REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CIVIL NO. 197 OF 2018

ANDREW MWANGI CHUI.....1ST PLAINTIFF

SHAURI MOYO DEVELOPERS LTD.....2ND PLAINTIFF

=VERSUS=

HASS PETROLEUM (K) LIMITED.....1ST DEFENDANT

THE LANDS REGISTRAR NAIROBI.....2ND DEFENDANT

THE HON.ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion dated 8th September 2020 in which it seeks that the Ruling which this court delivered on 7th May 2020 be reviewed. The Applicant also seeks an order that this suit be set down for hearing at the earliest time possible. The application is based on two grounds that is a mistake or error apparent on the face of the record and discovery of new and important evidence.

2. In respect of mistake or error apparent on the face of the record the Applicant argues that the court held that its title contained in LR No.2671 IR No.122352 is invalid which is not the case as its title has never been challenged. As for discovery of new and important evidence, though the Applicant did not specify, the said evidence in the application, it has claimed in its submissions that the new evidence is in entry number seven (7) in its title which was not availed at the time it filed a replying affidavit sworn on 9th may 2018 in opposition to the Respondents application of 25th April 2018.

3. The Applicant has introduced a new ground in its submissions and this is any sufficient ground. Under this ground, the Applicant argues that this court arrived at wrong findings in its ruling. The Applicant in particular states that this court misconstrued the law by its failure to acknowledge that the transfer of LR No.26719 IR.122352 to Dennis K Mwangi was by vesting order which vesting order was signed by the Deputy Registrar of this court.

4. The Applicant argues that if the order granting the Respondents an injunction is not reviewed, the Applicant is bound to suffer greatly as it has taken a facility of 14,000,000 US Dollars and offered the title to the suit property as security.

5. The Applicant further argues that whereas this court in its ruling found as a fact that the Respondents were not parties to HCCC No.610 of 2004, the court erroneously failed to make a similar finding that it was too not a party to ELC case No.1074 of 2015.

6. The Respondent opposed the Applicant's application based on grounds of opposition dated 15th October 2020 and a replying affidavit sworn on 8th February 2021. The Respondents contend that the Applicant's application is incompetent for failure to annex an extracted copy of the order which is sought to be reviewed. The Respondent also contend that the Applicant has failed to demonstrate any error on the face of the record or discovery of any new and important evidence.

7. I have carefully considered the Applicant's application and the opposition to the same by the Respondents. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicant has met the threshold for grant of review of the ruling delivered on 7th May 021.

8. Order 45 of the Civil Procedure Rules states that an application for review should be brought without unreasonable delay. The ruling

sought to be reviewed was delivered on 7th May 2020. This application was filed on 8th September 2020. This is a period of four months later. The delay has been attributed to the fact that the Ruling was delivered in the absence of the parties. Though the ruling was delivered in the absence of the parties, the parties had been asked to provide their e-mail address in the month of April 2020. This was due to Covid – 19 Pandemic. It was upon the Applicant to seek to know whether the ruling had been delivered or not. Be that as it may I am prepared to hold that the delay was not unreasonable given the circumstances in which the whole world was following the Covid-19 pandemic.

9. The Applicant states that there is an error apparent on the face of the record. The Applicant did not point out the said error or mistake in its application. It is in the submissions that the Applicant states that the mistake which is apparent on the record is that the court held that the title was invalid when that was not the case. The ruling of 7th May 2020 did not invalidate the title held by the Applicant. The court only observed that the portion over which the Applicant has title was part of the land allocated to the Respondent. Whether the title held by the Applicant is legal or not is a question which will be answered during the main hearing. There is therefore no error or mistake apparent on the record to warrant a review.

10. On the issue of discovery of new and important evidence, the Applicant has stated in its submissions that it was unable to annex a complete copy of title to the replying affidavit sworn on 9th May 2018 in opposition to the Respondent's application dated 25th April 2018. The Applicant contends that in the replying affidavit annexed to the replying affidavit sworn on 9th May 2018, there was no number seven entry. In the application which the Applicant has filed, it has annexed a copy of title showing an entry number seven which is a charge to Diamond Trust Bank for US Dollars 14,000 000.

11. It is important to note that entry number seven was entered on 17th October 2016. An official search of the title was given on 9th May 2018. This is the very day that the replying affidavit in opposition to the Respondents application of 25th April 2018 was prepared. The Applicant cannot therefore claim that this fact could not be availed as at the time the replying affidavit sworn on 9th May was prepared.

12. The Applicant has relied on the case of **Stephen Gathua Kimani Vs Nancy Wanjira Waruingi T/a Providence Auctioneers (2016) eKLR** where the court quoted from the code of Civil Procedure by Mulla where it was stated as follows:-

> ***"Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that 'the expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate.".***

13. The Applicant while relying on the case of **Stephen Gathua Kimani Vs Nancy Wanjira Waruingi T/a Providence Auctioneers (supra)** argued that this court erroneously failed to acknowledge that the Applicant was not a party to proceedings in ELC 1074 of 2015. The Applicant in further reliance on the case which has been cited went ahead to claim that the court failed to appreciate that the transfer of its title was from Dennis K. Mwangi following a vesting order which had been signed by the Deputy Registrar. In the same case relied by the Applicant, the Judge quoted from the case of **National Bank of Kenya Limited Vs Ndungu Njau** where the Court of Appeal stated as follows: -

> ***"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."***

14. It is therefore clear that misconception of law or evidence by a Judge is no ground for review. It may only be a ground of appeal. In **Jameny Mudaki Asava Vs Brown Otengo Asava & another (2015) e KLR** the Court of Appeal quoted from **Origo & Another Vs Mungala (2005) eKLR 307** where the Court of Appeal stated 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".***

15. There is no error apparent on the face of the record. In the case of **Nyamogo & Nyamogo Vs Kogo (2001) EA 170** 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 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."***

16. It is now clear that the Applicant has failed to demonstrate that there is an error or mistake apparent on the face of the record and that there is a discovery of new and important evidence which could not be obtained with reasonable diligence at the time of hearing of the applications resulting in the ruling sought to be reviewed. There is also no sufficient reason shown to warrant a review. I therefore find that the Applicant's application is without merit. The same is dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2021.

E. O. OBAGA

JUDGE

In the Virtual presence of:-

Mr Olaha for 1st Defendant/Applicant

Mr Muiruri for Plaintiffs/Respondents

Court Assistant:Steve

E. O. OBAGA

JUDGE