



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CIVIL CASE NO. 71B OF 2008**

**SYOMBUA MASILA**

**SALIM KIPRASHI (suing as the legal representatives of**

**the estate of IBRAHIM SALI.....PLAINTIFFS**

**VERSUS**

**IGNATIUS CHEGE MWANGI.....DEFENDANT**

**SAMSOSN MPATIAN RINKA.....INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. By its ruling dated 21<sup>st</sup> February 2020 this court dismissed the Interested Party's Application dated 15<sup>th</sup> January 2020 seeking inter alia to be enjoined in the suit, orders of stay of execution, injunction and review or setting aside of the Judgment dated 31<sup>st</sup> October 2014. Soon after the said dismissal, the Plaintiff and Interested Party filed the instant Application seeking to review the orders of dismissal. They also seek an order of stay of execution of the Decree issued herein, together with all consequential orders as well as an order of injunction to restrain the Respondents from interfering with Land Parcel Number **TRANSMARA OLOLCHANI/237** pending the hearing and determination of this application and an order summoning the Deputy County Commissioner Transmara West to attend court and produce a report with respect to the outcome of his investigations pertaining to the alleged fraud regarding the suit property.

2. The Application is based on the grounds stated on the face of the Notice of Motion and the Interested Party's Supporting Affidavit and Supplementary Affidavit.

The Defendant /Respondent swore an Affidavit on 11<sup>th</sup> March in opposition to the application.

3. The Application was canvassed by way of written submissions and the Applicants and Defendant/Respondent duly filed their submissions which I have considered.

4. The central issue for determination is whether the court ought to review its Ruling and order dated 21<sup>st</sup> February 2020.

Order 45 (1) of the Civil Procedure Rules provides as follows:

*“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 a new and 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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.*

5. The main ground for review advanced by the Applicants is that there is an error apparent on the face of the record. The basis of the said

error as I understand it is that the court in its Ruling erroneously observed that the Interested Party ought to have appealed rather than applied for review of the Judgment dated 31<sup>st</sup> October 2014, as the Interested Party was not a party to the said suit. The Interested Party contends that he only came to learn of the said suit when he was served with documents in **Narok ELC Case No. 56 of 2019**. That is when he discovered that he had been condemned unheard in the instant suit which touched on his plot. He contends that the court did not take into consideration all the Applicants' annexures to the Application dated 15.1.20 before delivering its Ruling.

6. What constitutes an error apparent on the face of the record was defined in the case of **Antony Gachara Ayub V Francis Thinwa C.A No 92 of 2008** while quoting with approval the case of **Draft and Develop Engineers Limited V National Water Conservation and Pipeline Corporation Civil Case No 11 of 2011** the Court of Appeal stated as follows:

*“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 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal”*

7. In essence, the Applicants are seeking a second bite at the cherry by asking the court to take into account the annexures to their Affidavits and arrive at a different finding. The Applicants' contention is that the court assumed that the Interested Party was a party in the original suit that and therefore based its decision on the finding that the Interested Party ought to have appealed against the Judgment. It is clear that the court started by considering whether the Interested Party ought to be enjoined as a party to the suit and concluded that the Application had been made too late in the day after Judgment had been delivered and only observed in passing that perhaps the Applicant should have considered appealing against the Judgment of the court.

8. In **Francis Origo & Another v. Jacob Kumali Mungala** (Civil Appeal No.149 of 2001 (unreported) cited in the case of **Pancras T. Swai v Kenya Breweries Ltd (2014) eKLR**, the High Court dismissed an Application for review because the Applicants did not show that they had made discovery of new and important matter.

The Court observed as follows:

*“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”*

9. I stand guided by the above decision and similarly hold that in the instant suit, even though the Applicants have contended that there is an error apparent on the face of the record, what they in fact mean is that the court arrived an erroneous conclusion of fact, as in their view it did not consider that the Applicant had not been a party in this suit before dismissing the application for review. In the circumstances, they ought to have filed an appeal rather than an Application for review as this court cannot sit on Appeal on its own Ruling.

10. Accordingly, I do not find merit in the application and I dismiss it with costs to the Respondents.

**Dated, signed and delivered at Kisii this 10<sup>th</sup> day of February, 2021.**

**J.M ONYANGO**

**JUDGE**