REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 163 OF 2014

MOHAMUD ILTARAKWA KOCHALE.....1ST PLAINTIFF

KOCHALE SOMO JALE.....2ND PLAINTIFF

ISSA JITEWE GAMBARE.....3RD PLAINTIFF

DAVID TAMASOT ARAKHOLE.....4TH PLAINTIFF

SEKOTEY SEYE.....5TH PLAINTIFF

(Suing on behalf of the residents of Laisamis Constituency and Karare Ward of Marsabit County)

VERSUS

LAKE TURKANA WIND POWER LTD.....1ST DEFENDANT

MARSABIT COUNTY GOVERNMENT.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

AARON IILETELE LESIANTAM.....1ST INTERESTED PARTY

HENERY PARASSIAN SAKAPLO.....2ND INTERESTED PARTY

STEPHEN NAKENO.....3RD INTERESTED PARTY

JOB LMALASIAN LENGOYS.....4TH INTERESTED PARTY

DAIR LENTIPAN.....5TH INTERESTED PARTY

(As representatives of the residents of Loiyangalani District, Marsabit County)

RULING

A. INTRODUCTION AND BACKGROUND

1. By a ruling dated and delivered on 21st January 2020 the court disallowed and expunged from the record the 2nd Defendant's replying affidavit filed on 10th April 2019 in response to the Plaintiffs' contempt of court application dated 25th April 2018. In its ruling the court found that the said replying affidavit had been filed way out of time without a just cause or excuse. The court further found that the 2nd

Defendant had not sought an extension of time nor explained the delay in filing in a satisfactory manner.

2. By a notice of motion dated 17th April 2020 expressed to be brought under the provisions of **Articles 25 & 50** of the **Constitution of Kenya, 2010** *(the Constitution),* **Order 45** of the **Civil Procedure Rules** *(the Rules),* **Sections 1A, 1B & 3A** of the **Civil Procedure Act (Cap. 21), and all enabling provisions of the law,** the 2nd Defendant sought the following pertinent orders:

a. That there be a review of the ruling delivered on 21st January 2020 and the court be pleased to set aside all consequential orders emanating therefrom.

b. That the 2nd Defendant's replying affidavit in response to the Plaintiff's application dated 26th April 2018 be readmitted.

c. That costs of the application be in the cause.

B. THE 2ND DEFENDANT'S APPLICATION

3. The said application was based upon the several grounds set out on the face of the motion and the contents of the supporting affidavit sworn on 17th April 2020 by Joseph Guyo, the 2nd Defendant's County Secretary. First, it was contended that the said ruling infringed upon its constitutional right to a fair hearing. Second, that the ruling offended the rules of national justice and fairness. Third, that it only became necessary to file a replying affidavit to the Plaintiffs' said application on 14th December 2018 when the 1st Defendant served its response and submissions to the Plaintiffs' application. Fourth, that **Order 51 Rule 14(2)** of the **Rules** was superior to the consent of the parties which required all the concerned parties to file their responses within 30 days with effect from 31st July 2018. Fifth, that the 1st Defendant's advocate misled the court on 20th January 2020 into believing that the previous bench had taken arguments on the objection to the replying affidavit. Sixth, that there was an error apparent on the face of the record. Finally, it was contended that since the previous bench had disqualified itself, the current bench ought to have considered the 1st Defendant's objection *denovo.*

4. The contents of the supporting affidavit essentially reiterated and expounded upon the grounds set out in the body of the motion. It was contended that the court had delivered the ruling dated 21st January 2020 without according the 2nd Defendant an opportunity of being heard hence there was a violation of the rules of natural justice. It was further contended that the 1st Defendant had not demonstrated what prejudice, if any, it could suffer if the 2nd Defendant's replying affidavit were admitted out of time. The court was consequently urged to allow the application.

C. THE PLAINTIFFS' RESPONSE

5. The Plaintiffs filed a replying affidavit sworn by the 4th Plaintiff David Tamasot Arakhole on 23rd June 2020. The 4th Plaintiff associated himself with the 2nd Defendant's said application hence wholeheartedly supported the review sought. It was contended that the 1st Defendant's response to the Plaintiffs' contempt application was only served on 14th December 2018. The Plaintiffs took the view that any of the parties could file replying affidavits at least 3 days before the hearing and that they were not bound by the consent restricting the period to 30 days with effect from 31st July 2018.

