



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANGA**

**MISC. APPL. (JUDICIAL REVIEW) NO. 2 OF 2019**

**REPUBLIC.....APPLICANT**

**VRSUS**

**REUBEN KANDUGU KAHIHANIA.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE MURANGA.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EXPARTE**

**JOHN KARUGO KURIA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. Vide a Notice of Motion dated 15/6/2020, the Applicant sought the orders as follows;

a. Spent

b. That the judgement of this Court dated the 7/5/2020 be reviewed or modified and upon the said review the application dated the 8/11/19 be granted as prayed.

c. That costs be provided for.

2. The application is based on the grounds adduced thereto and the Supporting Affidavit of the Applicant sworn on the 15/6/2020. The Applicant inter alia avers that there is an error on the face of the record. That leave was granted to commence judicial review proceedings out of time for orders to quash the decision of Kahuro Land Control Board thus satisfying the provisions of Order 53 of the Civil Procedure Rules.

3. That his application for Judicial Review was dismissed by the Court for having been filed without leave yet the leave had been granted on the on 5/11/19.

4. Further that he has lived on the suit land and extensively developed it which he avers amounts to discovery of new and important matter that was not within the knowledge of his Advocate at the time of filing the application on the 8/11/19. He urged the Court to review or modify the judgement in his favour.

5. Despite service the Respondents did not oppose the application. That said I will nevertheless determine the merits of the application.

6. The Applicant filed submissions which I have read and considered. The Applicant averred that leave was granted to file the application out of time on the 5/11/19 however his Counsel inadvertently forgot to annex it to the application. The Applicant further argued that the composition of the panel of elders was illegal and urged the Court to find as such.

7. Order 45 Rule 6(2) provides as follows;

“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”.

8. The operative tone of the above Order demands that the application for review must be based on a). the discovery of new and important matter of 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 decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any other sufficient reason.

9. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of **Brown Vs Dean (1910) AC 373** Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the Applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.

10. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be searched and fished out. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. In the case of **West Bengal Vs Kamal Sengupta AIR 2009 SC 476**, the Court stated as follows;

“the term mistake or error apparent by its very connotation signifies an error which is evident perse from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of review. ...To put it differently an order or decision of judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of law or fact. In any case while exercising the power of review, the concerned Court cannot sit in Appeal over its own judgment/decisions.”

11. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.

12. In this case the Applicant has sought review on two grounds; that the leave to file the application for review had been granted but the orders were not annexed to the application. This was correctly raised by the Court under para 11 of its judgement. I have now seen the said orders granted on the 5/11/19. It behoved the Applicant to demonstrate to the Court the said orders by annexing to his application. That said under para 12 of the said judgement the Court giving the Applicant the benefit of doubt proceeded to determine the application on its merit despite the failure of the Applicant to exhibit the orders. There was no prejudice suffered by the Applicant by the failure to exhibit the orders as the Court nevertheless proceeded to determine the matter on its merits. This ground fails.

13. The second ground for review is the discovery of new evidence. The Applicant has contended that his Counsel did not have information that he has lived on the suit land developing it extensively. This is a curious ground because the Applicant had the information yet he supposedly withheld it from his legal advisor. I say so because the case belongs to the Applicant and ordinarily all instructions flow from him to his counsel, he being the principal. This ground am afraid fails too.

14. The third ground raised by the Applicant is on the composition of the panel of elders. This matter was fully adjudicated and the Court pronounced itself in para 14 of the said judgement. This is not a ground for review. It is dismissed.

15. In the end the application is unmerited. It is dismissed with costs being payable by the Applicant.

**16. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2020.**

**J G KEMEI**

**JUDGE**

Delivered in open Court in the presence of;

Ndwiga for the Exparte Applicant

1<sup>st</sup> – 3<sup>rd</sup> Defendants/Respondents – Absent

Mwangi and Njeri, Court Assistants