REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERICIAL AND TAX DIVISION

CIVIL APPEAL NO. 4 OF 2018

MASENO UNIVERSITY SACCO SOCIETY LIMITED.....APPELLANT/APPLICANT

VERSUS

STIMA SACCO SOCIETY LIMITED.....RESPONDENT

RULING

1. The application for consideration is the Applicant's Notice of Motion dated 29th October, 2020 brought under **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act, Order 45 Rules 1b, 2 & 3, Order 51** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law. It seeks the following Orders: -

a. Spent.

b. THAT this matter be placed before Honourable Lady Justice Nzioka for hearing and determination of this application which seeks to review parts of the orders contained in the Judgement rendered by the Court in this matter on the 15th September 2020.

c. THAT upon the hearing and determination of this application inter-parties the Honourable Court be pleased to order and it is hereby ordered that the Honourable Court's Order contained in paragraph 68b(vi) of the judgement dated 15th September 2020 be and is hereby reviewed to read that "All sums received as dividends on the shares SHALL NOT be deducted from the purchase price".

d. THAT in the alternative to prayer (c) above; that upon hearing and determination of this application inter-parties the Honourable Court be pleased to order and it is hereby ordered that the Honourable Court's Order contained in paragraph 68b(ii) of the judgment dated 15th September 2020 be and is hereby reviewed and modified to read that the "sum payable in relation to order (i) shall be the sum stated in the agreement being Kshs. 108,000,000.00, PLUS INTEREST FROM THE DATE OF FILING SUIT IN THE TRIBUNAL".

e. THAT upon hearing and determination of this application inter parties the Honourable Court be pleased to order and it is hereby ordered that paragraph 68b(iv) of the judgment of the Honourable Court made on the 15th September 2020 is reviewed and modified to read "That the portion of the commission and taxes recoverable from the Appellant is Kshs 2,376,000.00 only which the portion of the commission and taxes payable by the Vendor paid on behalf of the Appellant by the Respondent to facilitate the transfer of shares and the Respondent to pay its own share of Kshs 3,456,110.00 as the purchaser in the transaction".

f. THAT upon hearing and determination of this application inter parties the Honourable Court be pleased to order and it is hereby ordered that its orders made on the 15th September 2020 are hereby reviewed accordingly in line with the orders sought and granted in c, d and e above.

g. THAT costs for this application do abide by the orders made in the judgment dated 15th September 2020

2. The application is predicated on the grounds on the face of it and supported by a rather lengthy Affidavit sworn on even date by the Applicant's manager **ADELAIDE MUSIDIKHU**. Her main contention was that unless the court intervenes and reviews the impugned orders in the judgment: the Respondent will have been protected from paying interest amounting to about Kshs 77,760,000.00 on the consideration of Kshs 108,000,000.00 which it had failed to pay for the shares; the Respondent will receive interest of Kshs 22,218,360.00 from the loan advanced to the Applicant which loan would have been paid off using the consideration above; the Respondent will receive

dividends of about Kshs 36,000,000.00 from shares it did not pay even a single cent for; and, will be refunded Kshs 5,832,110.00 which includes the sum of Kshs 3,456,110.00 on account of taxes and commissions which it was obligated to pay as a purchaser of shares.

3. She averred that the above will be unfair as the Respondent will be unjustly enriched whereas the Applicant will be highly impoverished by losing interest on the consideration of Kshs. 108,000,000 and still proceed to reward the Respondent with a payment of about Kshs. 36,000,000 as dividends earned and yet it refused to pay for the consideration when it was required to do so.

4. She contended that if the Respondent was to be entitled to the dividends, then it is imperative that it pays the Applicant interest on the consideration of Kshs. 108,000,000.00 from the date when it frustrated the transaction by withholding payment which was March 2016. It was also her contention that it will be unfair and unjust for the Applicant to be forced to pay back Kshs. 5,832,110 on account of consideration as ordered by the Court since the sum of Kshs. 3,456,110.00 was actually due from the Respondent itself. Further, she stated that it is interest of justice that the impugned orders be reviewed so as to bring this matter to conclusion.