6. The Plaintiffs further contended that they were not accorded a hearing before the 2nd Defendant's said replying affidavit was expunged from the record. They also contended that there was no discernible prejudice which the 1st Defendant could have suffered as a result of late admission of the 2nd Defendant's replying affidavit hence the court was wrong in expunging it from the record. Consequently, Plaintiffs contended that there were sufficient grounds to warrant a review hence they urged the court to allow the 2nd Defendant's said application for review.

D. THE 1ST DEFENDANT'S RESPONSE

7. The 1st Defendant filed a statement of grounds of opposition dated 19th June 2020 in opposition to the 2nd Defendant's said application. It was contended that the consent order of 31st July 2018 requiring all parties to file their responses and written submissions within 30 days was binding upon all parties including the 2nd Defendant. It was further contended that the 2nd Defendant's replying affidavit was filed about one year out of time and without leave of court or lawful justification after the Plaintiff and the 1st Defendant had already closed their respective cases in the main suit.

8. The 1st Defendant further contended that the 2nd Defendant was guilty of undue delay in filing the instant application for review since it was filed long after all the parties to the suit had closed their respective cases and some had even filed their written submissions in the main suit. It was contended that it was too late in the day to re-open the case since any further delay in the conclusion of the suit may lead to a miscarriage of justice.

9. It was further contended that all the concerned parties were allocated time to argue on the admissibility of the 2nd Defendant's replying affidavit before the previous bench which deferred its ruling thereon to 24th July 2019. However, the previous bench recused itself from the suit on 24th July 2019 before delivering the ruling. The 1st Defendant, therefore, contended that the court made no error in delivering the ruling on 21st January 2020 and consequently none of the grounds for review known to law under **Order 45** of the **Rules** had been demonstrated. The 1st Defendant was further of the opinion that the instant application was an abuse of the court process and a violation of the overriding objective of ensuring a just, expeditious, proportionate and affordable resolution of the suit as stipulated under the **Civil Procedure Act (Cap. 21).**

E. THE 3RD & 4TH DEFENDANTS' RESPONSE

10. The Attorney General filed grounds of opposition dated 4th September 2020 on behalf of the 3rd and 4th Defendants. It was contended that the application was frivolous, scandalous, mischievous and an abuse of the court process. It was further contended that there was inordinate delay in filing the application since all parties except the 2nd Defendant had filed their final submissions in the suit. The Attorney General contended that the grievances raised in the application did not meet the threshold for review and that they should be dealt with by way of appeal. Consequently, the court was asked to dismiss the application.

F. THE 5TH DEFENDANT'S RESPONSE

11. There is no indication on record of the 5th Defendant having filed a response to the application.

G. THE RESPONSE BY THE INTERESTED PARTIES

12. There is also no indication on record of the Interested Parties having filed a response or submissions in relation to the instant application for review.

H. DIRECTIONS ON SUBMISSIONS

13. When the application was placed before the court *ex parte* for directions on 18th May 2020 it was directed that the same shall be canvassed through written submissions. The 2nd Defendant was granted 14 days to file and serve its written submissions whereas the rest of the parties were granted 14 days upon service to file and serve theirs. The record shows that the 2nd Defendant filed its submissions on 11th June 2020 whereas the 1st Defendant filed its submissions on 26th June 2020. The Plaintiffs, on the other hand, appear to have filed their submissions on or about 23rd June 2020. There is, however, no indication on record of the rest of the Defendants and the Interested Parties having filed their submissions by the time of preparation of the ruling.

I. THE ISSUES FOR DETERMINATION

14. The court has considered the 2nd Defendant's notice of motion dated 17th April 2020 together with the supporting affidavit and annexures thereto, the Plaintiffs' replying affidavit in response thereto, the 1st Defendant's grounds of opposition and the material on record. The court is of the opinion that the following issues arise for determination in this matter:

a. Whether the consent order of 31st July 2018 on the filing of responses was legally binding upon all the parties.

b. Whether there was violation of the rules of natural justice or right to fair hearing under ***Article 50*** *of the* ***Constitution*** *in relation to the 2nd Defendant.*

c. Whether the application for review was filed without unreasonable delay.

d. Whether the 2nd Defendant has made out a case for review of the ruling and order of 21st January 2020.

e. Whether the 2nd Defendant is entitled to the orders sought in the instant application.

f. Who shall bear costs of the application.

