I have perused the record herein as well as my Judgment delivered herein on 22<sup>nd</sup> November 2019. While it is conceded by the Defendant as reflected on the record that this suit was consolidated with *Malindi ELC No. 4 of 2015* on 3<sup>rd</sup> January 2015, it is clear to me that this Court did not consider the pleadings in the said case before arriving at the Judgment herein.

8. A perusal of the Judgment reveals that this Court only considered the claim for injunction and payment of the sum of Kshs 13,200,600/- as sought in this suit. The claim for a further sum of Kshs 8,474,000/- as sought in *Malindi ELC No. 4 of 2015* does not feature anywhere in the impugned Judgment and it was therefore clear to me that there was indeed an error in my Judgment as submitted by the Plaintiffs.

9. A perusal of the Plaintiffs evidence-in-Chief reveals that the 1<sup>st</sup> Plaintiff herein relied on two Statement, one filed in Court on 7<sup>th</sup> November 2013 in the first case and the second one recorded on 3<sup>rd</sup> February 2015 in the consolidated *ELC No. 4 of 2015*. In the said second Statement, the Plaintiff asserts as follows:

**“That I am a male adult of sound mind and a resident of Malindi. That on or about 31<sup>st</sup> October 2013, the Defendant approached me and the 2<sup>nd</sup> Plaintiff and requested for a friendly loan to assist him sort out his issues at the Port as where he claimed his containers had been detained.**

**We agreed to assist him and we gave him a total of 72,000 Euros, equivalent of Kshs 7,920,000/-. I personally contributed 32,000 Euros. As security he issued us with post-dated cheques as security and assured us that the cheques will go through without any problem. Details are better particularized in paragraph 9 of the Plaintiff.**

**That he subsequently issued us with cheques totaling Euros 5,050/- equivalent to Kshs 554,400/- and we agreed that amount shall act as interest on the loan. We agreed that we deposit the cheques in one month’s time.**

**That on 2<sup>nd</sup> November 2013 we deposited with our banks the cheques but later on, we were informed that the cheques bounced.**

**We have made several demands to the Defendant but he has requested (sic) and/or neglected to pay our monies back hence this suit.”**

10. During his cross-examination by Mr. Ole Kina Learned Advocate for the Defendant on 11<sup>th</sup> April 2018 however, the record captures the 1<sup>st</sup> Plaintiff stating as follows in the relevant part:

**“We fell out with Mr. Grasso when I told him that there were two cheques missing. That was around November 2012. He insulted me when I asked about the 20 cheques. That was in 2012 November.**

**We have never made peace thereafter. The last sum I gave him was on 3<sup>rd</sup> November 2012. I did not therefore give him money in 2013 October. I never gave him any money at all in 2013.**

**At that time the Criminal Case was continuing in Court....”**

11. Arising from the foregoing, it was clear that the 1<sup>st</sup> Plaintiff seriously contradicted his claim as set out in the second suit in his evidence under oath in Court. According to his own account, as at the year 2013 when he states in his pleadings to have lent the money to the Defendant, they were no longer in talking terms with the Defendant and were indeed embroiled in a Criminal Case in which the 1<sup>st</sup> Plaintiff and his wife (the 2<sup>nd</sup> Plaintiff) were the complainants.

12. Having reviewed the evidence in regard to the same, I did not find any ground upon which to disturb the Judgment entered herein on 22<sup>nd</sup> November 2019. The Plaintiffs’ sole witness repudiated and rejected their pleadings as filed and the second claim is therefore untenable and without basis.

13. In the premises, while I do allow the application for review, I find no basis to enter Judgment for the Plaintiffs as sought herein. The application dated 28<sup>th</sup> November 2019 therefore succeeds only in part.

14. Each party shall bear their own costs.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**