5. In response, the Respondent also filed a lengthy Replying Affidavit sworn by its Senior Legal Officer **SUSAN MARUTI MUTALI** on 7th December 2020 hence the court will only highlight the main points. She averred that the Application is an abuse of the Court process and a tactic by the Applicant to delay and circumvent the execution of the judgment and the transfer of shares to the Respondent by Co-opholdings Co-operative Society Limited yet the Respondent has already complied with judgment by depositing the balance of the consideration with the Applicant.

6. She argued that the Respondent is entitled to the full dividends earned by the 9,000,000 shares from 19th January, 2016 when the property in the shares passed after the Applicant's authorized officials executed the Share Transfer Agreement in accordance with clause 2.2 of the Agreement. She stated that the Respondent only allowed the Applicant to earn the Dividends for the years preceding the execution of the Shares Transfer Agreement.

7. It was further her contention that the Applicant is not entitled to interest on the consideration of Kshs. 108,000,000/= as it was never a term of the share transfer agreement that delay in paying the consideration would attract an interest. She argued that should the court allow the interest rates to be applicable on the consideration as prayed by the Applicant, it would constitute rewriting Clause 2.2 of the Share Transfer Agreement to include a clause allowing the Applicant to receive an interest on the consideration. Further, she averred that Clause 2.2 and 4 of the Share Transfer Agreement provide for the manner in which the Respondent should receive dividends and not as claimed by the Applicant.

8. Further, she averred that the Share Transfer Agreement and the Loan Agreement were two contracts independent of each other and each being governed by its own terms and conditions. She noted that the Applicant is in default of a loan that was to be repaid within a maximum repayment period of forty-eight (48) months by forty-eight (48) equal monthly installments comprising principal and interest, commencing one month after disbursement and is using mere excuses to justify its action of defaulting in the repayment of the loan balance of Kshs. 43,057,365/=. She thus denied that the Applicant's assertions that the Respondent will be unfairly enriched as a result of the court order.

9. In rejoinder, the Applicant filed an equally lengthy Further Affidavit sworn by its manager **ADELAIDE MUSIDIKHU** on 20th February 2021. She averred that the Respondent breached the contract and failed to complete the transaction as required of it and therefore cannot seek to rely on its own acts of intentionally breaching a valid contract to benefit and lay claim to the dividends.

10. That the Respondent totally failed to complete the transaction as ordered by the Registrar of Shares of the Co-operative Bank of Kenya and therefore the court is urged to reconsider the order related to who is entitled to the dividends earned by the shares during the period the Respondent was in breach of the contract.

11. That the Respondent is blatantly selectively reading the Transfer of Share Agreements especially clause 2.2 paraphrased in the Replying Affidavit at paragraph 5 and forgetting that in the same agreement at clause 4 defines the completion date by stating that "the completion date shall be such a date when the parties shall have submitted all the necessary documents to the Registrar and have executed all the necessary documents as the registrar may prescribe and the registrar has processed the share certificate in the name of the purchaser".

12. That the Respondent out-rightly and without any excuse breached the contract, failed to pay consideration as ordered by the Registrar and therefore the share certificate could not be prepared in its name since the property in the shares could not pass without meeting the conditions set by the registrar and yet the dividends are payable to the person holding the shares in the books at the time they are declared.

13. That at no time did the Respondent both in its pleadings and submissions to the Co-operative Tribunal where the matter originated, ever lay claim to the dividends and therefore they cannot change tune at the appellate level upon realizing that, in error, the Honourable Court made in its judgment dated 15th September 2020 had stated that the Respondent could receive the dividends and has now latched at the same and forgot that for the last 4 years it has never laid claim to the dividends knowing very well that it was in breach on the contract which had indicated on how the dividends are to be treated and could not benefit from the same and had not paid the consideration.

14. That the loan facility letter for Kshs. 45,000,000 clearly indicated that the loan is secured by the 9,000,000 shares owned by the Applicant which the Respondent was in the process of purchasing hence it is not true that the two contracts that of purchase of shares and the loan for Kshs 45,000,000 were independent of each other. That clause 4 of the letter of offer for the Kshs. 45,000,000 clearly states that the shares which the Respondent was purchasing were the security for the new loan and therefore the two were connected and a breach of one automatically leads to having challenges in meeting the repayment requirements.

15. That the Respondent caused the accumulation of arrears on the loan repayment by the blatant breach of the shares transfer agreement by failing to pay the consideration and allow for the repayment of the loan and therefore cannot be seen to want to benefit from their own wrong doing to the detriment of the Applicant and thus the Respondent must be liable for the losses suffered as the Applicant only had the ability to repay the Kshs 30,000,000 loan.

