Twin Flames Limited v Kenya Rural Roads Authority & 2 others (Constitutional Petition 19 of 2020) [2022] KEELC 15579 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15579 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION 19 OF 2020

JO MBOYA, J

NOVEMBER 3, 2022

BETWEEN

TWIN FLAMES LIMITED ..... PETITIONER

AND

KENYA RURAL ROADS AUTHORITY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

Background

1. Vide notice of motion application dated the November 24, 2021, the plaintiff/applicant herein has approached the court seeking for the following reliefs;

    i. That the honourable court be pleased to review the judgment delivered on November 11, 2021 and grant the orders sought for in the petition as pleaded.

    ii. That the costs of this application be provided for.

    iii. That the honourable court be at liberty to make such other or further reliefs as the honourable court deems fit and expedient in the circumstances.

2. The subject application is premised and anchored on the various grounds which have been enumerated in the body thereof and same is further supported by the affidavit of Haggai Okeyo sworn on the November 24, 2021.

3. For completeness, the deponent of the supporting affidavit has annexed and attached thereto two documents, *inter alia*, a copy of the impugned ruling and a supplementary affidavit sworn on the April

13, 2021 and which was filed pursuant to leave of the court hitherto granted by Lady Justice K Bor Judge.

4. Though the subject application was duly served upon the defendants/respondents, neither of the said defendants/respondents filed any responses to the application. Consequently, the subject application is factually unopposed and unconverted.

5. Be that as it may, when the application came up for directions on the May 4, 2022, the court ordered and directed that the application be disposed of and canvased by way of written submissions.

Deposition By The Parties

a. Petitioner's/applicant's case:

6. Vide supporting affidavit sworn on the November 24, 2021, the deponent therein has averred that the subject petition was filed and lodged on the June 25, 2020, pertaining to and concerning the encroachment onto two named properties belonging to and registered in the name of the petitioner.

7. Further, the deponent has averred that upon the filing and service of the petition, the 1st and 3rd respondent filed a replying affidavit sworn by one Engineer Kenneth Mbogori. For clarity, it was pointed out that the replying affidavit was sworn on the March 18, 2021.

8. On the other hand, it has been averred that following the response by and on behalf of the 1st and 3rd respondents, the petitioner sought for and obtained leave to file a supplementary affidavit and that indeed a supplementary affidavit was drawned, sworn and filed on the April 13, 2021.

9. Be that as it may, the deponent has added that even though the petitioner duly filed and served the supplementary affidavit sworn on the April 13, 2021, the honourable court failed to take cognizance of the said supplementary affidavit, either in the course of the judgment or at all.

10. Other than the foregoing, the deponent averred that the failure to take into account the supplementary affidavit sworn on the April 13, 2021 and the annextures attached thereto, prevented the court from appropriately appreciating the petitioner's case and claim.

11. Besides, it has been averred that had the court taken into account the supplementary affidavit and the annextures thereto, the court would no doubt have found and held that the petitioner had proved and established the claim pertaining to encroachment onto the two named properties.

12. On the other hand, the deponent has also averred that the court also failed to take cognizance that indeed the sub-lease relating to LR No 29404 had been duly registered in terms of entry number 28, appearing in the original lease, which is said to have been attached to the supplementary affidavit.

13. Besides, the deponent has also averred that the court also observed that the map which had been availed and supplied by the petitioner had not been authenticated, yet the map which was availed and attached to the supplementary affidavit was duly prepared by a named surveyor and thereafter authenticated by the director of survey in accordance with the provisions of section 32 of the *Survey Act*, chapter 299.

14. Further, the deponent also added that the observation by the court that the map supplied by the petitioner was not accompanied by a license surveyor's report, also failed to take cognizance that the petitioner had duly supplied a map which was duly mapped and hence the extent of encroachment was proved and established.

15. Premised on the foregoing, the deponent has averred that there exists an apparent error and mistake on the face of record. In this regard, the deponent has invited the court to reconsider the contents of

the supplementary affidavit and to find and hold that that the subject application for review ought to be granted.

16. Other than the foregoing, the deponent has also averred that the petitioner has also established sufficient cause and basis to warrant the review of the impugned judgment and consequential decree.

17. Based on the foregoing, the deponent has finally stated that the subject application is meritorious and thus ought to be allowed.

b. Response by the respondents':

18. Though served with the application, none of the respondents herein filed any response or at all.

19. Consequently, the only deposition on record as pertains to the subject application are the ones filed and lodged by the petitioner.

