REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 31 OF 2018 (FORMERLY HIGH COURT CIVIL SUIT NO. 124 OF 1997)

BIKHABAI MUTHABAI PATEL.....1ST PLAINTIFF

CYPRIAN IBURLI NGARURO.....2ND PLAINTIFF

DR. FRANK KAMBE MWONGERA.....3RD PLAINTIFF

VERSUS

MACCU MOTORS LIMITED.....1ST DEFENDANT

YUSUF MUSA MUCHEKE.....2ND DEFENDANT

MR. KIRUKI T/A GT MOTORS.....3RD DEFENDANT

GERVASIO KARIUKI.....4TH DEFENDANT

SALIM KIMATHI.....5TH DEFENDANT

JAMES MBAABU.....6TH DEFENDANT

JOHN KURIA.....7TH DEFENDANT

FRANCIS MURIITHI.....8TH DEFENDANT

JOHN GATEMBU.....9TH DEFENDANT

HENRY MURIUNGI.....10TH DEFENDANT

NICHOLAS KINYUA.....11TH DEFENDANT

NJOROGE T/A SUNBIRD SERVICES.....12TH DEFENDANT

RULING

1. By a Notice of Motion dated 14th October 2019 and supported by the affidavit of Time Karimi Yusuf of even date, the 2nd Defendant (now deceased, but substituted by the said Time Karimi Yusuf) sought the following orders:

a. Spent

b. Spent

c. That the honorable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of determining and allowing the 2nd Defendant's counterclaim contained in the HCCC No. 7 of 2004 which was consolidated with the present suit;

d. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a

determination that the court appointed receiver/manager Mr. Henry Kuthima be ordered to pay to the 2nd Defendant Ksh. 20,400,000/= collected between the period of June 2002 and 3rd June 2019 when the judgement was delivered;

e. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a determination that the 2nd Defendant is not liable to pay costs to the Plaintiffs;

f. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a determination on which party should pay costs for the 2nd Defendant;

g. Any other order that the Honourable court may deem fit to grant in the circumstances;

h. The cost of the application to be provided for.

2. The Applicant's application is grounded on the fact that the court, on an error apparent on the face of the record, omitted to consider the 2nd Defendant's counterclaim in its final orders; erred in failing to pronounce itself on the party awarded to receive the rents collected by the court appointed receiver and made a blanket determination that all the Defendants would bear the costs of the suit, even where the 2nd Defendant was merely a lessee of the 1st Defendant.

3. The Plaintiffs/Respondents in this case have strenuously opposed the application. Vide a replying affidavit filed on 20th November 2019, the 2nd Plaintiff avers that in conjunction with the other Plaintiffs, they had filed suit HCCC No.124 of 1997, seeking the vacation of the Defendants from a parcel of land being Meru Municipality Block 11/50 (hereinafter referred to as the Suit Land) over which the Plaintiffs are registered as proprietors with a leasehold interest. That the 2nd Defendant filed suit HCCC No. 7 of 2004, seeking compensation for the structures erected on the Suit Land by her deceased husband. Eventually, the two cases, to wit, HCCC No.124 of 1997 and HCCC No. 7 of 2004 were consolidated and HCCC No. 124 of 1997 was retained as the running file.

4. In the judgement delivered on 03rd June 2019, the Court found that the Plaintiffs had proved their ownership to the Suit Land under a certificate of lease and were therefore entitled to the protection of the law. The Plaintiffs' claim was thus allowed with costs and the Defendant's defence and counterclaim dismissed.

5. In support of her application, the 2nd Defendant/Applicant filed submissions on 26th February 2020. In it, she reiterated the grounds set out in the notice of motion application. She admits that upon the merging of the two cases, her case was treated as a counterclaim to the Plaintiffs' suit. The 2nd Defendant/Applicant submits that in the course of delivering its determination, the court omitted to comment on the ownership of the kiosks erected on the Suit Land and to give directions on where the rent collected by the court appointed receiver would be directed. Additionally, she feels aggrieved by the order to pay costs to the Plaintiffs on the ground that her deceased husband was merely a tenant who was dragged into a suit revolving around the ownership of the Suit Land. It is for these reasons that the 2nd Defendant prays that the Court review its judgement and pronounce itself on the highlighted matters. The 2nd Defendant/Applicant reckons that the application for review is well grounded in law and satisfies the conditions set out under *Order 45 of the Civil Procedure Rules, 2010***.** She specifically points to the existence of an error apparent on the face of the record as the foundation for the review. The case of *Muyondi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243* is cited in support of the position.