16. That the letter of offer for the loan at clause 4 had a fall-back position that if the Applicant failed to repay the loan on its own accord after the shares had been paid for, the Applicant would repay the loan at a rate of Kshs. 3,200,000 per month and this was under the presumption that the shares had been paid for by the Respondent.

17. That if indeed the loan agreement and the sale of shares were independent of each other then why did the Respondent in the letter of offer for the loan demand that the cooperative bank which was to handle the shares transfer proceeds must give then an undertaking that it would release to them Kshs. 45,000,000 which the Respondent had loaned to the Applicant on the strength of the share transfer transaction between the Applicant and the Respondent which are conditions clearly stated on the loans application forms.

18. That it is surprising that the Respondent does not wish to pay the agency fees and yet the letters from the registrar of shares is clear on who is responsible for the payment of which fees and taxes in respect of a shares transfer transaction. The Respondent paid the fees and charges for both the vendor and the purchase and it is only the money paid on behalf of the vendor which can be claimed by them and not the entire amount.

19. That the arguments being made by the Respondent in its Replying Affidavit are merely opportunistic as it seeks to benefit from the errors in the judgment of the Honourable Court on the question related to entitlement to the dividends and payment of share transfer agency fees, commissions and the taxes applicable.

20. That the Respondent are estopped from claiming dividends and yet they had promised not to claim the same so long as they have not paid the considerations for the shares and which promise made the Applicant not to pursue the claim for interest on overdue consideration whose payment the Respondent had blatantly failed to honour and therefore putting the Applicant in a pecuniary embarrassing situation

21. That contrary to the judgment of the Honourable Court, the Respondent unilaterally took it upon themselves to calculate what was in their opinion due to the Applicant and ended misrepresenting facts and abused their position as the custodians of the Applicant's account and deposited what they erroneously considered as what is due to the Applicant in total disregard of any input from the Applicant.

22. That the Applicant did not refuse or ignore to co-operate in determining the decretal sum but we realized that what was being done or was to be done was an exercise in futility as we had instructed our advocates to seek a review of the judgment and therefore everything was to be held in abeyance pending the ruling of the application for review.

23. That despite having been informed that the Applicant was keen to have the judgment reviewed as it had fundamental errors, the Respondent misconstrued that to be refusal and went ahead and arrogated to itself powers it did not have in determining what is due to it contrary to the words and spirit of the judgment.

24. That after arrogating itself the role of determining in its opinion what was due to the Applicant, it went ahead and unliterary made calculations and then posted the same in the account it held on behalf of the Applicant who remained a spectator and yet it was the owner of the shares which formed the basis of the transaction.

25. That it is unfathomable how the respondent wants to received shares worth Kshs. 108,000,000 by paying a mere Kshs 424,961.50 and yet it is the author of the circumstances which led to the Applicant defaulting on repaying the loan of Kshs. 45,000,000 and further benefiting from dividends it did not deserve and still benefiting from the interest of a loan whose default they caused.

26. THAT the Respondent in its desire to unfairly enrich itself from its own actions of breaching a contract it has now been forced to perform has attempted to rush the conclusion of the issue without involving the Applicant so as to benefit from the errors in the judgment and yet it knows that the judgment of the Honourable Court has serious errors which we have sought to correct by way of an Application for review.

27. THAT the purpose and import of this application is to have the Honourable Court correct the following fundamental errors in the judgment to wit

a. Who is entitled to the dividends earned during period the Respondent was in breach of the share transfer contract?

b. Did the Respondent ever claim the dividends from the tribunal case up to the appellate stage in the high court.

c. Who was responsible for payment of the fees, commissions and taxes and did the Respondent as a vendor not liable to the payment of part of the commission, taxes and fees?

Submissions

28. The Application was canvassed by way of written submissions. The Applicant's written submissions are dated 17th May 2021 whilst the Respondent's written submissions are dated 27th May 2021.

29. The Applicant submitted that this Court has jurisdiction to review the judgment in question. It submitted that there are errors apparent on the face of the judgment which requires the Court to look at and review the judgment to correct them. It relied on the case of **Nyamogo & Nyamogo v Kogo 2001 E.A 174** as cited in **Ruth Kwachimoi & another v Charles Nalika Cheloti & another [2021] eKLR** where the court stated inter alia that 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.

