REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC APPEAL NO. 50 OF 2017

BENSON W. KAOS & 72 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF LANDS AND PHYSICAL PLANNING.....2ND DEFENDANT/RESPONDENT

THE COUNTY COMMISSIONER TRANS-NZOIA.....3RD DEFENDANT/RESPONDENT

THE DEPUTY COUNTY COMMISSIONER

TRANS-NZOIA WEST.....4TH DEFENDANT/RESPONDENT

THE COUNTY LANDS REGISTRAR, TRANS-NZOIA.....5TH DEFENDANT/RESPONDENT

J.K ROTICH.....6TH DEFENDANT/RESPONDENT

AND 80 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. Before me is an Application dated **22/07/2021** and filed by the **1st** to **6th** Defendants/Respondents on **23/7/2021.** The Applicants were represented by the Office of the Attorney-General. It was brought under **Articles 47** and **159(2)** of the **Constitution of Kenya, Sections 1, 1A, 1B, 3, 3A,** and **80** of the **Civil Procedure Act** and **Orders 12 Rule 7** and **45 Rule 1** of the **Civil Procedure Rules**. The Applicants sought for the following specific orders:

> **i) …spent**
>
> **ii) …spent**
>
> **iii) That the judgment be reviewed, set aside and or vacated forthwith as the submissions of the 1st to 6th defendants was not brought to the attention of the court when the impugned judgment was been made as well as the costs of the application.**

2. The Application was premised on the grounds on its face and supported by the affidavit sworn by the **State Counsel**, **Mr. Peter Kuria**. The grounds advanced were that there was an error apparent on the face of the record that warranted review of the judgment dated **27/5/2021**. The reasons given were that the judgment was silent on the issues raised by the **1st - 6th** Defendants, the judge made his decision on the erroneous assumption that there were no submissions filed on behalf of the **1st-6th** Defendants. He put forth the contention that it was both in the interest of justice and the public that the judgment be reviewed so that the court could avail itself of the Applicants' submissions and render a new judgment based on the issues raised. His view was that this honourable court had powers to recall and review its judgment and give effect to its manifest intention. He added that there would be no prejudice to be suffered by any of the parties if the orders sought were granted.

3. The supporting Affidavit expounded the grounds, adding thereto the history of the filing and hearing of the suit. He stated that on **27/01/2021** the matter was, in the presence of his colleague Mr. Odongo, slated for mention on **4/3/2021** to confirm filing of submissions. On that date the court fixed judgment for **29/4/2021**. The Plaintiffs served on the applicants a notice for the date. He annexed to the Affidavit a copy of the notice. His further deposition was that the learned State Counsel prepared submissions dated **31/3/2021** and filed them by email the same day. He attached to his Affidavit copies of both the email and submissions and marked as **"PK2 (a)** and **(b).** He then expressed shock that the submissions were not presented to the judge to consider them when preparing the judgment. That was the reason the Applicants claimed not to have been heard on the issues raised in rebuttal of the Plaintiffs'. Finally, he maintained that the interest of justice demanded that the **1st** Defendant, who to him was a defender of public interest, be heard on the suit dated **16/3/2017** through factual exposition in the submissions.

The Response

4. The Application was opposed by way of a replying affidavit sworn by one **Benson Kaos** on **27/8/2021** and filed on the even date. His response was that there was no error apparent on the face of the record to warrant the review and setting aside of the judgment. He stated that there were no submissions filed on behalf of the **1st - 6th** defendants as at **4/3/2021** when they were to be. He stated further that instead they were filed on **31/03/2021**, outside the timelines set by the court. He asserted that had they been filed within time, they could have been confirmed as being on the record.

5. His further deposition was that the issues in the submissions were fully addressed in the judgment their absence notwithstanding hence there was no error that could cause the court to review or set aside its judgment delivered on **27/5/2021**. He prayed for the dismissal of the Application with costs.

Directions

6. The Court directed that the Application to be heard by way of written submissions. No submissions were filed by any party herein. I hope that will not be the cause for the filing of another application in future for review of the decision on the instant Application. Be that as it may, this court must proceed to determine the merits of the issues that commend for determination presented in this application.

Analysis, Issues and determination

7. Upon careful consideration of the facts presented in the form of affidavits both in support and opposition of the Application and its grounds, this court found only two issues that commend for determination in that application are:

a) Whether the grounds and facts presented make the Application merited;

b) What orders to issue and who to bear the costs of this application?