Submissions By The Parties:

a. Petitioner's submissions:

20. The petitioner filed written submissions dated the September 23, 2022 and same has raised, highlighted and amplified three issues for consideration.

21. First and foremost, counsel for the petitioner has submitted that by finding and holding that the petitioner did not file a supplementary affidavit, yet one was duly filed, the court failed to take into account and consideration the supplementary affidavit sworn on the April 13, 2021.

22. In any event, it was further submitted that having not taken into account the impugned supplementary affidavit, there does exists an error and mistake apparent on the face of the record.

23. On the other hand, counsel for the petitioner also added that the sub-lease in respect of LR No 29404, had also been duly and formally registered. In this regard, counsel invited the court to take cognizance of entry number 28 contained in the original lease.

24. Similarly, counsel for the petitioner submitted that to the extent that the court failed to see and take cognizance of the formal registration of the sublease relating to LR No 29404, there was also an error and mistake which ought to be corrected.

25. Additionally, counsel for the petitioner submitted that the petitioner herein adduced and availed to the honourable court a duly and authenticated map prepared by a license surveyor and authenticated by the director of survey. However, despite the petitioner availing a duly authenticated map, the honourable court still found and held that the map availed had neither been duly certified nor authenticated.

26. In the premises, counsel added that the finding and holding by the court that the impugned map was neither certified nor authenticated also constitutes an error and mistake apparent on the face of record.

27. In view of the foregoing submissions, counsel for the petitioner has therefore submitted that the petitioner has identified and proven the existence of error and mistake apparent on the face of record, to warrant the review of the impugned judgment and decree.

28. In support of the foregoing submissions, counsel for the petitioner has cited and relied on various decisions *inter alia* *Ajit Kumar Rath v Sate of Orisa & others*, Supreme Court cases 596 at page 608, *Tokesi Mambili 7 others v Simeon Litsanga* civil appeal No 90 of 2001 (unreported), *National Bank of K Ltd v Ndungu Njau* (1997)eKLR.

29. Secondly, counsel for the petitioners has submitted that the petitioners availed and supplied sufficient evidence to show that the petitioner's properties had been unduly encroached upon and trespassed onto by the respondents.

30. Further, counsel has added that at paragraphs 6 and 7 of the supplementary affidavit sworn on the April 13, 2021, the petitioner herein exhibited the true position of the road reserve which was duly marked in blue and also pointed out the area where the respondents had trespassed onto.

31. Consequently, the counsel for the petitioner has submitted that from the totality of the evidence that was tendered by and on behalf of the petitioner, it was evident and apparent that indeed the respondents had encroached onto the property of the petitioners.

32. On the other hand, counsel for the petitioner's has submitted that to the extent that the petitioner was the lawful and legitimate proprietor of the suit property, same cannot be illegally and unprocedurally encroached upon by the respondents, without due compensation.

33. Additionally counsel for the petitioner has submitted that the actions complained of are indeed geared towards denying and depriving the petitioners of her rights to property, which is contrary to and in contravention of the provisions of article 40 of the *Constitution* 2010.

34. To this end, counsel for the petitioner has invited the court to take cognizance of the decision in the case of *National Land Commission & 5 others* (2016)eKLR and *Anarchary Ltd v The Attorney General* 92014)eKLR, respectively.

35. Finally, the counsel for the petitioner has submitted that the petitioner herein has proven and established the existence of an error and mistake apparent on the face record and hence, it is appropriate and expedient to grant the reliefs sought at the foot of the application.

36. Be that as it may, counsel for the petitioner has also added that a failure to grant the relief sought would be tantamount to allowing the respondents to breach, contravene and violate the petitioners constitutional rights, as pertains to the suit properties.

37. Premised on the foregoing, counsel for the petitioner has therefore implored the court to find and hold that the subject application is meritorious and thus same ought to be granted.

Submissions By The Respondents

38. Despite being served with the written submissions by and on behalf of the petitioner, none of the respondents herein deemed it fit, expedient or appropriate to file written submissions.

39. For completeness, the only set of written submissions that were filed and which formed part of the record are the submissions filed on behalf of the petitioner.

Issues For Determination:

40. Having reviewed the notice of motion application dated the November 18, 2021 together with the supporting affidavit thereto and having similarly considered the written submissions filed by the petitioner, the following issues do arise and are thus germane and worthy of determination;

    i. Whether there exists and error and mistake apparent on the face of record.

    ii. Whether the error and mistake, if any, is of such a magnitude to warrant the review, variation and setting aside of the impugned judgment and decree.

iii. Whether the findings by the honourable court, which ultimately led to the dismissal of the petition are capable of review, either in the manner sought or at all.

