



**REPUBLIC OF KENYA**

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

**ELC CASE NO 1107 OF 2013**

**GEORGE BONIFACE MBUGUA Alias**

**GEORGE BONIFACE NYANJA.....PLAINTIFF**

**VERSUS**

**MOHAMMED JAWAYD IQBAL**

**(Sued as the Personal Representative of the Estate of the Late**

**Ghulam Rasool Janmohamed.....DEFENDANT**

**RULING**

**Background**

1. Before this Court for determination is the Plaintiff's Notice of Motion Application dated 1<sup>st</sup> of October 2021 seeking the following orders:
  - a) *This Honourable Court be pleased to review and set aside the Ruling and orders of Justice Obaga dated 23<sup>rd</sup> September 2021 and in its place, an order be issued allowing the parties herein to file additional evidence to be used by the Court in assessment of mesne profits.*
  - b) *Costs of this Application be provided for.*
2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of George Boniface Mbugua, the Plaintiff herein dated 1<sup>st</sup> October 2021.
3. The Plaintiff deponed that sometime in 1986, he entered into an agreement with the Defendant for the purchase of all that property known as L.R No.1/387 situate along Ngong Road, Nairobi; that the purchase price of the property was Kshs 2,000,000, which sum he duly paid and thereafter took possession of the property as a purchaser for value and that the Defendant nevertheless declined to transfer the property to him on allegations that he had not completed payment of the purchase price.
4. According to the Plaintiff, the Defendant's refusal to transfer the suit property led him institute the present suit seeking for orders of specific performance. The Plaintiff deponed that the matter proceeded for trial after which the court, vide its Judgment of 31<sup>st</sup> May 2018, found in his favour and ordered the transfer of the suit property into his name and that the Defendant subsequently filed an appeal being Nairobi Civil Appeal No.242 of 2018.
5. It is the deposition of the Plaintiff that the Court of Appeal, vide its decision of 8<sup>th</sup> November 2019, overturned the trial court's Judgment in its entirety and remitted the matter to this court for assessment of rent/mesne profits/damages due to the Defendant and that the assessment of the rent/mesne profits/damages aforesaid was to be done taking into account the sum of Kshs 1,500,000 paid by the Plaintiff towards the purchase in 1987.
6. It is the Plaintiff's deposition that the issue of assessment of mesne profits is pending in this court; that he would like to file additional documents being a valuation report and a financial analyst report showing the increase of the value of Kshs 1,500,000 from 1987 to 2021 and that his advocate made an oral application seeking to have the aforesaid documents adduced but the court, in its Ruling of 23<sup>rd</sup> September 2021, declined to grant the same on the grounds that allowing additional evidence would go against the Court of Appeal Judgment.
7. The Plaintiff deponed that he is dissatisfied with the Ruling delivered by this court (Obaga J.) on 23<sup>rd</sup> September 2021 on the ground that there is an error apparent on the face of the record; that the court did not consider that to come up with an accurate figure, it would need to

base its assessment of mesne profits on reports and/or further documents and that there is sufficient reason to review and set aside the said Ruling.

8. The Plaintiff contends that there is no document on record showing the current value of the suit property; that the Court of Appeal, while finding that the sale had aborted, and the Defendant had not refunded the sum of Kshs 1,500,000 paid by the Plaintiff, directed that the assessment of mesne profits be done taking into account the aforesaid sum of Kshs 1,500,000; that the value of Kshs 1,500,000 paid in 1987 has appreciated and that the increase in value of the said sum should be considered in the assessment, failure to which the Defendant will be unjustly enriched,

9. According to the Plaintiff, this suit sought to compel the Defendant to transfer the suit property to the Plaintiff and hence the aspect of the value of Kshs 1,500,000 was not in issue; that it is not possible for this court to make an assessment of mesne profits without an expert's report showing the value of Kshs 1,500,000 from 1987 to date and that the filing of new evidence in this regard does not amount to reopening the suit because the issue of ownership of the suit property was finally determined by the Court of Appeal.

