REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC NO. 16 OF 2019

DELTA CONNECTIONS LIMITED ..... PLAINTIFF

VERSUS

ALFRED MWARINGA DECHE .....DEFENDANT

RULING

This ruling is in respect of a Notice of Motion dated 16th October 2020 by the plaintiff/applicant seeking for the following orders:

a) Spent

b) That this Honourable Court be pleased to set aside and stay execution of the ruling or orders made on 13th October 2020 pending the hearing and determination of this application.

c) That this Honourable Court be pleased to set aside and or review its ruling and or orders made on the 13th October 2020.

d) That this Honourable Court be pleased to consider the grounds of opposition and replying affidavit filed by the Plaintiff/applicant in opposition to the Defendant/respondent's Notice of Motion dated 24th September 2019.

e) That the costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

PLAINTIFF/APPLICANT'S SUBMISSION

Counsel relied on the grounds on the face of the application together with the supporting affidavit by counsel sworn on 16th October 2020.

Counsel submitted that the Court is vested with the power to review its ruling and orders under Order 45 Rule 1 (b) of the Civil Procedure Rules. It was counsel's submission that there was an error on the face of the record in that the Court in determining the Defendant's application dated 24th September 2019 failed to appreciate the Plaintiff's grounds of opposition and the replying affidavit sworn on 5th October 2020.

It was counsel's further submission that the applicant having filed the responses and received a stamped copy from the court registry, the applicant was satisfied that its pleadings were properly filed and placed on the Court record for consideration and determination by the Court.

Counsel also submitted that when the defendant's application came up for hearing the Honourable Court stated that it did not have the Plaintiff's documents on record and proceeded to allow the Defendant's application as unopposed. That the courts delivery of ruling on account that the defendant's application was unopposed amounts to an error on the face of the record as failure to place the documents filed on record was beyond the Plaintiff's control.

Counsel relied on the case of the case of **Nyamogo & Nyamogo V Kogo (2001) EA 170 cited in Veleo (K) Limited** where the court held 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 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 apparent on the face of the record would be made out. An error which has to be established by along 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 appeal.".

Counsel further submitted that the applicant's application for review is not premised on a misinterpretation of the law but facts therefore causing an error apparent on the face of the record and relied on the case of **National Bank of Kenya Ltd vs Ndungu Njau (1996) KL 469 (CAK) at page 381** where the Court stated: -

"*A Review may be granted whenever the court considers what 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."*

Counsel therefore urged the court to allow the application for review and fix the application dated 24th September 2019 for hearing.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant relied on the replying affidavit sworn on 27th January 2021 and submitted that the application is an abuse of the court process and that the application has been overtaken by events Counsel summarized the provisions of Order 45 that

a) Where there is discovery of new and important evidence which was not available at the time the decree or order was made.

b) On account of some mistake or error apparent on the face of the record.

c) Any other sufficient cause.

d) Application has not been made without unreasonable delay.

It was counsel's submission that an erroneous conclusion of law of evidence is not a ground for review but may only be a ground for Appeal hence the applicant has not met the threshold for review.

Counsel also submitted that there was no reason why the applicant would be opposed to an application for amendment as the applicant can have an opportunity to file a response to the amended defence.

ANALYSIS AND DETERMINATION

This is an application for review of the orders of the court dated 13th October 2020 which allowed the defendant's application to amend defence and counterclaim. The ground for the review is that the court did not consider the plaintiff's grounds of opposition and replying affidavit which was allegedly filed on 7th October 2020.

The court record indicates that when the application dated 24th September 2020 came up for hearing Ms. Adoyo holding brief for Mr. Gathu counsel for the Plaintiff stated as follows:

"*We oppose the amendments. <u>We have however not filed a response</u>."*

The court then proceeded to rule as follows:

"*As the application dated 24/9/2019 is not opposed, the same is allowed as prayed…."*

If the said grounds of opposition and replying affidavit had indeed been filed on that 7th October 2020, it is inconceivable why counsel for the Plaintiff would state as above. There's no plausible reason given by the Plaintiff's advocates as to why counsel holding brief stated that they had not filed a response if the same had indeed been filed. It follows that the court was right in determining the application as it did.

The law on applications for review of a decree or order is found in Order 45, rule 1 as follows:

(1) 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 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, <u>or on account of some mistake or error apparent on the</u>

> ***face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.***

It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted.

In the Court of Appeal case of Zablon **Mokua v Solomon M. Choti & 3 others [2016] e KLR** cited its earlier decision in **Nyamogo & Nyamogo v Kogo (supra)** where it was held that:

> ***"… an error apparent on the face of the record cannot be defined precisely or exhaustively…and it must be left to be determined judicially on 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 on 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."***

The application herein challenges the merits of the decision and orders issued on 13th October 2020 on ground that the court failed to consider its grounds of opposition and replying affidavit. It seems that the line of argument counsel has taken is that the court gave an erroneous decision by not considering the grounds of opposition and replying affidavit. This is not one of the grounds for review but a ground for appeal if a party is not satisfied with the outcome of the court order. There was no error apparent on the face of the record.

Furthermore, the court has discretion to allow amendments on its own motion or by application by the parties. Amendments should freely be allowed before judgment.

I have considered the application, submissions by counsel and find that the application lacks merit and is dismissed with costs to the defendant.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF NOVEMBER, 2021

M. A. ODENY

JUDGE