J. ANALYSIS AND DETERMINATIONS

a. Whether the consent order of 31st July 2018 was legally binding upon all the parties

15. The court has considered the material on record and the submissions of the parties on this issue. The 2nd Defendant and the Plaintiffs submitted that the period of 30 days stipulated in the consent for all the concerned parties to file their responses to the Plaintiffs' contempt of court application was merely optional and that the consent was superseded by the provisions of **Order 51 Rule 14 (2)** of the **Rules.** The said rule grants liberty to a respondent to file and serve his response to an application at least three (3) clear days before the hearing date. It was submitted that the said rule superseded the consent order of 31st July 2018.

16. On the other hand, the 1st Defendant submitted that the consent order limiting the period to 30 days with effect from 31st July 2018 was legally binding upon all the parties since they freely and voluntarily consented thereto. It was further submitted that the 2nd Defendant did not at any time apply for variation or setting aside of the consent order. The 1st Defendant disputed that the consent order was inferior to **Order 51** of the **Rules.** It was further submitted that the consent was a court order hence legally binding upon all concerned parties and that the 2nd Defendant was duty bound to comply therewith.

17. The effect of a consent order was considered in the case of **Hirani Vs Kassam (1952) 19 EACA 131** where the court stated at page 134 as follows:

> **"The mode of paying the debt, then, is part of the consent. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgements and Orders (7th Edn); vol 1, p. 124, as follows:**
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> **"*prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them…and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."** (emphasis added)

18. That legal position was reaffirmed in the subsequent cases of **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd [1982] KLR 485, Wasike V Wamboko [1988] KLR 429** and **SMN V ZMS & 3 others [2017] eKLR.** In the case of **Wasike V Wamboko *(supra)*** the Court of Appeal of Kenya held, *inter alia,* that:

> **"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;**
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> > **'It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.'**
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> **Both Lord Denning MR and Buckley LJ appeared to agree with this statement, moreover, that there was very little distinction between interlocutory orders (which was the kind of order there being considered) and final orders in this respect …"** (emphasis added)

19. The court is, therefore, of the opinion that the consent order of 31st July 2018 was legally binding upon all the parties to the suit having been properly recorded with the consent of all the parties before the previous bench. It was not suggested or demonstrated that the consent order was illegal, void or contrary to public policy. It was not demonstrated that it was vitiated by duress, fraud, mistake, misrepresentation or any of the grounds which would vitiate a contract.

20. The court is unable to accept the suggestion that the consent order was merely optional or cosmetic. The court is also unable to agree with the suggestion that the consent was superseded by **Order 51 Rule 14(2)** of the **Rules.** The parties were undoubtedly aware of those provisions by the time the consent was being recorded. They must be taken to have intended to be bound by the consent order with respect to the filing of responses and submissions. Moreover, no authority was cited for the proposition that the **Rules** would automatically override the terms of a court order whenever there is apparent conflict between a court order and the **Rules.**

b. Whether there was violation of the rules of natural justice or right to fair hearing under Article 50 of the Constitution

21. It was contended by the Plaintiffs and the 2nd Defendant that they were not accorded an opportunity of being heard before the ruling of 21st January 2020 was made. It was further contended that the court was misled by the 1st Defendant into believing that the previous bench had taken arguments on the admissibility of the 2nd Defendant's replying affidavit and reserved a ruling thereon whereas that was not the case. Additionally, it was contended that since the previous bench had disqualified itself, the current bench ought to have heard submissions on the matter *de novo.* The 2nd Defendant further submitted that when the court gave directions on 20th January 2020 it was recorded that the parties would be accorded an opportunity to argue the admissibility of its replying affidavit on 21st January 2020 but the court proceeded to deliver a ruling thereon without hearing the parties.

22. The court is aware that one of the fundamental principles of the bill of rights is a right to a fair hearing as stipulated in **Article 50(1)** of the **Constitution.** The court also accepts that the right cannot be achieved unless all concerned parties are accorded an opportunity of being heard before any decision affecting them is made. The 2nd Defendant relied upon the cases of **Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR; Martha Wangari Karua V IEBC** *Nyeri Civil Appeal No. 1 of 2017* and **Phillip Chemuolo & Another V Augustine Kibede [1982-88] KLR 103.**

23. So, was the 2nd Defendant denied an opportunity of being heard on the question of the admissibility of its replying affidavit which was filed out of time? The court has fully considered the material on record on this issue. When the court concluded the hearing of the suit on 20th January 2020 it gave directions on highlighting of submissions on the Plaintiffs' contempt of court application dated 25th April 2018. It was directed that the parties shall highlight their respective written submissions thereon on 21st January 2020.