10. In response to the Application, the 1<sup>st</sup> Defendant filed Grounds of Opposition dated 14<sup>th</sup> October 2021 in which it averred that;

i. The Application is utterly misconceived and wanting in substance and raises no sufficient grounds warranting the review and/or setting aside of the Ruling and orders of the Honourable Justice Obaga issued on the 23<sup>rd</sup> September 2021.

ii. This Court has no jurisdiction to deviate and/or interfere with the directions contained in the Judgment of the Court of Appeal in Civil Appeal No. 242 of 2018: Mohammed Jawayd Iqbal Vs George Boniface Mbugua delivered on the 8<sup>th</sup> of November 2019 and purport to review the orders as sought.

iii. This Court has no jurisdiction to allow the parties herein to file additional evidence for the assessment of mesne profits as the Court of Appeal has already set the parameters for assessment as per its Judgment delivered on the 8<sup>th</sup> of November 2019.

iv. The review and/or setting aside of the Ruling and orders as sought by the Applicant is untenable both in law and in fact, and is frivolous, vexatious and amounts to a gross abuse of the court process and a total waste of the Courts time.

v. The Application is solely aimed at attempting to alter the Judgment of the Court of Appeal through the back door despite the fact that the Court of Appeal itself refused to review its Judgment upon application by the Plaintiff/Applicant herein.

vi. That the instant Application is frivolous, vexatious and lacks a legal basis and as such the same ought to be dismissed *in limine*.

### **Submissions**

11. The Application was canvassed by way of oral submissions. The Plaintiff's advocate submitted that the question of whether Kshs 500,000 of the purchase price had been paid arose during the trial, the payment of Kshs 1,500,000 being undisputed; that the ELC Court in determining the matter found that the Plaintiff had fully paid the purchase price and ordered the suit property to be transferred to the Plaintiff and that the Defendant preferred an appeal and the Court of Appeal determined that there was no evidence of the payment of Kshs 500,000 by the Plaintiff.

12. Counsel submitted that the Court of Appeal overturned the trial court's Judgment and remitted the matter to this court for assessment of mesne profits and damages; that he sought leave to adduce additional evidence with regard to the assessment of the mesne profits and damages but the same was declined and that the court (Obaga J.) held that the only way the assessment was to be done was through the evidence already adduced at trial.

13. Counsel for the Plaintiff urged that this is a court of justice and should not allow the Plaintiff to be unjustly enriched; that the issue of quantum was never determined by the court and that the sum of Kshs 1,500,000/= paid in 1987 does not have the same value today and it is imperative that evidence to that effect is provided to the court to aid it arrive at a just decision. Counsel submitted that the Plaintiff was in possession of additional evidence which was not available when Obaga J. delivered his Ruling.

14. It was submitted by counsel for the Defendant that the Plaintiff's application is frivolous; that the Plaintiff has not made out a case for review of the Ruling of Obaga J and that whereas the Plaintiff seeks to show the current value of Kshs 1,500,000, the Court of Appeal directed this Court to assess the rent/mesne profits payable to the Defendant only.

15. According to the Defendant's counsel, the rent/mesne profits sought to be assessed are with respect to the Defendant's counter-claim; that all that this court is required to do is to assess the damages and deduct the sum of Kshs 1,500,000 payable to the Plaintiff from it; that consequently, no additional evidence is required as the onus is on the Defendant to prove his counterclaim and that there is no error apparent on the face of the record or sufficient reasons to review the Ruling of this court.

16. In response, counsel for the Plaintiff submitted that for the Defendant to seek to take possession of the land, and for the Plaintiff to pay him mesne profits, less the amount paid in 1986, the same would amount to a mechanical approach by the court and will be contrary to the concept of unjust enrichment as pronounced by the Court of Appeal in its Judgment.

### **Analysis & Determination**

17. Having considered the pleadings and oral submissions by counsel, the only issue that arises for determination is whether the Plaintiff

has made out a case warranting a review of the Ruling of this court (Obaga J.) delivered on 23<sup>rd</sup> September 2021.