6. The Plaintiffs filed their submissions on 27th April 2020. They adopted the contents of their replying affidavit dated 20th November 2019. Their position is that the application for review is misguided and bad in law as it does not satisfy the requirements of *Section 80 of the Civil Procedure Act and accompanying Order 45 of the Civil Procedure Rules, 2010*. The Plaintiffs observe first, that the 2nd Defendant has already filed an appeal against the judgement, thereby disqualifying themselves from the review process. Secondly, they note that the grounding of the review on the basis of an error on the face of the record is a misapprehension of the law. They contend that the reasons advanced for the review essentially constitute an appeal in disguise and cannot be allowed in law. They cite the case of *Samuel Obonyo Mududa Vs Warera Gnofnah [2013] e KLR; Nyamogo & Nyamogo Advocates Vs Kogo [2011] E.A; Middle East Bank Kenya Limited Vs Thalia Katia Maria Castanha [2016]e KLR and Mistry Valji Vs Janendra Raichand & 2 Others [2016] eKLR* in support of their argument.

7. The court-appointed official receiver filed his submissions on 18th May 2020. He agrees that he was so appointed by the court on 11th June 2002 to collect and levy distress from the tenants occupying the Suit Land. He states that he was however prevented from executing his mandate by reason of the 2nd Defendant/Applicant's incitement of the tenants against remitting the rent to him. He thus resorted to engaging Quickline auctioneers to proclaim the rent due, at the time totaling to Six Hundred and Fifty-Eight Thousand Shillings (Ksh. 658,000). In response, the tenants filed Civil Suit No.808 of 2003 seeking declaratory orders that they were not tenants of the Defendants on the Suit Land thereby stopping them from claiming rent from them as well as a permanent injunction restraining the Defendant from interfering with the tenants' business on the Suit Land. During the hearing, it came out that the 2nd Defendant/Applicant herein had been the one collecting rent from the tenants contrary to the court directions of 11th June 2002. Judgement in the matter was delivered on 29th November 2018 where the tenant's suit was dismissed for failure to comply with existing court orders. It is the official receiver's submission then that the Applicant ought to account for the rents collected to the Plaintiffs as the registered lease holders over the Suit Land. Similar to the Plaintiff's submissions, the official receiver faulted the grounds set out as errors on the face of record contemplated under *Order 45 of the Civil Procedure Rules 2010***.** Two cases are cited in support of the position: *Amritlal Bhamji Davda Vs Abdi Ahmed & 2 Others (1987)e KLR; Kenya Sugar Board Vs Ndung'u Gathinji (2013)e KLR***.**

8. The Parties have correctly traced the legal foundation of review applications to *Section 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules, 2010***.** Given that the entire application turns on these provisions, the same have been captured hereunder verbatim.

Section 80 of the Civil Procedure Act, Cap 21

"*Any person who considers himself aggrieved -*

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

[*Order 45, rule 1.] Application for review of decree or order*.

1. (*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, 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay"

9. From the onset, an application for review becomes inaccessible where an appeal has already been preferred. Although the Plaintiffs/Respondents in their submissions point out that the 2nd Defendant/Applicant has already lodged an appeal against the judgement, they have not filed with the court any notice of appeal or memorandum of appeal in support of their allegation.

10. Next, an application for review is required to meet any of the three criteria set out under ***Order 45 Rule 1,*** that is:

a) Where there has been a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by them at the time when the decree was passed or the order made;

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

c) For any other sufficient reason.