24. On the same date, the 1st Defendant's advocate, Mr. Wairoto, drew the court's attention to a pending ruling on the admissibility of the 2nd Defendant's replying affidavit which had been filed on 10th April 2019 without leave of court. He informed the court that the issue of its admissibility had been argued before the previous bench which had reserved a ruling thereon. However, that bench disqualified itself from the proceedings before delivery thereof. He, therefore, sought a ruling on that issue. The record shows that Mr. Minishi who was present for the 2nd Defendant confirmed that the admissibility of his client's replying affidavit was canvassed before the previous bench. Mr. Kiprop for the Interested Parties informed the court that there was a pending ruling on the admissibility of the 2nd Defendant's said replying affidavit.

25. It is evident from the record of proceedings that the advocates for the 3rd, 4th & 5th Defendants, though present, did not comment on the

issue. Ms. Hashi was present for the Plaintiffs but she did not either confirm or discount what the advocates for the 1st Defendant, 2nd Defendant and the Interested Parties had told the court. It is strange that even after delivery of the ruling on 21st January 2020 neither the Plaintiffs' advocate nor the 2nd Defendant's advocate raised the issue of not having been heard on the issue of the admissibility of the 2nd Defendant's replying affidavit. The record simply shows that Mr. Minishi sought leave to appeal the ruling which leave was granted by the court.

26. The court has further checked the proceedings before the previous bench on the admissibility of the 2nd Defendant's said replying affidavit. The record shows that on 22nd July 2019 Mr. Wairoto for the 1st Defendant argued his objection to the admissibility of the said affidavit on the basis that it had been filed out of time without leave of court and that the 1st and 2nd Defendants had already closed their respective cases. The record shows that Mr. Kiprop for the Interested Parties supported Mr. Wairoto's objection whereas Ms. Hashi for the Plaintiffs and Mr. Minishi for the 2nd Defendant urged the court to disallow the objection on the basis that the hearing of the suit was still on-going and that any party aggrieved by the admission of the affidavit could apply to recall any witnesses.

27. The record further shows that the previous bench indicated that it shall consider the matter and deliver a ruling thereon on 24th July 2019 at 9.00a.m. (See page 234 of the proceedings). It is common ground that the previous bench recused itself from the suit on 24th July 2019 before delivering the ruling. It is thus clear that the 2nd Defendant's entire application is predicated upon a false foundation. The official court record clearly shows that the parties were afforded a hearing before the previous bench which they utilized. The 2nd Defendant knew all along that a ruling on the admissibility of its replying affidavit was pending. Their advocate was supplied with copies of the proceedings long before filing the instant application. Mr. Minishi also confirmed before this court on 20th January 2020 that the issue of admissibility of his replying affidavit was canvassed before the previous bench and that a ruling thereon was yet to be delivered. It would thus appear that the instant application was mischievously filed so as to delay or derail the conclusion of the suit which is pending highlighting of submissions in October 2020.

28. The 2nd Defendant referred the court to page 18 of the proceedings of 20th January 2020 which he submitted showed that the court had informed him that he would submit on the admissibility of his replying affidavit on 21st January 2020. The court has carefully perused the record of proceedings. There is absolutely no record to support the 2nd Defendant's contention. The record merely shows that it was Mr. Minishi who informed the court that the parties had agreed to highlight their submissions on the contempt of court application on 21st January 2020 including the admissibility of the 2nd Defendant's replying affidavit. At no point did the court accede to having submissions made *de novo* on the admissibility of the said replying affidavit. The court had given directions on the suit on 23rd October 2019 whereby it was directed that the suit shall proceed from where the previous bench had reached. There was no question of the court hearing the suit, application, objection or other proceeding *de novo.*

29. In the circumstances, the court is unable to appreciate how the 2nd Defendant was denied an opportunity to be heard on the question of the admissibility of its replying affidavit. The court has also noted that the contempt of court application dated 25th April 2018 was solely directed at the 1st Defendant. No adverse orders were sought against the 2nd Defendant at all. It is doubtful if the allegations the 1st Defendant may have made against the 2nd Defendant in its replying affidavit could make the latter liable for contempt of court in terms of the application dated 25th April 2018.

c. Whether the application for review was filed without unreasonable delay

30. It is now well settled that an application for review should be filed expeditiously and without undue delay. That requirement is specifically provided for under **Order 45 Rule 1** of the **Rules.** It is common ground that the impugned ruling was delivered on 21st January 2020. It is also common ground that the instant application dated 17th April 2020 was filed on or after that date. There was absolutely no explanation for the delay between January and April 2020 in the 2nd Defendant's supporting affidavit.