30. It also relied on the case of **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR** where the court stated that the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it.

31. The Applicant submitted that from the Court's reasoning in its Judgment, there can be no two conclusions on where it was heading. It submitted that the primary reason why it seeks review is because of the Learned Judge's finding at *paragraphs 33 and 34 of* the Judgement that there was a binding and valid sale agreement between the Applicant and Respondent for the sale of 9,000,000 ordinary shares of Coop Holdings Cooperative Limited for a consideration of Kshs. 108,000,000 at a share price of Kshs. 12 each. In its view, the final orders of the Court were inconsonant with this reasoning within the judgment necessitating review since the final orders seem to hold the Applicant liable for the loses suffered and yet it was the victim of breach of a contract.

32. Further, it argued that the Learned Judge found that only the Applicant's officials executed the undated certificate of payment whereas the Respondent's officials refused to make payment without any legal basis and therefore breached the contract, then proceeded to depart from the finding of the Tribunal which had earlier held that although a binding contract existed, the order of specific performance could not issue as the Respondent would be violating the SASRA Act since the amounts concerned were huge.

33. Further, it was submitted that the Judge found *at paragraph* 50 that the Applicant justified in retaining the share transfer since consideration had not been paid to it hence the discomfort with the final ratio decidendi that the Applicant remits the dividends earned from these shares to the Respondent. It argued that it is an error and contradictory for the Court to hold that the Applicant was justified in holding onto the shares pending the payment of consideration for a period of over 6 years and then proceed to order that the dividends earned by the shares during the period that the Respondent was in breach of the share transfer agreement be paid to the Respondent. It submitted that this is erroneous as it would amount to rewarding the Respondent for the breach of the contract and the punishing the Applicant for seeking to enforce the agreement.

34. The Applicant submitted that the proper position was that the parties ought to have been required to perform the contract at the time of the judgment and the breach period was to be considered as a period which lapsed pending performance and the innocent party ought to be rewarded and not told to hand over dividends which it rightly earned as still owner of the subject shares and which dividends had not been earned by the Respondent since it failed, refused and or neglected to pay for the shares in breach of the agreement and contrary to the instructions from the Shares Registrar and therefore be entitled to the dividends.

35. Further, it stated that the Court in its judgment further faulted the Tribunal for introducing foreign material in its judgment of material, being the **SASRA ACT** that was not in the pleadings or evidence. It stated, *at paragraph 51 and 59*, that the Respondent could not breach the agreement and casually allege that the shares could be sold to someone else as the said shares were encumbered having been used as a security for the loan advanced to the Applicant. The import of this finding was that the Applicant held the shares in trust for the Respondent while the latter held the Applicant's consideration in trust for them. In the Applicant's view, the only logical conclusion would be that where the Respondent receives dividends earned by these shares back as was the final order of the learned Judge, the Applicant was also to receive the interest earnable by the consideration held in trust by the Respondent and this forms the basis of prayer d in the application for review.

36. According to the Applicant therefore, it is the error and contradiction in the final order which was contrary to the eloquent reasoning by Honourable Court in the body of the judgment that has necessitated the application for review since there is an apparent error between the final order and the reasoning in the judgment and we do invite your ladyship to relook at it and review it. In its view, the shares cannot be stated to still belong to the Applicant and then proceed to order the applicant to handover the dividends earned by the said shares during the period the Respondent was in breach.

37. Additionally, it was submitted that the Court at paragraph 57 of the judgment found that the Respondent upon failure to pay consideration for the shares *"had willed their right to the dividends to the Applicant"* and therefore it is contradictory and erroneous for the Court to order that the dividends earned during the breach whose right over had been willed to the Applicant as the appellant in the appeal to be paid back to the Respondent.

38. It was also noted that at *paragraph 67* the court found it inequitable that the Respondent was gaining from its breach which caused loss of members to the Applicant. That it found the loss of opportunity occasioned to the Applicant for the Kshs. 108,000,000 at 12% per annum to be Kshs. 12,960,000 besides the loss of resorting to further recruitment after the mass exodus and losses of institutional reputation and concluded that the amount of Kshs. 2,500,000 awarded by the Tribunal did not take into account all the circumstances of the case and/or the loss suffered by the appellant and was therefore not adequate damages. However, in a twist, the learned judge gave orders controverting her findings at *page 33* of the judgment. The Applicant reiterated the averments made in the Affidavits it filed in support of this application.

