REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 119 OF 2007

BETWEEN

MUNICIPAL COUNCIL OF KISUMU .... PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED ………..……....…. DEFENDANT

RULING

1. The defendant, Kenya Power and Lighting Company Limited, has brought a Notice of Motion dated 10th June 2016 seeking, inter alia, orders of review and or setting aside the judgment of this court delivered on 27th May 2016 and all consequential orders. Before I deal with the application, I will set out a brief background of the proceedings.

2. This suit was filed by the plaintiff seeking payment for outstanding wayleave charges for electricity poles and cables erected in Kisumu Town amounting to Kshs. 48,781,000/-. The defendant denied owing the plaintiff any money in outstanding wayleave charges. It filed an application on 2nd November 2007 seeking to strike out the suit or mark it as wholly compromised on the ground it was filed after the then Ministry of Local Government had, by a letter dated 16th August 2007, addressed to all local authorities recalled any approval it may have issued under **section 148** of the ***Local Government Act (Repealed)*** to collect wayleave charges. The Ministry notified all local authorities that the Government would pay outstanding arrears owed by the defendant to all local authorities. The application came up for hearing on various dates but was eventually abandoned by the defendant.

3. On 24th July 2013, the matter was placed before the Environment and Land Court (‘’ELC’’) for pre-trial conference. After perusing the file, Kaniaru J., directed that the matter be placed before the High Court for determination as he was of the view that the matter in dispute was of commercial nature and did not involve use of land and or the environment. On 26th September 2013, the matter was again listed for hearing before the ELC and once again Kaniaru J., in the presence of counsel for both parties directed that the matter be placed before the High Court for hearing and determination. After various adjournments, the matter was finally set down for hearing before the High Court. The plaintiff presented and closed its case on **3rd December 2014**. The matter was then listed for defence hearing on various days but the defendant did not call any witnesses. The court ordered the defendant to close its case on **28th April 2016** and directed the parties to file their written submissions. The defendant did not file submissions despite being served. The court pronounced its judgment on **27th May 2016** and ordered the defendant to pay Kshs. 48,781,000/-, interest at court rates and costs of the suit.

4. The defendant’s application is supported by the affidavit of Jude Ochieng sworn 10th June 2016 and

oral submissions by counsel for the defendant, Mr Atudo. The first broad ground raised in the application deals with jurisdiction of the High Court to adjudicate over the subject matter of this claim. The defendant contends that the claim of wayleave fees and charges is matter that is founded on the use of land and the rights attached thereto and should have been determined by the ELC in accordance with the provisions of **Article 162(2)(b)** of the Constitution as read with **section 13** of the ***Land and Environment Act, 2011***. These provisions provide for the establishment of a court with equal status of the High with exclusive jurisdiction to hear and determine disputes relating to, *"the environment and the use and occupation of, and title to, land."*

5. The defendant contends that the failure to transfer the matter to the ELC is an error apparent on the face of record and can only be rectified by way of review and setting aside of the judgment. The defendant contends that High Court presided over the matter without jurisdiction and it is only fair that the judgment be set aside.

6. The second broad ground advanced by the defendant to set aside the judgment is that the failure to call its witnesses and adequately defend the matter was occasioned by mistakes on the part of its advocates for which and it should not be punished. Mr Ochieng deponed that when the defendant was served with a summons to enter appearance it retained the services of ***Wasuna & Company Advocates*** to act on its behalf. After some time, the defendant decided to withdraw instructions from the firm of ***Wasuna*** and retained the services of ***Mbugwa, Atudo & Macharia Advocates*** who took over the matter. Mr Ochieng explained that while this matter was proceeding, the defendant decided to instruct the firm of ***Hamilton Harrison & Mathews Advocates*** to take over the conduct of the matter as it was handling similar matters against the defendant in Nairobi. The defendant then wrote to the firm of ***Mbugwa*** withdrawing instructions.

7. The defendant contends that when the case came up for mention on 8th December 2016 for purposes of fixing a hearing date, the firm of ***Hamilton*** failed to attend court and an advocate, from the firm of ***Mbugwa***, who happened to be present when the matter attended to fixing the date, proceeded to take a date by consent in the mistaken belief that the firm was still on record. The defendant contends that the advocate who held brief for the firm of ***Mbugwa*** inadvertently forgot to inform the defendant of the hearing date. The defendant further contends that in any case the firm of ***Mbugwa*** was no longer its advocates on record at the time. Mr Ochieng deponed that the defendant did not know that the matter was proceeding for hearing due to the prevailing confusion over representation hence he was shocked to receive a copy of a draft decree for his approval and after making an enquiry with the firm of ***Hamilton***, he realised that the firm had not been acting on their behalf. The defendant submits that it was always ready to defend the matter and has forwarded crucial documents to its advocates but that they have failed defend the matter with zeal.