Analysis And Determination

Issue number 1 & 2

Whether there exists and error and mistake apparent on the face of record.

Whether the error and mistake, if any, is of such a magnitude to warrant the review, variation and setting aside of the impugned judgment and decree.

41. It is common ground that an applicant can seek for and procure an order for review on the basis of various grounds, inter-alia, error and mistake apparent on the face of record, discovery of new and important evidence and sufficient reasons/basis.

42. Be that as it may, the subject application has primarily been raised and anchored on the basis of an error and mistake apparent on the face of record.

43. Consequently, it behooves this court to interrogate the impugned error and mistake, which have been alluded to and to consider whether the impugned error and mistake are of a nature that warrants the grant of the orders sought.

44. To start with, counsel for the petitioner submitted and pointed out that the petitioner sought for and obtained leave to file a supplementary affidavit, in response to the replying affidavit sworn by one, Engineer Kenneth Mbogori.

45. Further, counsel for the petitioner added that pursuant to and premised on the leave that was granted by the honourable court, the petitioner indeed filed and lodged a supplementary affidavit sworn on the April 13, 2021.

46. On the other hand, counsel for the petitioner submitted that despite the fact that the petitioner duly filed the supplementary affidavit, the honourable court herein proceeded to find and held that no such supplementary affidavit had been filed or at all.

47. At any rate, counsel for the petitioner further added that indeed the supplementary affidavit, which was filed by the petitioner has since been annexed to the current application. Consequently, counsel has invited the court to find and hold that there was an error and mistake in not taking into account the contents of the said supplementary affidavit.

48. I must point out that the court did not come across the said supplementary affidavit sworn on the April 13, 2021. Consequently and in this regard, the court did not take into account the contents thereof.

49. Nevertheless, I have since set sight on the supplementary affidavit sworn on the April 13, 2021 and which was filed on the April 15, 2021. For clarity, the contents thereof constitutes a reiteration of what had hitherto been alluded and averred in the main affidavit in support of the petition.

50. On the other hand, the supplementary affidavit has also introduced a further map in respect of the status of the impugned road, namely, Laikipia road, which is said to have encroached onto the named properties, albeit without the consent and permission of the petitioner.

51. Though the court did not take cognizance of the supplementary affidavit sworn on the April 13, 2021, a copy of which has since been availed to the court, together with a copy of the revenue receipt, I am

afraid that the contents thereof are not of such a magnitude or nature to impugn or impeach the final decision of the court.

52. Secondly, counsel for the petitioner also contended that there was an error and mistake when the court held that the map that had been availed by the petitioner was devoid of the requisite certification to confirm and authenticate that indeed it was a certified copy of the true map held and kept by the relevant authority in accordance with the relevant laws.

53. Despite the contention by counsel for the applicant that there was an error and mistake to that effect, I have had a second chance to re-look at the map which was annexed by the petitioner and I must observe and reiterate that same has not been duly certified in accordance with the *Evidence Act*, chapter 80 Laws of Kenya.

54. Additionally, it is imperative to point out that a public document can only be produced and availed to court, either by producing or annexing the original copy thereof or a certified true copy of the original and not otherwise.

55. To this end, it is appropriate to take cognizance of the provisions of section 79 and 80 of the *Evidence Act*, chapter 80, Laws of Kenya.

56. For convenience, the fore-cited provisions are reproduced as hereunder;

79.	Distinction between public and private documents.

(1)	The following documents are public documents —	
	(a)	documents forming the acts or records of the acts —
		(i) of the sovereign authority; or
		(ii) official bodies and tribunals; or
		(iii) public officers, legislative, judicial or executive, whether of Kenya

		or of any other country;
	(i)	of the sovereign authority; or
	(ii)	of official bodies and tribunals; or
	(iii)	of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
	(b)	public records kept in Kenya of private documents.
(a)	documents forming the	

		acts or records of the acts—
		(i) of the sovereign authority; or
		(ii) of official bodies and tribunals; or
		(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
	(i)	of the sovereign authority; or
	(ii)	of official bodies and tribunals; or

	(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country; (b) public records kept in Kenya of private documents. (2) All documents other than public documents are private.
(1)	The following documents are public documents— (a) documents forming the acts or records of the acts— (i) of the sovereign authority; or

		(ii)	of official bodies and tribunals; or
		(iii)	of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
	(i)	of the sovereign authority; or	
	(ii)		of official bodies and tribunals; or
	(iii)	of public officers, legislative, judicial or executive, whether of Kenya or of any other country;	
	(b)		public records kept in Kenya of private documents.
(a)	documents forming the acts or records of the acts—		

	(i)	of the sovereign authority; or
	(ii)	of official bodies and tribunals; or
	(iii)	of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
(i)	of the sovereign authority; or	
(ii)		of official bodies and tribunals; or
(iii)	of public officers, legislative, judicial or executive, whether of Kenya or of any other country;	
(b)		public records kept in Kenya of private documents.
(2)	All documents other than public documents are private.	
80.	Certified copies of public documents.	