39. It was further the Applicant's assertion that whereas the parties herein are seeking to reconcile accounts to bring this matter to a close, the issues of interest payable and by who, the dividends and whose they are and the commissions and taxes remain contentious despite the judgment necessitating this review application. The Applicant reiterated that if the judgment were to be left to stand despite the numerous errors and factual mistakes therein it would unconscionably enrich the Respondent and unjustly impoverish the Applicant which will only sink it further into financial ruin from whence it has been trying to come from circumstances solely created by the Respondent.

40. The Applicant was further of the view that the highlighted circumstances qualify as both an error apparent on the face of the record as well any other sufficient reason when a Court can review its Judgment as envisaged in Order 45(1) of the Civil Procedure Rules.

41. The Respondent on its part formulated four issues for determination which it submitted on as hereunder.

i. *Whether the Applicant has met the threshold to warrant this honorable court to review its judgment delivered on 15th September 2020*

42. The Respondent submitted that from the Applicant's application, there is no new and important matter that could not be produced by the

Applicant at the time when the judgment was rendered. It stated that all the issues raised in the present application were the same ones raised when the appeal was canvassed and upon which the court arrived at its judgment. It relied on the case of **Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006** cited in the case of **Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR** for the position that an application for review can only be allowed on strong grounds.

43. Further, it was submitted that the Applicant's application has not illustrated what error apparent on the face of the record was made by the Court in its judgment. The Respondent relied on the detailed explanation on what amounts to an error apparent on the face of the record as set out in the case of **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** and **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.** Reliance was placed in the case of **Daniel Lago Okomo v Safari Park Hotel Ltd & Another [2018] eKLR** where it was stated that a court of law does not simply review a judgment just because a litigant is unhappy with the judgment.

44. It was the Respondent's view that an application for review must meet the stringent requirements for review provided for under **Order 45** of the **Civil Procedure Rules, 2010** which the Applicant has not met. It submitted that a review is by no means an Appeal which seems to have been the Applicants intention.

ii. Was there an apparent error in the judgment rendered by this honourable court on 15th September, 2020?

45. The Respondent was of the view that the Applicant has not categorically stated how the impugned orders amount to an error in the Judgment that warrants a review of the Court. It contended that an error apparent on the face of the record should not require an elaborate argument to illustrate its existence; it should be self-evident on the face of the record. It also argued that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal and it relied on the case of **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR** in this regard.

46. The Respondent submitted that what the Applicant has done is to simply question the decision made by the court, thus showing that they were not satisfied with the judge's decision. It stated that instead of the Applicant exercising its right to file an Appeal, it is seeking a Review yet the Court cannot sit in appeal over its own judgment.

47. The Respondent asserted that all the parts highlighted in the application as being an error apparent on the face of the record are not prima-facie visible and require detailed examination. Plainly put, the court exercised its mind on the matter after examining all the arguments and documents presented before it by the Appellant and the Respondent and the fact that the Applicant does not agree with parts of the court's decision does not make it an error apparent on the face of the record. The Respondent argued that the Applicant cannot therefore cherry pick the parts of the judgment that are in its favour and term the unfavorable parts of the judgment as an error apparent on the face of the record.

48. The Respondent was amazed that prayers C, D and E of the instant Application even proceeds to suggest how the judgment should have been concluded. In its opinion, that amounts to requesting this honourable court to change its findings to suit the Applicant's interests camouflaged as an application for review as opposed to genuinely seeking a correction of an apparent error in the judgment which error the Applicant has not sufficiently established. It argued that the Applicant should have considered filing an appeal at the Court of Appeal for further determination as this court is now *functus officio*.

iii. What is specific performance and how does it apply to this matter?

49. Relying on the definition of specific performance as set out in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR,** the Respondent submitted that the Applicant argued in its Memorandum of Appeal that, having fulfilled all the conditions of the contract and the shares having been registered in the name of the Respondent, no circumstance exist to deny it the remedy of specific performance. The Applicant therefore appreciated that the shares had already been transferred to the Respondent on 19th January, 2016. It reiterated that this Court established that there was a valid contract and the shares having passed to the Respondent, the Respondent was therefore entitled to full dividends earned by the subject 9,000,000 shares in accordance with Clause 2.2 of the Share Transfer Agreement.