8. It is the defendant's case that besides the error apparent on record, there is sufficient reason to enable the court to review its judgment and set aside its proceedings and orders in the interests of justice. The defendant further contends that if this application is not allowed it will condemned unheard and that the resulting judgment would force the defendant to increase electricity charges to the detriment of its customers.

9. The plaintiff opposes the application through the replying affidavit of its counsel who has been acting in the matter, Mr David Otieno, sworn on 27th June 2016. Counsel submitted that the plaintiff's claim is for payments of outstanding charges created under the ***Local Government Act (Repealed)*** and as such the case does not fall within the jurisdiction of the ELC.

10. Mr Otieno contended that from the correspondence exchanged between the defendant and the firm of ***Hamilton*** annexed to Mr Ochieng's affidavit, it was clear that the defendant failed to give clear instructions as requested and as such the firm was reluctant to take over the conduct of the matter and they informed the defendant of their decision and returned the file forwarded to them. Mr Otieno was of the view that the defendant should not blame its advocates as it is the one that frustrated them failing to give instructions necessary to defend the matter. Mr Otieno averred that this was the same fate suffered by the firm of ***Wasuna***, the defendant's initial advocate.

11. Mr Otieno submitted that on two dates the matter was placed before the ELC, the court directed that the matter be placed before the High Court. He took the position that these orders settled the issue of jurisdiction. Counsel submitted that there was no sufficient reason to review the judgment as the defendant was guilty of undue delay and were not entitled to seek the court's indulgence.

12. This is an application for review made under **section 80** of the ***Civil Procedure Act (Chapter 80 of the Laws of Kenya)*** and **Order 45 rule 1** of the ***Civil Procedure Rules***.

> **Section 80** of the ***Civil Procedure Act*** provides: -
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> *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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

While Order **45** Rule**1** of the ***Civil Procedure Rules, 2010*** provides as follows:-

> ***45****Rule* ***1(1)*** *Any person considering himself aggrieved-*
>
> *a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay. [Emphasis mine]*

13. Under these provisions, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review.

14. The defendants case was that there was an error apparent on the face of record because the High Court did not have jurisdiction to determine this matter as charges arising from wayleaves constitute land use and occupation which falls within the jurisdiction of the ELC.

15. The Court of Appeal in ***National Bank of Kenya Limited v Ndungu Njau*** **[1996] KLR 469** explained what constitutes an error of law apparent on the face of the record:

> *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 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 be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review*. [Emphasis mine]

16. In ***Nyamogo & Nyamogo Advocates v Kogo*** **[2001] EA 170,** the Court stated 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. 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 as 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 appeal. [Emphasis mine]

17. The record is clear that the matter was listed before the ELC on two occasions and on each occasion the learned ELC judge expressed the view that the matter was a commercial matter which belonged to the High Court. This is the decision that is sought to be reviewed. Those orders, terse as they were, are decisions of a competent court. They may be right or wrong. In other words, I find and hold that the learned ELC judge settled the issue of jurisdiction by giving orders that the matter be determined by the High Court. Whether the decision was erroneous or not, whether the learned ELC judge misconceived or misconstrued his jurisdiction is now a matter of argument. To entertain such arguments would amount to proffering an appeal against a court of equal status and competence to determine the issue of jurisdiction. In coming to this conclusion I find support in ***National Bank of Kenya Ltd vs Ndungu Njau*** **(Supra)** where it was stated that:-

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

18. I therefore find and hold that the defendant has not established that there is an error apparent on the face of record to enable me review the judgment and decree under **section 80** of the ***Civil Procedure Rules*** and **Order 45 rule 1** of the ***Civil Procedure Rules***.

19. The defendant's other argument was based on *"for any other sufficient reason"* as a ground for review. It has been pointed out in various decisions, the words, *"for any sufficient reason"* must be viewed in the context of **section 80** of the ***Civil Procedure Act***, which confers an unfettered right to apply for review. In ***Sarder Mohamed v Charan Singh Nand Sing and Another*** **[1959] EA 793**, the Court 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.

20. The defendant's argument is that it has always been ready and willing to defend the matter but the advocates on record let it down. From record, it is obvious that the defendant was given several opportunities to defend itself. It is also clear from the correspondence annexed to the affidavit of Mr Ochieng that the communication from the defendant to its advocate was wanting. In an email dated 22nd December 2015, Mr Fraser from the firm of ***Hamilton*** wrote to the defendant on the following terms;

We note that this case was filed in 2007. All of the papers that you have forwarded to us seem to have been filed in 2007. There is no indication of what transpired over the last 8 years and what the present position is.

Can you please give us more information so that we can take a decision as to whether we are able to assist in this matter bearing in mind that it is pending before the High Court in Kisumu.