11. The case of ***Paul Mwaniki Vs National Hospital Insurance Fund Board of Management [2020] e KLR*** provides useful amplification on the matters to be considered as qualifying for review.

"i. *A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in

Order 45 Rule 1."

12. Of the three grounds upon which an application for review can be premised, the 2nd Defendant/Applicant hinges her application on an error apparent on the face of the record. Various decisions have sought to unpack the contours of this specific ground. See ***Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,*** *where the Court of Appeal adopted the decision in* ***Nyamogo & Nyamogo Vs Kogo (2001) EA 174***in describing an error apparent on the face of the record 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 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."* (underline, mine)

13. In ***Attorney General & O'rs Vs Boniface Byanyima, HCMA No. 1789 of 2000***, the court citing ***Levi Outa Vs Uganda Transport Company, {1995} HCB 340***held that the expression 'mistake or error apparent on the face of record'

> *"Refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."*

14. More recently in ***Republic Vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya [2019] e KLR,*** the court held as follows*:*

> *"Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review… The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."*

15. The 2nd Defendant/ Applicant's application must thus be held under the light of the foregoing decisions to evaluate whether or not it is properly founded. By way of recapitulation, the Applicant's grounds for review are as follows:

> *a. That the honorable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of determining and allowing the 2nd Defendant's counterclaim contained in the HCCC No. 7 of 2004 which was consolidated with the present suit;*
>
> *b. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a determination that the court appointed receiver/manager Mr. Henry Kuthima be ordered to pay to the 2nd Defendant Ksh. 20,400,000/= collected between the period of June 2002 and 3rd June 2019 when the judgement was delivered;*
>
> *c. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a determination that the 2nd Defendant is not liable to pay costs to the Plaintiffs;*
>
> *d. That the Honourable court be pleased to review the judgement delivered on 3rd June 2019 for purposes of making a determination on which party should pay costs for the 2nd Defendant;*

16. The four grounds upon which the application for review is made clearly call for, and already have, in the nature of the responses filed by the Plaintiffs and Official Receiver in their replying affidavits and submissions, required lengthy reasoning and counter arguments. On the first ground, it is not contested that upon the consolidation of the two cases HCCC No.124 of 1997 and HCCC No. 7 of 2004, the 2nd Defendant's case automatically became a counterclaim as against the Plaintiff's suit. In the judgement rendered on 3rd June 2019, the Court dismissed the Defendant's defense and counterclaim. This included, quite obviously, the 2nd Defendant's counterclaim. The desire by the Applicant to have this position reconsidered may be a good ground for appeal but not for review.

17. The second ground on the final destination of the monies collected has invited a response from the official receiver who says that he did not collect any money at all and it was infact a finding in Civil Suit No.808 of 2003 that the Applicant was the one who had subverted the process and was collecting the rents herself.

18. On the third and fourth grounds as to the order for costs, the judgement couldn't be clearer on its position that costs were to be borne by the Defendants. The 2nd Defendant's view that she ought not to have been ordered to pay costs cannot conceivably be an error on the face of the record giving a pass to a review application. See - ***Pancras T. Swai Vs Kenya Breweries Limited [2014] e KLR*** where the Court Appeal

cited its earlier decision in ***Francis Origo & another Vs Jacob Kumali Mugala C.A Civ Appeal No. 149 of 2001*** where it expressed itself 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."*

19. See also ***National Bank of Kenya Ltd Vs Ndungu Njau {1996} KLR 469*** where the ***Court of Appeal at Page 381*** as cited in the case of ***Stephen Gathua Kimani Vs Nancy Wanjira Waruingi t/a Provident Auctioneers [2016] e KLR held:***

> *"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue" In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."*

20. It is the court's finding that the application for review on the basis of an error apparent on the face of record cannot stand in the present circumstances. The application is dismissed with costs to be borne by the 2nd Defendant/Applicant.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of;

1. Mwangi E. Muthoni for the Plaintiffs/Respondents

2. Mr. Munene for the 2nd Defendant/Applicant

3. M/s Muthoni for the 1st Defendant/Applicant

4. Fardowsa; Court Assistant