31. The question as to whether the delay in any given case is unreasonable depends on the circumstances of each case and the explanation rendered for the delay. The impugned ruling in this case was delivered on 21st January 2020. Thereafter, the court proceeded to hear the remaining witnesses in the suit. The court also proceeded to take the submissions of the parties on the contempt of court application. The court further gave directions on the filing of written submissions on the main suit in January 2020 and some of the parties have already filed their written submissions. The 2nd Defendant has not rendered any explanation for the delay of about 3 months in the filing of the application for review. In the case of **Kenfreight (E.A) Limited V Star East Africa Co. Ltd [2002] 2 KLR 783,** the Applicant had filed its application for review after a delay of 3 months and the High Court found that such delay was unreasonable since no adequate or satisfactory explanation for the delay had been rendered. There being no explanation for the delay in the instant case, the court finds and holds that the 2nd Defendant's application was not filed without unreasonable delay within the meaning of **Order 45 Rule 1** of the **Rules.**

d. Whether the 2nd Defendant has made out a case for review of the ruling and order of 21st January 2020

32. The 2nd Defendant's application is based upon various provisions of the **Constitution,** the **Civil Procedure Act (Cap. 21)** and **Order 45** of the **Rules.** However, a review application is primarily based upon **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Rules.** Whereas **Section 80** confers a general power of review, **Order 45** stipulates the circumstances under which a review application may be entertained. **Order 45 Rule 1** stipulates as follows:

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

33. So, does the material on record disclose or demonstrate any of the grounds for review? The 2nd Defendant submitted that the order striking out and expunging its replying affidavit from the record was not in accordance with the law since no formal application for striking out was filed by the 1st Defendant; that the court erred in expunging its replying affidavit since it resulted in denial of its constitutional right to a fair hearing; and that the objection to the affidavit ought to have been heard *de novo* since the previous bench had disqualified itself before delivery of a ruling thereon. It would appear that the 2nd Defendant was not keen to bring its application squarely within the four corners of **Order 45 Rule 1** of the **Rules.** The 2nd Defendant simply threw all its grievances at the court to search for itself if they could fit within **Order 45 Rule 1.**

34. It was not demonstrated that there was an error of law apparent on the face of the record. The 2nd Defendant was simply saying that the court was wrong in its ruling of 21st January 2020 by expunging its replying affidavit from the record. It was simply saying that the court erred in its sense of judgement and in its application of the **Rules** and the **Constitution** and that it gravely erred in applying a drastic measure (of striking out) when there were alternatives to striking out.

35. It could not be said that the court was misled by the 1st Defendant's counsel into believing that a ruling on the admissibility of the 2nd Defendant's replying affidavit was pending because Mr. Minishi for the 2nd Defendant confirmed before court that indeed the ruling on the issue was pending. Even if the 1st Defendant's advocate had tried to mislead the court, the 2nd Defendant's advocate had ample opportunity to correct and discount any such misrepresentation. Moreover, a perusal of the entire material on record reveals that the court was not misled in any way.

36. The Plaintiff contended that the issue of admissibility of the 2nd Defendant's replying affidavit was a "substantial question of law" and that the exclusion of admissible evidence could be considered as an error of law on the face of the record within the meaning of **Order 45 Rule 1** of the **Rules.** It was further contended that express and mandatory statutory provisions on the right to be heard were violated hence such violation constituted an error on the face of the record warranting a review. The Plaintiff further submitted that constitutional and statutory principles for striking out pleadings were not considered by the court. In particular, it was submitted that the court erred in upholding the objection since the 1st Defendant had not clearly demonstrated what prejudice, if any, it would suffer if the replying affidavit was admitted out of time. It was the Plaintiffs' contention that all such errors constituted sufficient reason to review the ruling and order dated 21st January 2020.

