



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC.NO.497 OF 2012**

**PRIMIX ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FIDEL HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KIKI INVESTMENT LTD ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**GEORGE N. KARIUKI ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**KENYA REINSURANCE CORPORATION LTD (STATUTORY MANAGER OF UNITED  
INSURANCE COMPANY LTD)..... DEFENDANT/RESPONDENT**

**R U L I N G**

The matter for determination is the *Notice of Motion* application dated **29<sup>th</sup> May 2015**, brought by the Plaintiff/Applicant herein **Premix Enterprise Ltd** against the Defendants/Respondents. The application is premised under Section 1A, 3, 3A and 80 of the Civil Procedure Act, Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules, 2010, Order 45 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the Law.

The Applicant has sought for the following orders:-

**1. Spent.**

**2. That pending the hearing and determination of the Application herein, a temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, together with their agents, employees, servants and/or agents from in any way levying distress against the Plaintiff, or from in any way or manner interfering with the Plaintiff's peaceful occupation, use and possession of the suit premises known as Nairobi/Block 75/1055, Nairobi/Block 75/1056 and Nairobi/Block 75/1057**

**3. That the Ruling dated, and delivered on the 4<sup>th</sup> of April 2015 by Hon. Justice J. Onguto be reviewed and/or set aside.**

**4. That the costs of this Application be provided for.**

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **PrimRose Mwelu Nyamu**, a Director of the Plaintiff's Company.

These grounds are:

- a. THAT no Notice was issued by this Honourable Court and/or Counsel for the Respondents that the Ruling on the Notice of Motion application dated 10<sup>th</sup> October 2012, would be delivered on 23<sup>rd</sup> April 2015.**
- b. THAT the Ruling referred to in Paragraph (a) above was delivered by Hon. Justice J. Onguto whereas the application was canvassed before Hon. Lady Justice Gacheru.**
- c. THAT there has been no notice issued to any of the parties intimating that the matter had been transferred to Hon. Justice J. Onguto and it was therefore un-procedural for Hon. Justice Onguto to deliver the Ruling when the matter was still pending before Hon. Lady Justice Gacheru.**
- d. THAT there is an error apparent on the face of the record.**
- e. THAT the instant application has been made without unreasonable delay.**
- f. THAT it is in the interest of justice that the Ruling dated 4<sup>th</sup> April 2015, be reviewed and/or set aside.**

In her **Supporting Affidavit**, **PrimRose Mwelu Nyamu** averred that the matter had been heard by **Lady Justice Gacheru** who was to deliver her Ruling on **14<sup>th</sup> October 2013**. However the said Ruling was not delivered. She further averred that she was shown a letter dated **27<sup>th</sup> May 2015**, from **Ajaa Olubayi & Co. Advocates** for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants addressed to their advocates and which was copied to **John Mbijiwe t/a Bealine Auctioneers** demanding that they clear outstanding rent arrears of **Kshs.650,000/=** and vacate the premises within **14 days** from the date of the said letter. It was her further averment that she informed their advocate on record who went to the Court registry and requested to peruse the court file and noted that a **Ruling** for their **Notice of Motion** dated **10<sup>th</sup> October 2015**, was delivered on **4<sup>th</sup> April 2015**, by **J. Onguto** which **date was a Saturday**. She alleged that their advocate on record confirmed that he was never served with any **Notice**, either for the **Notice to Show Cause** or for the **Ruling**. She also averred that she had been advised by their advocate on record that it was unprocedural for the case to be taken before another Judge who had never heard the case whereas the Judge handling the matter was still in the same court. It was her contention that the Judge who was handling the matter never disqualified herself and had not been transferred and she urged the Court to review the **Orders** issued on **4<sup>th</sup> April 2015**. The deponent urged the Court to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from carrying distress or evicting the Plaintiff herein. She urged the Court to **allow** their **Notice of Motion** dated **29<sup>th</sup> May 2015**.

The application is opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and also the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant filed its Grounds of Opposition and stated that the application herein is **ex-facie incompetent, misconceived** and an **abuse of the court process**. Further that there has been inordinate and or unreasonable delay in bringing the present application in contravention of Order 45 Rule (1)(1) of the Civil Procedure Rules 2010 being that the **Ruling** was delivered on **5<sup>th</sup> May 2015**, and the Applicant filed the present application on **29<sup>th</sup> May 2015**. It was also averred that this application is an afterthought and it intends to defeat the course of justice and delay the expeditious prosecution of this matter. Further that the Plaintiff/Applicant has not established that there is an error apparent on the face of the record and/or any of the grounds for review as provided by Order 45 (1)(1) of the Civil Procedure Rules, 2010.