18. The law governing applications for review is set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1(1)** of the **Civil Procedure Rules**. **Section 80** of the Act provides as follows:

**80. 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.**

19. **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 review of Judgment to the court which passed the decree or made the order without unreasonable delay.”**

20. The provisions of **Order 45 Rule 1** of the **Civil Procedure Rules** were restated by the Court of Appeal in **Benjoh Amalgamated Limited and another v Kenya Commercial Bank Limited [2014] eKLR** as follows:

**“In the High court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.**

21. The reading of the law shows that the power of the court to review its Judgments and Rulings is not absolute and is hedged in by the restrictions indicated in **Order 45** of the **Civil Procedure Rules**. The power can be exercised upon discovery of 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 him at the time when the order was made.

22. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The power of review can be exercised only for correction of a patent error of law or fact which stares one in the face without any elaborate argument being needed for stabilizing it.

23. While discussing the concept of mistake or error on the face of the record, the Court of Appeal in **Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR** referred to its various decisions as follows;

**“This Court in Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 described an error on the face of the record as follows:**

**In Nyamogo and Nyamogo v 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 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 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. This laid down principle of law is indeed applicable in the matter before us.”**

24. This position was also restated by the Ugandan Court of Appeal in the case of **Apollo Waswa Basude & 2 others (As administrators to the Estate of the late Sepiriya Rosiko) Vs Nsabwa Ham, Civil Appeal No 288 of 2016**, where the court at para 310 stated thus;

**“...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law...”**

25. Briefly, the background to this matter is that the Plaintiff instituted this suit against the Defendant seeking orders of specific performance. The trial court found in favour of the Plaintiff by granting the order of specific performance. Aggrieved by the decision of the trial court, the Defendant filed an appeal in the Court of Appeal. In its Judgment, the Court of Appeal overturned the trial court's decision and remitted the matter to this court for assessment of the rent/mesne profits/damages due to the Defendant.

26. Before the matter could proceed for assessment of mesne profits and or damages, counsel for the Plaintiff made an oral application seeking to call the evidence of an economist and a valuer to guide the court on the issue of inflation. In opposition to the application by the Plaintiff to call for fresh evidence, counsel for the Defendant informed the court that the Judgment of the Court of Appeal was clear that the matter had been referred back to this court for assessment of damages and or mesne profits, which assessment should be based on the evidence on record. Counsel for the Defendant submitted that admitting new evidence was akin to re-opening the case.

27. Vide its Ruling of 23<sup>rd</sup> September 2021, this court (Obaga J.) disallowed the request by the Plaintiff to adduce additional evidence. The court stated as follows:

***“The Court of Appeal was clear that despite the trial court referring to the evidence of a valuer who had been called by the Defendant and identifying the issue of whether the Defendant was entitled to rent as claimed in the counter-claim, never addressed the issue in the Judgment. It is therefore clear that this court was only to assess mesne profits based on the evidence which was adduced during the trial. Allowing additional evidence will clearly go against the order of the Court of Appeal. I therefore disallow the request by the Plaintiff to adduce additional evidence during the assessment of mesne profits”.***

28. The Plaintiff contends that that there is an error apparent on the face of the record and sufficient reasons to review the Ruling of the court. The basis of this argument is that the court “did not consider that to come up with an accurate figure, it will need to base its assessment of mesne profits on reports and/or further documents.” The Plaintiff opines that there is no document on the court record showing the current value of Kshs 1,500,000 that the Plaintiff paid to the Defendant in 1986.

29. The fact that the court declined to allow new evidence to be adduced or that it failed to consider the need for such additional evidence to assess mesne profits/damages cannot by any stretch be said to be tantamount to an error on the face of the record. In my view, what the Plaintiff is questioning is this court's interpretation of the Court of Appeal directions in respect to the assessment of mesne profits/damages.

30. The issue of whether the interpretation of the Judgment of the Court of Appeal by this court is right or wrong requires lengthy deliberations, with probably divergent opinions. In the instant case therefore, this court is not convinced that there is an error apparent on the face of the record.