(1)	Every public officer having the custody of a public document which any person has a right to inspect

				shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed	

		whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
	(2)	Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

(1)	Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
(2)	Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

57. Though the counsel for the petitioner had submitted that there was an error, it is important to underscore the fact that the impugned map which the petitioner was relying upon, being a public document, same needed to have been certified as a true copy, to warrant its admission and being relied upon by the court.

58. On the other hand, it is also important to draw a distinction between preparation of the impugned map by a licensed surveyor and the authentication thereof by the director of survey.

59. Suffice it to point out that provided that the impugned map is a public document, (sic) held by the director of survey, same needed to be duly certified, which was not the case.

60. Other than the foregoing, the other error and mistake, which was pointed out by counsel for the petitioner related to the fact that the sublease in respect of LR No 29404 had been duly endorsed and contained in the original lease.

61. However, I beg to state and point out that the original lease which was availed to the court and which contained the sequential entries, did not reflect or show that the sublease in respect of LR No 29404, had been duly registered.

62. For the avoidance of doubt, the sublease in respect of LR No 29403 was registered *vide* entry number 9 and thereafter followed by the sublease in respect of 29405, which was registered *vide* entry number 10.

63. Clearly, the sublease, in respect of LR No 29404, was neither evident nor reflected *vide* the copy of the original lease, which was availed.

64. Be that as it may, my attention has now been drawn to entry number 28, in the original lease (but which did not form part of the original annexure). In this regard, I do confirm that indeed entry number 28 relates to LR No 29404.

65. However, having found and held that the sublease in respect of LR No 29404, was duly registered in terms of entry number 28, and relates to the petitioner herein, the question that needs to be addressed is whether the error herein can warrant the review and variation sought.

66. Before supplying an answer to the foregoing question, it is imperative to recall that the court had found and held that the sister property, namely, LR No 29403, lawfully belonged to and was registered in the name of the petitioner.

67. Similarly, I now wish to add that LR No 29404, also belongs to and is registered in the name of the petitioner in terms of entry number 28, in terms of the annexture that has now been shown to the honourable court.

68. Nevertheless, having found and held that the two named properties belonged to and are registered in the name of the petitioner, the primary issue which culminated into the dismissal of the petition was whether the petitioner had established and proven encroachment by the respondents.

69. For coherence, this court found and held that no credible evidence was placed before the court to prove and establish that the respondents had indeed encroached onto the named properties and if so, by what extent.

70. Premised on the basis that no evidence had been laid before the court to warrant a favorable finding in favor of the petitioner, the error pertaining to ownership to LR No 29404, would still not impact upon and impeach the final outcome that was reached and arrived at by this court.

71. Having made the foregoing observation, it is my finding and holding that before an error or mistake apparent on the face of record can anchor or found review of the judgment and decree, it must be shown that the error and mistake goes to the root of the impugned judgment and decree and not otherwise.

72. Put differently, an error or mistake relating to a secondary issue in the proceedings, judgment and decree, even when established and corrected, will not impugn, impeach and negate the primary findings of the honourable court.

73. In the premises, it is my finding and holding that the error and mistake relating to the supplementary affidavit and failure to take cognizance of entry number 28 in the original lease, relating to LR No 29404, do not go to the root of the decision of the court.

74. In a nutshell, I find and hold that the petitioner/applicant herein, has not met the requisite threshold to warrant a review of the judgment and decree of the honourable court (sic) on the basis of error and mistake apparent on the face of record.

Issue number 3

Whether the findings by the honourable court, which ultimately led to the dismissal of the petition are capable of review, either in the manner sought or at all.

75. In respect of the third issue herein, it is appropriate to recall that the court calibrated on various aspects of the petitioner's case and in particular whether the petitioner had proved and established encroachment onto the suit/named properties.