The Respondent further stated that the Ruling delivered by **J. Onguto** was delivered in accordance with the law and in accordance with Order 21 of the Civil Procedure Rules. Further that the Applicant's application is disguised as an

Appeal whose appropriate forum is the Court of Appeal.

The Court directed that the instant application be canvassed by way of Written Submissions. In compliance thereof, the **Law Firm of Kilonzo & Aziz Co. Advocates** for the Applicant filed their Written Submissions on **25<sup>th</sup> October 2015**, and urged the Court to allow its application. The Applicant relied on the case of ***Karisa Chengo & 2 Others..Vs..The Republic (2015) eKLR C.A No.44,45 & 76 of 2014***. The Applicant submitted that when Onguto J. delivered the **Ruling** on **4<sup>th</sup> April 2015**, he had no jurisdiction as he was not a gazetted and authorized Judge of Land and Environment Court and could therefore not handle matters relating to land.

The **Law Firm of Milimo Muthoni & Co. Advocates** for the 1<sup>st</sup> and 4<sup>th</sup> Defendants **filed** their **Written Submissions** on **17<sup>th</sup> November 2015**, and urged the court to dismiss the instant application. They submitted that the matter herein did not fall under the purview of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the said Act to warrant a review. That there was no error apparent on face of the record. They urged the Court to rely on Article 159(2)(d) of the Constitution which provides that **....."justice shall be administered without undue regard to procedural technicalities...."**

The **Law Firm of Ajaa Olubayi & Co. Advocates** for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Written submissions on **3<sup>rd</sup> November 2015**, and also urged the Court to dismiss the Plaintiff's **Notice of Motion** dated **29<sup>th</sup> October 2015**. It was their submission that there was no error apparent on the face of record or any sufficient reason adduced by the Plaintiff to warrant review of the Ruling delivered on **4<sup>th</sup> May 2015**. It was their further submissions that the appropriate forum for the Applicant is the Court of Appeal but not review of the said Ruling.

This court has now carefully considered the instant Notice of Motion and the other Pleadings generally. The Court has also considered the court's records and the Ruling delivered by Onguto J. on **4<sup>th</sup> April 2015**, which is the subject of this application. The Court has also considered the Written Submissions and the cited authorities together with the relevant provisions of law and the Court makes the following findings:-

The Plaintiff/Applicant in its **Notice of Motion** dated **29<sup>th</sup> May 2015**, has sought for two main prayers.

**1<sup>st</sup> – That pending the hearing and determination of the instant application, temporary injunction do issue, restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from levying distress against the Plaintiff or interfering with the Plaintiff's occupation, use and possession of the suit property herein.**

**2<sup>nd</sup> – Review or setting aside of the Ruling delivered on 4<sup>th</sup> April 2015 by Onguto J.**

On the **1<sup>st</sup> prayer**, the Court has noted that on **3<sup>rd</sup> June 2015**, the Court did allow the said **prayer no.2** for **14 days** and thereafter the said Interim Orders had been extended severally. However, this Court also note that the Plaintiff applied for temporary injunction pending the hearing and determination of this application. It did not apply for temporary injunction pending the hearing and determination of the suit. The said application is being determined vide this Ruling and the Court finds that **prayer no.2** of the **Notice of Motion** dated **29<sup>th</sup> May 2015**, is now spent and the Court will therefore not extend the Interim Orders in force and will not deal with the said prayer as it was pending for hearing and determination of the application. **Prayer no.2** is consequently now **spent**.

On **prayer no.3** of Review or Setting Aside of the Ruling delivered on **4<sup>th</sup> April 2015**, the same is

anchored under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules which specify the grounds available for review of a Decree, Order or Judgement of the Court. It is apparent that the Plaintiff/Applicant filed an **amended Notice of Motion** dated **10<sup>th</sup> October 2012**, and sought for injunction orders. The said application was opposed by the Defendants herein. The Court had on **19<sup>th</sup> June 2013**, directed that the said **Notice of Motion** be canvassed by way of Written Submissions and the matter was to be mentioned on **14<sup>th</sup> October 2013**, for a Ruling date. However, from the court's records, the matter was next mentioned on **13<sup>th</sup> March 2015**, before **Onguto J.** when he reserved the matter for Ruling.

It is also evident that on **4<sup>th</sup> April 2015**, Onguto J. delivered a Ruling and dismissed the Plaintiff's **Notice of Motion** amended on **10<sup>th</sup> October 2012**, with costs to the 4<sup>th</sup> Respondent. Subsequently, the Plaintiff/Applicant filed the instant **Notice of Motion** seeking for review of the said Order citing various grounds.

