REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 285 OF 2011

REPUBLIC …….……………………….………..….….....................PETITIONER

versus

KAJIADO NORTH DISTRICT LAND REGISTRAR &

THE DISTRICT LAND REGISTRAR KAJIADO …….….…......1ST RESPONDENT

COMMISSIONER OF LANDS ……………………….………...2ND RESPONDENT

THE HON. ATTORNEY GENERAL ………………………… 3RD RESPONDENT

THE OLKEJUADO COUNTY COUNCIL …………………… 4TH RESPONDENT

RULING

1. The application dated 25th March 2015 by way of Notice of Motions is brought pursuant to the provisions for order 45 rule 1(b) of the Civil Procedure Rules where the applicant seeks review of this court's judgment dated 27th January 2015. In the alternative, that the judgment to be reviewed and set aside inorder for the application to be heard afresh.

2. The application is premised on grounds that: The applicant is aggrieved by the order of the court made on the 27th January, 2015; there is an error apparent on the face of the record; the application has been made without undue delay; It is in the interest of justice that the ruling and order made on 27th January, 2015 be set aside; the decision by the District Land Registrar Kajiado to register the transfer of LR No. Ngong/Block 2/683 on plot No. 131 Vol.11 to Grace Wanjira is wrong, abuse of authority, unlawful, arbitrary and fraudulent; the transfer to Grace Wanjira is fraudulent as the letter of allotment dated 27th May, 1992 was allocated to Simon Salaon Pertet absolutely, the transfer to grace Wanjira was fraudulent as the applicant is the lawful owner.

3. Attached to the application is a Notice of Motion with a statement made pursuant to section 8 of the Law Reform Act order 53 rule 1 (1)(2)(3)(4) of the Civil Procedure Rules 2010 which the applicant wanted the court to deem to be properly filed under section 8 and 9 of the Law Reform Act.

4. The application was unopposed.

5. The applicant herein filed a Judicial Review Application dated 4th January 2012 where he sought

orders of mandamus directed to the Kajiado District Land Registrar through the office of the Attorney General compelling the 1st and 2nd respondents to register the applicant as the registered owner of Land Reference number Ngong/block 2/683 (hereinafter the subject plot). An order of certiorari to quash the decision of the 1st respondent to register Grace Wanjira as the proprietor of the suit premises. An order of prohibition to prohibit the 1st respondent from registering, mortgaging, charging, leasing, subleasing the suit premises. The application was heard and dismissed for lack of following the procedure laid down in matters of Judicial Review.

6. Right at the outset, I wish to point out that the application is brought in the name of the State which is referred to as the 'petitioner' instead of the applicant. The application therefore lacks an applicant as there is neither an applicant nor exparte applicant.

7. The application is brought pursuant to the provisions of Order 45 rule 1(b) that provides;

> ***"1. (1) Any person considering himself aggrieved—***
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> ***(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."***

In order for a ruling or judgement to be reviewed by the court, the applicant must prove that he has discovered new and important matter or evidence which was not within his knowledge and which could not be produced at the time when the ruling was delivered; or was on account of some mistake or error apparent on the face of the record.

8. It has been state d by the applicant that there was an error on the face of record. The Court of Appeal dealt with the meaning of **"error apparent on the face of record**".

In the case of **Anthony Gachara Ayub vs Francis Mahinda Thinwa (2014) eKLR** it remarked that the High Court correctly defined it in the case of **Draft and Develop Engineers Limited –v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011** where the court stated thus:-

> ***"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 substantial point of law state 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".***

9. In his submissions counsel for the applicant Mr. Wachakana stated that there was an omission on the part of the applicant who omitted to bring the application in the name of the Republic. He pleaded with the court not to punish the applicant for the mistake of his counsel who omitted to comply with the law.

10. The advocate therefore acknowledges the fact that the omission was on the part of the applicant to

move the court in a correct manner. The court is not to blame for the omission. An error on the face of record amounts to an omission by the court to consider some evidence or facts that were originally on record. This court analyzed evidence adduced by way of affidavit and dismissed the application. No new material has been brought up for consideration by the court.

11. In the case of **National Bank of Kenya Limited –v- Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)** the court 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 be self evidence and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge would 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."***
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> ***"………the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."***

12. In striking out the application this court considered it and concluded that the application was fatally defective as it deviated from the laid down provisions of the law. This was not a subject of review. If the applicant imagined that the court proceeded on an erroneous exposition of the law then it would be a good ground of appeal. This having not been the case I find the application lacking merit. Accordingly it is dismissed with no order as to costs.

13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 2nd day of JUNE 2015.

L. N. MUTENDE

JUDGE