REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 899 OF 2009

IN THE MATTER OF THE ESTATE OF NDETO MUOKA – (DECEASED)

BETWEEN

MUMBUA NDETO.....PETITIONER

VERSUS

JOSEPH MUTUNGA NDETO.....APPLICANT

AND

JOSEPH MUNYAO KAKULA.....OBJECTOR

RULING

1. On 24th day of September, 2018, this Court delivered a ruling in respect of Summons for Confirmation of Grant dated 11th July, 2017 by which the applicant herein, **Joseph Mutunga Ndeto**, sought an order that the Grant of Letters of Administration intestate or with Will Annexed made to **Mumbua Ndeto**, now deceased on 17th April, 2012 in this matter be confirmed. To that Summons was filed a protest on 13th September, 2017.

2. After considering the foregoing this court expressed itself inter alia as follows:

> **"The Objector's claim herein is based on the existence of a judgement. There is no averment that the Court which handed down the said judgement had no jurisdiction to do so. Whereas there was an appeal filed, as is clearly shown the said appeal has since abated by operation of the law. In the proceedings leading to the judgement in question, it was clear that the Defendant therein was sued in her capacity as the widow of the person who sold the land to the Objector. That is the same person who is the subject of these proceedings. It is therefore my view that to contend that these proceedings relate to the estate of a person who was not the subject of the Kangundo Case amounts to splitting the hairs. In any case the said judgement was a judgement that bound both the defendant therein as well as the Applicant herein since it was determining the status of the said land…It follows that the Applicants whose claim to the subject property is based on his deceased's title who was found by the Kangundo Court to have sold the subject land to the Objector, can only claim the same subject to the rights and interests of the Objector. As regards the issue of limitation I agree the same does not apply in light of the appeal which was lodged by the Defendant and in any case these proceedings do not amount to an action by the Objector."**

3. The applicant has now moved this court vide a Notice of Motion dated 14th January, 2019 seeking an order that this court reviews the said decision. The ground upon which the application for review is based is that since no administrator for the estate of **Ndeto Muoka**, his deceased father, had been appointed, nobody including **Mumbua Ndeto** had the capacity to be sued and therefore Kngundo Civil Suit 94 of 1992 – **Joseph Munyao Kakula vs. Mumbua Ndeto** – in which the Protestor herein sued **Mumbua Ndeto**, and the orders arising therefrom were incompetent.

4. It was his view that the Protestor ought to have cited his said mother which he never did. In the applicant's view, had this matter been brought to the attention of the court, the finding would have been different. It was further contended that since the consent for sale was not obtained within 6 months, the said transaction was a nullity. This issue, according to the applicant, was similarly not brought to the attention of the court, and had it been brought, a different finding would have been arrived at.

Determination

5. I have considered the issues raised in the subject application, the affidavits in support of and in opposition thereto, the submissions filed and authorities relied upon and this is the view I form of this matter.

6. **The *Code of Civil Procedure*,** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji** Mulla states:

> ***"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."***

7. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, (Okwengu, J (as she then was)** expressed herself as hereunder:

> **"In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra statute* which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same…It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.**

8. That was the Court of Appeal's decision in Court of Appeal case of **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which 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."**

9. With respect to the other issues raised, the Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

> **"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."**

10. The decision whether or not to review a court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

11. That was the Court of Appeal's decision in **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

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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."

12. I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

13. In this case, it is clear that the applicant is trying to give a different complexion to the case he presented before this court. This court's decision was simply based on the fact that there was a decision giving the protestor the suit parcel of land which decision was never successfully challenged. That that is still the position has not been disputed. It may well be that the Kangundo Court's decision was wrong and that the land ought not to have been given to the Objector. However, what in effect the applicant intends to achieve by the present application for review is to overturn the said Kangundo Court decision or at least render it ineffectual.

14. The issues being raised by the applicant now must have been within the knowledge of the applicant at the time the earlier application was being argued. They ought to have been raised at that point. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002,** the Court of Appeal expressed itself as follows:

"Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof...Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error."

15. In my view if the applicant is unhappy with the said decision he ought to have either appealed against the same or applied for its review. Without any of those steps that decision remains and must be given effect to by this Court since this Court cannot purport to overturn the same in Succession proceedings.

16. From the ruling delivered so far, in so far as the High Court is concerned, the applicant ought to heed the advice of the Court of Appeal in in **J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997** in which case the Court warned the appellant that:

"Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts…The application before the Superior Court, as well as this appeal, are nothing but subtle attempts by the appellant to re-open the matter of the sale of the suit property. The suit was heard and determined by the Superior Court and an appeal against its judgement was heard and determined. The Court of Appeal cannot sit on appeal on its judgement for there is no power for a Court to sit on appeal against itself in the same proceedings. The Court of Appeal, when it delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject to the limited application of the slip rule…The appellant, no doubt, lost a substantial property. The loss arose out of operation of the contract of mortgage freely executed by him and the respondent bank. The court should not be seen to lack sympathy for him. But, no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation… The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs."

17. In the premises I find that the application dated 14th January, 2019 is devoid of merits. The same fails and is hereby dismissed with costs to the Respondent.

18. It is so ordered.

Read, signed and delivered in open Court at Machakos this 14th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kingara for the Objector

CA Geoffrey