37. In the case of **Origo & Another V Mungala [2005] 2 KLR 307,** the Court of Appeal of Kenya held, *inter alia* that:

a. A person who makes an application for review under the Civil Procedure Rules Order XLIV rule 1 has to show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The applicant must make the application for review without unreasonable delay.

b. An erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.

c. A person who files a notice of appeal which is struck out cannot thereafter proceed by way of review as rule 1 (1)(a) of the Civil Procedure Rules order XLIV applies to an order from which an appeal is allowed but from which no appeal has been preferred.

38. The court is of the opinion that there is no error apparent on the face of the record to warrant a review. At least none has been demonstrated on the basis of the material on record. In the case of **National Bank of Kenya Ltd Vs Ndungu Njau Civil Appeal No. 211 of 1996 (1997) eKLR** the Court of Appeal made the following pronouncement on the meaning of an error 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 provisions of law cannot be a ground for review."

39. Similarly, in **Nyamogo & Nyamogo V Kogo [2001] EA 170** the Court of Appeal described an error on the face of the record which would warrant a review thus:

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and 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 possibly 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 and drawn out process of reasoning 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for

appeal."

40. In the case of **Njoroge & 104 Others (suing in representative capacity for Kariobangi South Civil Servants Estate Tenant Purchasers) V Savings & Loan Kenya Ltd & Another [1990] KLR 78** it was held, *inter alia,* that:

> a. A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or law is no ground for a review although it may be a good ground for an appeal.
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> b. An application for review should not be taken as a form of appeal. To warrant a review of an error alleged to be on the face of a record, such error ought to be so clear as to be without dispute.

41. The court is further of the opinion that whatever errors the court may have committed in its ruling of 21st January 2020 can only be challenged on appeal. If the court failed to apply mandatory statutory and constitutional principles in striking out the 2nd Defendant's replying affidavit that cannot be the subject of review since the outcome may lead to the court sitting on appeal over its own decision. The doctrine of *functus officio* ought to be applied in the circumstances. The court's jurisdiction with respect to the admissibility of the 2nd Defendant's replying affidavit has been fully exhausted.

42. The court is unable to accept the 2nd Defendant's submission that the court ought to have heard the objection to its replying affidavit *de novo.* The 2nd Defendant relied on the case of **Mandavia V Rattan Singh [1968] EA 146.** In that case, Farrell J took over the conduct of execution proceedings which had been commenced before Miles J. Upon conclusion of the proceedings, the Appellant appealed to the East African Court of Appeal contending that Farrell J had no jurisdiction to complete the hearing and to accept the evidence taken before a different judge. In dismissing the appeal, the Court of Appeal held that Farrell J had jurisdiction to complete the hearing without hearing afresh the evidence already taken before Miles J. The court (per Duffus JA) held, *inter alia,* that:

> **"The use of the power given by r. 10 is a matter in the discretion of the trial judge. I am of the view that Farrell J., in his ruling clearly and correctly set out the principles which should guide the court on an application of this nature. He said:**
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> > **'There appears to be no authority on the application of the rule, but it seems to me that the proper test is whether the successor judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions which have already been put forward and to continue the hearing on that basis. I am satisfied that such is the position here. No complaint has been made as to the record of the submissions put forward on behalf of the applicant and I agree with the counsel for the decree-holder that the evidence of Mr. Lee Browne is not such as to require in the interests of justice that it should be reheard.'**
>
> **I am of the opinion that Farrell J., had jurisdiction to continue with the hearing of this application from the stage to which his predecessor, Miles J., had left it, and that he correctly considered the evidence given by Mr. Lee Browne in arriving at his decision."**

43. The material on record indicates that all the concerned parties had fully ventilated the issue of the admissibility of the affidavit before the previous bench. The submissions of the parties on the issue are still on record. The record further shows that on 23rd October 2019 this court gave directions to the effect that the suit shall proceed from the point it had reached. The directions certainly covered any pending applications or proceedings such as the Plaintiffs' application dated 25th April 2018. There is no indication on record of those directions having be reviewed, varied or set aside either by the court or on appeal. In fact, there is no indication on record to show that those directions were ever challenged by the 2nd Defendant. It would, therefore, have been utter waste of judicial time and resources to repeat the same motions before the current bench.