8. On the issue of whether the grounds and facts presented make the Application merited thus calling for a review or setting aside of the impugned judgment, this Court is guided by the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule (1)** of the **Civil Procedure Rules**. It is now well settled law that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, the applicant must prove that:

i) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or,

ii) Some mistake or error apparent on the face of the record or,

iii) Any other sufficient reason

Further that the application has been brought without undue delay.

9. In the application before me, the Applicants were particular on the issue that caused them to move the Court, that was that there was an error apparent on the record. For that reason, the Court will limit itself to analyzing two points herein, one, whether the Application was made with or without delay, and two, whether there was an error apparent on record and if so what its import was.

10. I start with the straightforward point, that is to say, the issue of delay or in other words, to consider the length of time taken so as to decide whether or not there was undue delay. The impugned judgment was delivered on **27/5/2021** and the instant Application brought on **23/7/2021**. That is five days shy of two months. A period of that kind is not unreasonable delay considering the nature of the Application before me. There are other Applications such as extension of time to carry out an act or duty whose timelines are strict and such a period would then constitute unreasonable delay. In taking into account what constitutes undue delay, the Court will apply its wisdom on a case by case basis. That said, I turn to the issue that is the crux of the instant application.

11. The next issue was that the Applicant's submissions were filed but not presented to the judge for consideration, thus constituting an error apparent on record. The straight and simple answer to a question that may be paused in that regard is that failure for the Court to consider submissions which are on record constitutes an error apparent on record. This has been held so in the case of ***Paul Odhiambo Onyango & another v Kalu Works Limited [2020] eKLR*** where the Court said, "*Failure to take into account submissions which are not on the court record is not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same*" (***Emphasis mine***). In the case of ***Nathan Chesang Moson v Grand Creek Llc & another [2020] eKLR*** the Court of Appeal in considering an appeal arising from the refusal of the judge of the superior Court to set aside a judgment on account of an

argument that the judge had not considered submissions on record, stated as follows:- "*The Judge chose not to specifically refer to submissions by either of the parties to the suit. However, this does not mean that he did not consider them*." What the Lordships meant was that even when there are submissions on record, that judge may consider them but not refer specifically to them.

12. The phrase "on the face of the record" means that the document that would be said to be constitute the face of the record must actually be in the Court record, that is to say, duly filed as part of and in the Court file at the time the error is committed. Any document that was formerly on the record, for instance one that is expunged or expressly abandoned prior to the error being committed or one that is placed in the Court file as part of it after the error cannot be said to have caused the error said to be apparent on the record. Such a document is strange to the error and it cannot therefore be constitutive of an error apparent on the face of the record.

13. The facts in the present case are slightly different. They are that the Applicants filed their submissions late into the Court email and left it at that. They never followed up to confirm whether or not the submissions were actually received in the Court Registry, printed, stamped and handed over to the judge. They ought to have done this particularly when they knew that they did not attend Court on **04/03/2021** to confirm to the Court that they had not filed the submissions and also give an indication on what they intended to do especially since the mention date was taken by consent. Thus, the failure to bring to the attention of the judge the filed submissions was partly caused by the Applicants, and partly the Registry for not printing the submissions and placing them on record. And since they were not on the record by the time of the preparation of the judgment it cannot be said to be that failure to consider them amounts to an error apparent on the face of the record. In this era of vibrant litigation where virtually every citizen appears to have been 'enlightened legally' under the new constitutional dispensation of access to justice it behooves every such party moving the Court on any issue however small or big to keenly consider the manner, meaning and import of every statement they make before the Court. Not all that they think is clear on first impression is truly so.