50. The Respondent further noted that this Court gave an order of specific performance in favour of the Applicant as against the Respondent and ordered the Respondent to finalise and conclude the Share Transfer Agreement within thirty (30) days of the Judgment. In order to do so, the Respondent was supposed to pay the consideration owed to the Applicant in accordance to Paragraph 68b (iv) of the Judgment. The Respondent submitted that it exercised all reasonable efforts to invite the Applicant to participate in the process of determining the decretal sum payable to them, which efforts were frustrated at every opportunity. As such, the Respondent thus proceeded to compute the decretal sum payable to the Applicant and settled the sum of Kshs. 424,961.50/=on 7th November 2020 and the Respondent's Advocates wrote a letter to the Applicant's advocates informing them of the same.

51. It submitted that the decretal sum payable was calculated in accordance to the court's orders and the Respondent deducted the dividends which had accrued from the year 2016. In its view, it is therefore evident that the property in the shares had already passed to the Respondent thus giving them a right to receive dividends payable to them and cannot be therefore termed as unjust enrichment as claimed by the Applicant in their Application.

iv. Who should bear the cost of the application?

52. On this, the Defendant relied on the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd (2018) eKLR** where the Court stated that costs follow the event and are granted at the discretion of the Court. It thus urged that this application be dismissed and the costs thereof be awarded to it.

Analysis and Determination

53. I have carefully analyzed the application, the affidavits in support thereof, the Replying Affidavit and the parties' submissions. In my view, the only issue for determination is whether the Applicant has met the threshold for review of the judgment delivered herein on 15th September, 2020.

54. The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *as follows*:-

> ***"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."***

55. Order 45 Rule 1 of the Civil Procure Rules provides for the grounds on which review may be granted. It states thus:-

> ***"(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."***

56. The main grounds for review from the above provision are therefore; **discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.**

57. The above are further fortified by the principles for review laid down in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** as follows:

> ***"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.***
>
> ***x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."***

58. In the instant case, the Applicant seeks review of the judgment delivered herein on 15th September, 2020 on two grounds namely: that there is an error apparent on the face of the record and for any other sufficient reason.

59. **Is there an error apparent on the face of the record?** In **Kanyabwera v Tumwebaze [2005] 2 EA 86** the court held as follows regarding what constitutes an error apparent on the face of the record.

> ***"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law."***

60. In the case **Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243,** the Court of Appeal held that:

> ***"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."***

61. I note that the Applicant has gone to great lengths to try and explain various factual and legal issues that in its view constitute an error apparent on the face of the record. In my view though, these averments challenge the merits of the decision and thus require a reappraisal of the evidence to establish if indeed such an error exists in the impugned judgement. From the above authorities however, it is clear that such an error must be self-evident and do not need elaborate arguments to support it. Indeed, it suffices to note that the fact that another judge could have taken a contrary view of the matter does not constitute a sufficient ground for review and neither 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. (See **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR.**

62. **Indeed, and as stated by the Court of Appeal in Francis Origo & another v Jacob Kumali Mungala [2005] eKLR**, an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. In this case, the averments constitute grounds for appeal and this court cannot sit on appeal of its own decision. In the premises therefore, I find that the Applicant has not established that there is an apparent error on the face of the record to warrant a review of the judgment.

63. Next is to consider whether there is any other sufficient reason to warrant review. In **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (supra),** while determining what constitutes any other sufficient reason, the court stated as follows:

> ***"A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Signh and Another it was 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 (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..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment."***

64. In the instant case, I am not persuaded that the various factual and legal arguments made by the Applicant amount to sufficient reason within the meaning of the authority cited above nor is it *analogous* to the other two grounds stipulated under Order **45** Rule **1 of the Civil Procedure Rules.**

65. In view of the foregoing, I find that the Applicant has not met the threshold for review of the judgment delivered herein on 15th September, 2020.

Deposition

66. Consequently, I find that the Applicant's application dated 29th October, 2020 lacks merit and is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND JULY, 2021.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Muchiri h/b Wangila Onkoba for the Appellant/Applicant.*

2. *Alekiin for the Respondent*