31. Further, the court having determined that it was precluded from allowing any additional evidence by the Court of Appeal, the Defendant should have lodged an appeal against the said Ruling as opposed to filing an application for review. As stated by the Court of Appeal in *Nyamongo vs Nyamongo (supra) and Pancras T. Swai v Kenya Breweries Limited [2014] eKLR*, a mere error or a wrong view by the court is certainly not a ground for a review, although it may be for an appeal.

32. That being the case, it is my finding that the Plaintiff has failed to show that there is an error apparent on the face of the record to warrant the review of the Ruling of 23<sup>rd</sup> September, 2021.

33. The second limb of the Plaintiff's prayer for review is premised on the ground of “any other sufficient reasons”. The scope of the ground “for any other sufficient reason” has been subject to different interpretations by the courts. There are two schools of thought, the first one being that the “sufficient reason” alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record while the second view is that the “sufficient reason” need not be analogous to the previous grounds.

34. In the case of *Nasibwa Wakenya Moses vs. University of Nairobi & Another [2019] eKLR*, Mativo J held as follows:

***“An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another [13]* where the court held that: -***

***“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”***

***Mulla in the Code of Civil Procedure [14] (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 ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its Judgment.***

***Perhaps it is worth citing *Evan Bwire vs Andrew Nginda [15]* where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.’***

35. Similarly, the Court of Appeal in the case of *Assets Recovery Agency vs Charity Wangui Gethi & 3 others [2020] eKLR* stated that:-

***“The ground “other sufficient reason” has been held to be consonant with the first two grounds: See *Kuria v Shah [1990] KLR 316.*”***

36. However, the Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited [2014] eKLR* was of a contrary view and adopted the position that “sufficient reasons” need not be analogous by stating;

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed v. Charan Singh Nand Singh and Another (1959) EA 793*, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)* this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another vs Charan Singh (C.A. No. 80 of 1985) (unreported)* wherein this Court held that

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

37. This court adopts the position that “any sufficient reason” must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record. I say so because there could be other compelling reasons, not contemplated under **Order 45 Rule (1)** of the **Civil Procedure Rules**, which may necessitate the review of a decree or an order.

38. As to whether the Plaintiff in the current application has succeeded in convincing this court that there exists “a sufficient reason” to review its orders of 23<sup>rd</sup> September, 2021, it is my view that it has not. I say so because the Plaintiff’s application is based on the fact that if the Defendant was to refund to the Plaintiff Kshs. 1,500,000 that was paid in 1987, he (the Defendant) will be enriched unjustly.

39. In my view, whether the Plaintiff should be refunded more than the Kshs. 1,500,000 that he paid to the Defendant due to inflation should have been canvassed at the Court of Appeal. Indeed, the Court of Appeal was categorical on the amount that is payable to the Plaintiff as follows:

*“Following the failure of the agreements between the parties, what should have happened is a return of the purchase price to Nyanja paid in part...whereas the appellant as the innocent party would have been entitled to damages for breach of contract from Nyanja, such damages would have to be set off against the Kshs. 1,500,000,000 that Nyanja paid to the deceased and his estate between 1985 and 1987. He would otherwise be unjustly enriched and the court cannot countenance that, either... We remit this matter to the Environment and Land Court for assessment of the rent/mesne profits/damages the appellant is entitled to only, while taking into account the sum of Kshs. 1,500,000 paid towards the abortive purchase of the suit premises.”*

40. This court’s mandate as directed by the Court of Appeal is to assess the rent/mesne profits/damages payable to the Defendant while taking into account the Kshs. 1,500,000 paid by the Plaintiff, and not any other amount. In view of the conclusions herein above, the court finds that the Plaintiff has not met the necessary threshold to warrant the orders sought.

41. For those reasons, the Plaintiff’s Application dated 1<sup>st</sup> October 2021 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Mr. Wanyama for the Plaintiff

Mr. Ahmednasir for the Defendant

Court Assistant: John Okumu