76. In the course of deliberating on the various issues at the foot of the impugned judgment, the honourable court made various findings as hereunder;

    i. The petitioner's claim of encroachment was anchored and premised on a map which was tendered and adduced before the court. However, the impugned map was not certified in accordance with the relevant laws.

    ii. The court also found and held that the impugned map, which had not been duly certified, was similarly not accompanied by a report prepared/authored by a licensed surveyor to show the ground position of the named properties vis a vis the position of Laikipia road, same being the road which was alleged to have encroached onto the suit properties.

    iii. The court also found and held that in the absence of a survey report, which is the expert evidence, the court of law which is not trained/schooled in survey/geospatial issues, would not be able to put meaning to the cold drawings contained/reflected in the map.

    iv. The court also found and held that there were two conflicting maps availed and placed before the court, one by the petitioner and the other by the respondents. In this regard, the court was unable to authenticate which of the contradictory sets, ought to be relied upon and used by the court.

77. Having calibrated on the various issues, which have been reproduced in the preceding paragraph, the court found and held that the petitioner herein had neither proved nor established the claim pertaining to encroachment onto the suit properties.

78. There is no gainsaying that the burden of proof laid at the door step of the petitioner. Consequently, it behooved the petitioner to be at the forefront and to ensure that sufficient and credible evidence is placed before the court and not otherwise.

79. However, in respect of the subject matter, the petitioner adopted a perfunctory approach and left the issues for the discernment of the court.

80. To my mind, the court would not have been able to wriggle out of the factual quagmire and controversy, compounded by the contradictory averments contained in the conflicting/rivaling affidavits and sets of maps, supplied by the disputing parties.

81. Based on the fact that it was the petitioners obligation to prove her case on a balance of probabilities, a failure to do so would obviously entail a dismissal.

82. To this end, it is appropriate, mete and expedient to recall the observations by the Supreme Court in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the Supreme Court of Kenya, held as hereunder;

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
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> 50. This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
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> > "...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
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> 52. The allegations of discrimination are captured in various e-mails, affidavits, and the petition itself. The petitioners have not denied that they were engaged in an employment contract with the 1st respondent, which contract expressly stipulated the terms of engagement. The affidavit of Magaret Rigoro brings this out, and also explains how foreign researchers were engaged by the 1st respondent, even though 1st respondent had no control over the terms of their employment. This has not been controverted by the petitioners, who merely claim that such lack of control had exposed them to discrimination.

83. To my mind, the petition herein was dismissed on the basis of clear, conscious and deliberate findings of facts and law. For clarity, the court pronounced itself on the substantive issues, based on the courts understanding of the evidence as presented and the relevant law.

84. In my humble view, the explication of the facts and the law in the manner alluded to and reflected upon in the impugned judgment, do not warrant an application for review.

85. In the premises, to entertain the subject application for review and essentially to grant same as sought, would be tantamount to sitting on appeal over and in respect of own decision. Clearly, such an invite is contrary and inimical to the established position of the law.

86. To buttress the foregoing observation, it is appropriate to take cognizance of and to underscore the holding of the Court of Appeal *vide* the case of *National Bank of Kenya Ltd v Ndungu Njau* (1997)eKLR, where the court stated as hereunder;

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. 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.
>
> In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

87. Additionally, the parameters pertaining to and concerning review were also re-visited in the case of *Nyamogo & Nyamogo v Kogo* (2001) 1 EA 173, where the court stated and observed as hereunder;

> "We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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 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 as 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 a review although it may be for an appeal."

88. This court may or may not have been correct in the exposition of the law and whether the petitioner has proved the encroachment. However, such an error, if any, cannot be the basis of an application for review, either in the manner sought or at all.

89. Be that as it may, I beg to state and reiterate that this court consciously and deliberately dealt with the disputed facts, on the basis of the obtaining law. Consequently, such a decision does not lend itself to review vide the provisions of order 45 rule of the *Civil Procedure Rules, 2010*.

90. In a nutshell, I find and hold that the instant application for review constitutes a disguised invitation to have the court sit on appeal on own decision and is therefore misconceived, bad in law and legally untenable.

Final Disposition:

91. Having reviewed the issues for determination that were identified and highlighted in the body of the ruling herein, it is now appropriate to make the final and dispositive orders.

92. In my considered view, the determination and disposal of the petition was anchored and premised on the fact that the petitioner had neither proved nor established the impugned encroachment, violation and thus infringement complained of.

93. Having come to the foregoing conclusion, the only avenue for challenging and impeaching the impugned decision of the court was by way of an appeal to the honourable court of appeal and not otherwise.

94. Consequently and in the premises, the application dated the November 24, 2021, is devoid of merits. In this regard, same be and is hereby dismissed with no orders as to costs.

95. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2022.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Kevin Court Assistant.

Mr. Haggai Okeyo for the Petitioner.

N/A for the Respondents.