44. It was never suggested or demonstrated that the court was not in as good a position as the previous bench to consider and evaluate the material and submissions on record on the admissibility of the 2nd Defendant's replying affidavit which was filed out of time. It was not suggested or demonstrated that the submissions or proceedings on record were incomplete, inaccurate or misleading. It was not demonstrated that the interest of justice required canvassing the objection *de novo.* The court is thus of the opinion that the 2nd Defendant's authority indeed supports the directions given by the court on 23rd September 2019 and the action of delivering the ruling of 21st January 2020 on the basis of the material and submissions on record.

e) <u>Whether the 2nd Defendant is entitled to the orders sought in the instant application</u>

45. The court has already found that the 2nd Defendant has not demonstrated any of the requirements for review of the ruling and order dated 21st January 2020. No error apparent on the face of the record has been demonstrated. There was no demonstration of discovery of new or important evidence or matter or any other sufficient reason to warrant a review. The application was also not filed without unreasonable delay.

46. The court is of the view that there is another cogent reason why the application for review must fail. Under the provisions of **Order 45 Rule 1** of the **Rules,** an application for review is only tenable from an order or decree from which no appeal has been filed. The material on record, however, indicates that the 2nd Defendant filed a notice of appeal dated 22nd January 2020 on 31st January 2020 pursuant to **Rule 75** of the **Court of Appeal Rules, 2010.**

47. In **Origo & Another V Mungala *(supra)*** the Appellant had filed a notice of appeal against an order of the High Court which was struck out since it was filed out of time. He subsequently filed an application for review before the High Court. The Court of Appeal held that once

a notice of appeal is filed against the decision of the High Court, there was no room for a subsequent application for review. The court held, *inter alia,* that:

> **"… A similar situation arose in Kisya Investments Ltd V Attorney General and R.L. Odupoy Civil Appeal No. 31 of 1995 (unreported) in which this court said:**
>
> **"The principal and only ground of appeal urged before us was that the first defendant having filed a notice of appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of review. We accept this is a sound proposition of law …"**

48. Similarly, in **Otieno, Ragot & Company Advocates V National Bank of Kenya Ltd [2020] eKLR,** the Respondent who had filed a notice of appeal decided to file an application for review before the High Court in respect of the same decision. Although the Respondent had not yet filed a record of appeal, the Court of Appeal held that the notice of appeal was sufficient to preclude the prosecution of an application for review. The court held, *inter alia,* that:

> **"…It is not permissible to pursue an appeal and an application for review concurrently: if a party chooses to proceed by way of appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karari & 47 Others V Kijana & 2 Others [1987] KLR 557 the court held that:**
>
> > **'… once an appeal is taken, the review is ousted and the matter to be remedied by review must merge in the appeal.'**
>
> **[See also African Airlines International Limited V Eastern & Southern Africa Trade Bank Limited [2003] 1 EA1 (CAK)."**
>
> **Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of the review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and the judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal …"**

49. The court is, therefore, of the opinion that the 2nd Defendant's application for review is utterly incompetent since it is an attempt to gamble with law and the judicial process. The application fails to meet the threshold set out under **Order 45 Rule 1** of the **Rules** which stipulates that the court can only entertain an application for review where the aggrieved party has not exercised the option of appeal.

f) Who shall bear the costs of the application

50. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the 1st Defendant who opposed the instant application shall be awarded costs of the application to be borne by the 2nd Defendant only. The rest of the parties shall not be awarded costs since they did not participate in the application by filing submissions.

K. CONCLUSION AND DISPOSAL ORDER

51. The upshot of the foregoing is that the court finds absolutely no merit in the 2nd Defendant's notice of motion dated 17th April 2020. It was an application based on blatant falsehood that the 2nd Defendant was denied an opportunity to canvass the issue of admissibility of its replying affidavit filed on 10th April 2019 whereas the record of proceedings indicated otherwise. The application was filed when a notice of appeal had already been filed and hence there was no room for a subsequent application for review. Accordingly, the 2nd Defendant's notice of motion dated 17th April 2020 is hereby dismissed in its entirety with costs to the 1st Defendant. It is so decided.

Ruling delivered electronically via e-mail this 1st day of October, 2020.

HON. P.M. NJOROGE	**HON. J.G. KEMEI**	**HON. Y.M. ANGIMA**
JUDGE (PJ)	**JUDGE**	**JUDGE**