14. What constitutes an error apparent on the record was discussed in the case of in **Chandrakhant Joshibhai Patel v R [2004] TLR, 218**. In that case the Court held that an error apparent on the face of the record is one which:

> ***"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."***

15. In the case of Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243, the Court of Appeal described such an error 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."***

16. Guided by the authorities cited, in my humble view, an error apparent on the face of record has to constitute two main things: one, there is a record, and two, there is an error, and three, the error is one which is such that a person looking at the record without further inquiries to fill in gaps notes it immediately in such a manner as to shout without hesitation, "Ah! With all this, what happened here?" In that regard what is the record herein? On **27/1/2021** the Court gave the following directions: "*The Plaintiff shall file and serve written submissions on only the counsel for the **1st** to **6th** defendants within **14** days from today. The **1st** to **6th** defendants' counsel shall respond to those submissions within **14** days of service*." By necessary implication, these were strict time lines. Again, it should be clear and is a matter of judicial notice of the fact that as soon as the matter was mentioned on **04/03/2021** for compliance and the Court gave a date for ruling, the Court file was placed immediately before the Judge for preparation of the Judgment. That preparation could as well have been the same day, a day afterward or even the last day when delivery was to be made. What could happen if the Judge wrote the judgment immediately and the submissions were not in the file even as it appears that they were filed **27 days** after the mention by which date the Judge had the file to act accordingly? Would that have amounted to an error apparent on the face of the record as the Applicants want to convince the Court? Certainly not, and by the same token the facts herein do not constitute one such error. It was mandatory for the parties to comply with the said timelines.

17. The above notwithstanding, the Court wishes to enlighten the Applicants about the essence of submissions. The first point is that even then, assuming that the submissions could have been printed and placed on the record but the judge failed to consider them, thus committing an error apparent on the fact of record, the question that begs an answer immediately is: does the non-inclusion of consideration of submissions in a judgment have an adverse effect on the outcome of the case? I do not think so. The error is not fatal to the decision or one that will entitle a party to a review of any nature whether due to an alleged error apparent on the face of record or a sufficient reason. I say so because submissions are not pleadings. Parties base their case on pleadings and evidence or facts. They are always bound by their pleadings but not submissions.

18. The next question is what submissions are. They are a summation of the salient points or issues that a party wishes to point to the Court that it should emphasize. Apart from firming up an argument in order to sway the Court's mind or convince the judge about a party's case, submissions are mere hands put or drawn up in the air towards the Court for it to see what (an item that) is held in them rather than leaving that it lying on the table. I will use an analogy here. In a case where there is a cook, his hands, food and a hungry judicial officer in a restaurant, the officer can only eat food and not the hands that present the food to him. Submissions are like hands. They do not and shall never take the place of the item (food) in them (hands). For instance, if the hands held forth food for the judicial officer to take and eat, the officer in his learned and right mind can never eat the hands that hold the food. He can only take the food and consume. What if the officer does not notice any hands drawn up holding the food out to him until the cook becomes tired and places his hands and food on the table? That does not change the fact that food was in the hands and it was the food he was to eat yet the hands were resting on the table where the food was. The judicial officer will still eat the food as required by nature (in this case nature is comparable to the judicial duty to consider the

evidence and pleadings in arriving at a decision).

19. It is important to underscore the meaning of submissions and their import in a matter as has been discussed in a number of decisions. **Mwera, J** (as he then was) held in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**, where he states that **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."**

20. In **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** his Lordship stated as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

21. Additionally, **Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

22. In ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***, the Court of Appeal stated:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."**

23. In the recent case of ***Patrick Simiyu Khaemba v Kenya Electricty Transmission & another [2021] eKLR*** this Court viewed submissions descriptively as follows:-

> **"As such, since submissions are "marketing tools" for parties, they must contain what is being marketed. Only persons with the disability of the mind which leads to total insanity are completely unable to discern what they are doing that may he heard in markets shouting that they are selling something when they actually are not. Perhaps drunkards and drug abusers who, in that state, have lost their senses due to the effect of the substances do likewise. But counsel, and learned for that matter, often market their clients' issues to judges and judicial officers generally through submissions. In regard to Applications, such issues obtain in the manner I have stated above, and not through submissions…"**

24. Then, in ***Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007*** Mwera J. (as he then was) also described them a flowery language as follows:-

> ***"…regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests' attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon."***

25. Much has been said about submissions. They do not make much difference in forming the real basis for a decision of the Court. But the Court may, not out of legal obligation, consider whether a party may suffer prejudice if his submissions are not considered. For that reason, I have looked at the submissions said to have been left out consideration and I find in them no point raised that the court did not consider that may have made it to reach a different conclusion than it did.

26. The end result is that the application dated **22/7/2021** cannot see the light of the day: the light is so far away as not to be within the visible universe. It is unmerited and is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF FEBRUARY, 2022.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE