



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 226 OF 2016**

**WILFRED NG'ANG'A NGARUIYA.....PLAINTIFF**

**-VERSUS-**

**REGISTERED TRUSTEES OF FAITH MISSION CHURCH.....1<sup>ST</sup> DEFENDANT**

**VICTOR WAHOME KARIUKI.....2<sup>ND</sup> DEFENDANT**

**IBRAHIM SAKWA MZEE.....3<sup>RD</sup> DEFENDANT**

**JOSPHAT MUSYOKA NDAMBUKI.....4<sup>TH</sup> DEFENDANT**

**HARUN NGUGI NDUNGU.....5<sup>TH</sup> DEFENDANT**

**ISAAC MASILA MUTULA.....6<sup>TH</sup> DEFENDANT**

**FABIAN CHIMAKATI.....7<sup>TH</sup> DEFENDANT**

**MOSICA PROPERTIES LIMITED.....8<sup>TH</sup> DEFENDANT**

**MWANGANGI MUTULA MUTUA.....9<sup>TH</sup> DEFENDANT**

**JOSEPH WAWERU CHEGE..... 10<sup>TH</sup> DEFENDANT**

**JOSEPH MUTINDA MUTUKU.....11<sup>TH</sup> DEFENDANT**

**AND**

**MATHEW MULI MUTISO.....1<sup>ST</sup> PROPOSED INTERSTED PARTY**

**MEDLINE WANJIRU KINYANJUI.....2<sup>ND</sup> PROPOSED INTERESTED PARTY**

**BEATRICE ANYANGO MACHIO.....3<sup>RD</sup> PROPOSED INTERESTED PARTY**

**JOEL MULI.....4<sup>TH</sup> PROPOSED INTERESTED PARTY**

**STANLUS NDETI MWANIA.....5<sup>TH</sup> PROPOSED INTERESTED PARTY**

**GIDEON OMARE.....6<sup>TH</sup> PROPOSED INTERSTED PARTY**

**FRANCIS MUOKI.....7<sup>TH</sup> PROPOSED INTERESTED PARTY**

**RULING**

## **Introduction**

1. Vide a Notice of Motion Application dated 22<sup>nd</sup> February, 2021, the proposed Interested Parties (the Applicants) have sought for the following orders:

***a) That this honourable court be pleased to review and/or set aside its ruling and orders issued on 29.01.2021 and in its place there be an order allowing the proposed interested parties to be enjoined in the suit.***

***b) That the cost of this application be provided for.***

2. The Application was supported by the Affidavit of the 5<sup>th</sup> Proposed Interested Party who deponed that vide an Application dated 13.01.2020, they sought to be enjoined in this suit for the reason that they had an interest in the disputed parcel of land by virtue of the fact that they bought the same from the 9<sup>th</sup> Defendant through the 8<sup>th</sup> and 10<sup>th</sup> Defendants.

3. The 5<sup>th</sup> Proposed Interested Party deponed that at the point of purchase of their respective plots, they had written contracts which shows the purchase of the plots; that the allotment letters contains the particulars which ordinarily are included in sale agreements and that it was a mistake apparent on the face of the record that this court proceeded on the assumption that there was no written agreement between the buyer and seller.

4. The 5<sup>th</sup> Proposed Interested Party deponed that by virtue of the fact that they exhibited the allotment letters and receipts evidencing the money they paid to the sellers of the plots they bought the land from, they had done everything possible to show that they were interested parties in the matter and that it would be in the interest of justice that the Application for review is allowed as prayed.

5. The Application was opposed vide a Replying Affidavit of the Plaintiff who deponed that no new grounds have been relied upon in seeking a review of this court's Ruling and that the Application was a mere replica of the Application for joinder dated 13.01.2020 and therefore lacked merit.

6. The 5<sup>th</sup> Interested Party filed a Further Affidavit in which he deponed that the appeal at the Court of Appeal was not in respect to the Ruling of this court dated 29.01.2021; and that there is absolutely nothing that can prevent the court from reopening the case.

## **Submissions**

7. The Application was canvassed by way of written submissions. Counsel of the Proposed Interested Parties submitted that the grounds for review were unpacked in the case of ***Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR*** where Mativo J held as follows:

***“A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”***

8. Counsel submitted that the Applicants have since learnt that there was another suit pending before this court being ELC No. 1 of 2021 in which the Plaintiff/Respondent herein, Wilfred Ng'ang'a Ngaruiya, had been sued as a Defendant and that in that suit, the bone of contention was the same parcel of land that is in dispute in this suit.

9. Counsel submitted the Proposed Interested Parties were in possession of allotment letters which were backed by relevant receipts and that it was therefore a mistake for the court to have proceeded on the assumption that apart from the allotment letters, which were actually filed, the Applicants still needed to have filed other sale agreements as evidence of their interest in the disputed parcel of land.

10. Counsel for the Plaintiff/Respondent submitted that it was important to distinguish between grounds of appeal and grounds for review. Counsel relied on the case of ***National Bank of Kenya Ltd vs Ndungu Njau [1996] KLR 469*** where the Court of Appeal held as follows:

***“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 has 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.”***

11. Counsel for the Plaintiff submitted that the Applicants had not demonstrated any of the grounds for review, and that the grounds being relied upon by the Applicants cannot form the basis for a review. Counsel for the Plaintiff relied on the case of ***Nyamogo & Nyamogo vs. Kogo (2001) EA 174***, where the court 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 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 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.”*

12. The Plaintiff’s counsel submitted that the term "mistake or error apparent" by its very connotation signified an error which was evident *per se* from the record and did not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error was not self-evident and detection thereof required long debate and process of reasoning, it was submitted, it could not be treated as an error apparent on the face of the record for the purpose of review.

13. Counsel submitted that an order, decision, or judgment could not 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, it was submitted, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

### **Analysis and Findings**

14. The only issue that arises for determination is whether the court should review its Ruling dated 29<sup>th</sup> January, 2021. **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** provides 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, 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.*

15. The Ruling of this court that the Applicants are seeking to review is dated 29<sup>th</sup> January, 2021. While dismissing the Applicants’ Application to be enjoined in this suit, this court held as follows:

**23. The failure by the Applicants to annex the Sale Agreements in respect of the portions of land that they purportedly bought in the year 2008 or thereabouts is contrary to the provisions of Section 3(3) of the Law of Contract Act which provides as follows:**

**“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

**24. Having not annexed executed and attested Sale Agreements, the Applicants’ claim in respect of L.R. No. 12715/155 is a non-starter. In any event, the Plaintiff has alleged in the Plaint that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants do not have a good title for L.R. No. 12715/155.**

**25. The Plaintiff having pleaded in the Plaint that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants had no good title to pass to any person, and the Applicants being not the registered proprietors of the suit property to date, it is my findings that the Applicants’ interests vis-à-vis the Plaintiff’s claim can only be ventilated by the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants who are already parties to this suit. Indeed, if the Defendants’ claim succeeds then the Interested Parties will still have their portions of land.**

16. In the current Application, the Applicants’ case is that they are in possession of allotment letters which contain the particulars that ordinarily are included in sale agreements and that it was a mistake apparent on the face of the record that this court proceeded on the assumption that there was no written agreement between the buyers and the seller.

17. The 5<sup>th</sup> Proposed Interested Party deponed that by virtue of the fact that they exhibited the allotment letters and receipts evidencing the

money they paid to the sellers of the plots they bought, they had done everything possible to show that they were interested parties in the matter and that it would be in the interest of justice that the Application for review is allowed as prayed.

18. The reading of the Application shows that the Applicants’ are faulting this court for having not found that a Letter of Allotment is synonymous with a sale agreement for the purposes of section 3 (3) of the Law of Contract, and therefore there is an error apparent on the face of the record, which error should be reviewed by this court in their favour.

19. In ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243***, the Court of Appeal discussed what an error apparent on the face of the record is 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 and is certainly no ground for a review although it may be for an appeal.”*

20. From the above decision, it is clear that there is a distinction between a mere erroneous decision and an error apparent on the face of record. As was held in the ***Muyodi case*** (supra), 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.

21. However, 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, and is certainly no ground for a review although it may be for an appeal.

22. The issue of whether a letter of allotment is the same as an agreement contemplated under the **Law of Contract Act** can only be established after a long drawn process of reasoning, with divergent opinions on the same. That being the case, the decision of this court on that issue cannot be said to be an error apparent on the face of the record, but rather, if at all, an erroneous decision.

23. As was held by the Court of Appeal in ***National Bank of Kenya Ltd vs Ndungu Njau (1996) KLR 469*** an order cannot be reviewed just because it is shown that the judge decided the matter on a foundation of incorrect procedure or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case or that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed has subsequently arrived at different decisions on the same issue.

24. The Court of Appeal was clear in the ***National Bank case*** (supra) that in such a scenario, 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. That is what the Applicants should have done.

25. In any event, the court decline to allow the earlier Application by the Applicants to be enjoined in this suit for other reasons other than their failure to annex the sale agreements, including the fact that the people who purportedly sold to them the suit properties were already parties to the suit.

26. For those reasons, it is my finding that the Application dated 22<sup>nd</sup> February, 2021 is not meritorious. The Application is dismissed with costs.

**DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 8TH DAY OF OCTOBER, 2021**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

.....for the Plaintiff

.....for the Defendant

.....for the Interested Party

Court Assistant – John Okumu