21. It is only on 26th April 2016, after a period of 4 months, that the defendant sent to the firm of ***Hamilton*** the file held by their previous advocates and requested the for further advice. After reviewing

the matter, the firm of Hamilton responded by the letter dated 6th May 2016 stating as follows:

> *[W]e note from the file that the matter was coming for hearing on 8th December, 2015 for defence evidence. Did that happen? We assume from this that the plaintiff's case has closed. We cannot find anything in the file you have sent to us to indicate that statements of evidence have been filed on behalf of your company or who your witnesses are going to be. What is the position regarding your evidence?*

22. The defendant did not respond to the issues raised by its advocates because on 3rd June 2016 the firm of ***Hamilton*** again wrote the defendant as follows:

> *We refer to out emails dated 6th and 20th May, 2016. As we have not heard from you we assume that you do not wish us to act in this matter and we return herewith your file.*

23. The tenor and effect of this correspondence is that it is indeed the defendant who frustrated its advocates on record. It failed to give clear instructions necessary for counsel to act on its behalf. This is not a case of a mistake by the advocates.

24. In this case two principles are in tension. The first, as urged by the defendant, is that the defendant should not be punished for what are the mistakes of its advocates. This finds supports in various cases among them; ***Adiel Mureithi Philip v Thomas Maingi*** **NRB CA Civil Appeal (Appl) No. 282 of 2007 (UR)** where the Court cited with approval the dicta in ***CMC Holdings Ltd v James Mumo Nzioka*** **[2004]KLR 173**, ***Philip Chemwolo & Another v Augustine Kubede*** **[1982-1988]KAR 1036** and ***Belinda Murai and 9 Others v Amos Wainaina*** **[1982]KLR 38**. In the ***Philip Chemwolo Case (Supra)***, Apaloo JA., expressed the view that;

> *Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.*

25. On the other side is the plaintiff who has urged the principle that the court ought not to excuse the conduct of the defendant as justice demands that litigation be conducted efficiently. Counsel called in aid the case of ***Charles Omwata Omwoyo v African Highlands and Produce Co., Ltd*** **[2002]** which cited ***Mawji v Lalji and Others*** **Civil Application No. 236 of 1992(UR)** in which the following dicta in ***Kettleman v Hansel Properties Ltd*** **[1988] 1 All ER 38** was cited with approval;

> *Another factor that a judge must weight in the balance is the pressure on the courts caused by great increase in litigation and consequent necessity that, in the interests of the whole community, legal business should be conducted, efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases which justice will better be served by allowing the consequences of the negligence of lawyers to fall on their own head rather than allowing the amendment at a very late stage of the proceedings.*

26. As I have set out the history of this matter elsewhere in this ruling, the advocates bear the least responsibility for the lackadaisical way the defendant handled the case. It cannot turnaround and latch on the mistakes of their advocates to seek the court's indulgence. Its argument that it was always ready and willing to defend its case is negated by the fact that it has never even filed its witness statements or list and bundle of documents. This is a case where blame falls squarely on the defendant, who knowing that it had a case to defend, is now trying to hide behind its internal inefficiencies in dealing with its advocates to set aside the judgment. This is a case where the dicta in ***Kettleman Case*** is apposite. In ***Habo Agencies Limited v Wilfred Odhiambo Musingo*** **[2015] eKLR** expressed the view that;

> *It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.*

27. Finally, I am asked to consider the fact that a judgment of this nature will affect the cost of electricity thereby making the Kenya a non-competitive destination since the cost of wayleaves were not factored into the cost of electricity due to the Government directive of 16th August 2007. The issue of the directive is not new. The defendant had filed an application to on 2nd November 2007 to strike out the claim on that basis but failed to prosecute it! I will not comment substance of the directive save to say that the Chemitei J., considered the directive vis-à-vis the legal imperative and came resolved the issue in favour of the plaintiff. In any case, if the Government directive of 16th August 2007 is still in force, I see no difficulty in the same Government indemnifying the defendant because the decree herein. I also note that the importance put on this judgment by the defendant is not supported by the casual way its officers dealt with the litigation. Perhaps it is also worth noting the Courts failure to deal decisively with old cases and to dispense justice without delay also affects Kenya as an investment destination.

28. I am not persuaded to exercise my discretion *''for any other sufficient reason''* in favour of the defendant.

29. For the reasons I have set out above, I dismiss the Notice of Motion dated 10th June 2016 with costs.

DATED and **DELIVERED** at **KISUMU** this 5th day of **December 2016**.

D.S. MAJANJA

JUDGE

Mr Atudo instructed by Mbugwa, Atudo & Macharia Advocates for the applicant/defendant.

Mr Otieno instructed by Otieno Ragot & Company Advocates for the plaintiff.