Section 80 of the Civil Procedure Act is very clear on the issue of review. It states as follows:-

***“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 review of judgement to the Court which passed the Decree or made the Order and the Court may make such orders thereon as it thinks fit.”***

From the above provision of law, the Court has discretion to make such an Order of review but as usual the said discretion must be exercised judicially.

Further Order 45 Rule 1(a) & (b) provides for grounds to be considered while determining an application for review. These grounds are:-

- i. Discovering of new and important matter or evidence***
- ii. On account of some mistake or error apparent on the face of record.***
- iii. Any other sufficient reason.***

As has been submitted by the 4<sup>th</sup> Defendant that review of a decision is a serious step and should be resorted to only when glaring omission or patent mistake or like grave error has crept in earlier by Judicial fallibility. Further as was held in the case of **Rose Kaiza..Vs..Angelo Mpanju Kaiza, Civil Appeal no.225 of 2008**, that:-

***“An application for review under Order 44 Rule 1 must be clear and specific on the basis upon which it is made”.***

In the case of **Evans Bwire..Vs..Andrew Ngida, Kisumu HCCC No.103 of 2000**, the Court held that:-

***“an application for review cannot be entertained if the Order sought to be reviewed has not been extracted”.***

This Court has considered the **Notice of Motion** dated **29<sup>th</sup> May 2015**, and noted that the Applicant has attached the **Ruling** delivered on **4<sup>th</sup> April 2015**, but not the Order emanating from the said Ruling. Further the Court finds that for an application for review to succeed, the Applicant must prove existence of error apparent on the face of record, discovery of new and important matter of evidence which were not within the knowledge of the Applicant. See the case of **Daniel Macharia Karagacha..Vs..Monicah**

Waithira Mwangi, Civil Appeal no.159 of 2000 where the Court held that:

***“Review is only available where there is an error of law apparent on the face of the record or there is discovery of new and important matter of evidence which the Applicant could not by exercise of due diligence have placed in his Pleadings or before the Judge when he heard the earlier application”.***

This Court has looked at the grounds stated by the Plaintiff while seeking for review and the Court finds that none of them qualify to be an error apparent on the face of record. The fact that Gacheru J. had directed the **Notice of Motion** dated **10<sup>th</sup> October 2012**, to be canvassed by way of Written Submissions did not amount to hearing of the said application. Allocation of cases to individual Judges is an administrative function and the fact that **Onguto J.** reserved the matter for Ruling after confirming the Written Submissions had been filed did not constitute an error apparent on the face of record or mistake to warrant a review of the Ruling delivered by the said Judge on **4<sup>th</sup> April 2015**. If the Ruling herein is dated **4<sup>th</sup> April 2015** which was a Saturday then the said error is a typographical or clerical error which can be cured or corrected as provided by Section 99 of Civil Procedure Act but not by seeking to review the whole Ruling as it does not go to the substance of the whole matter.

As was held in the case of **Laxmaibhai M.Patel & Others ..Vs..Nolake Investment Ltd & Others, Kisumu HCCC No.264 of 1997,**

***“An error on the face of record should be obvious and capable of being seen by one who runs and reads that that is an obvious mistake and not something that can be established by a long drawn process of reasoning on points or which there may conceivably be two opinions. See 15<sup>th</sup> Edition of Mulla on the Code of Civil Procedures Volume III page 2775.***

On the fact that **Onguto J.** had no jurisdiction to hear and determine matters related to land, the Court finds that this Court is not an Appeal Court and will therefore refrain from making a finding that the said Ruling by **Onguto J.** was null and void and therefore should be set aside and/or reviewed. The said ground can appropriately be canvassed at the Court of Appeal.

Having now carefully considered the instant **Notice of Motion** dated **29<sup>th</sup> May 2015**, filed by the Plaintiff/Applicant, the Court finds it not merited and consequently, the said application is dismissed entirely with costs to the Defendants/Respondents.

It is so ordered.

**Dated, signed and delivered at NAIROBI this 14<sup>TH</sup> day of July, 2017.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Gichigo holding brief for Mr. Kilonzo for the Plaintiff/Applicant

Mr. Masivo for the 1<sup>st</sup> and 4<sup>th</sup> Defendants/Respondents

No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondent though aware of the Ruling date

Court clerk - Hilda

**L. GACHERU**

**JUDGE**

**14/7/2017**

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**14/7/2017**