REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 55 OF 2016

SIMON TESOT KIPKURUI……PLAINTIFF

VERSUS

SARAH ROTICH…….DEFENDANT

RULING

This Ruling is in respect of the Defendant's application dated 20th December 2016. The application is brought pursuant to Order 45 rules 1 and 5, Order 51 rules 1 and 3 of the Civil Procedure Rules, sections 1A, 1B and 63 of the Civil Procedure Act and all enabling provisions of the law. The application seeks orders for review of the ruling made on 28th October 2016 with a view to setting aside or dismissing it.

The application is anchored on the grounds set out in the Notice of Motion as well as the supporting affidavit sworn by the defendant/ applicant on 20th December 2016. In the said affidavit the applicant depones that the plaintiff/respondent misinterpreted the court's ruling and demolished her shop, cut down trees and evicted the applicant from her parcel of land known as KERICHO/KIPKELION BLOCK 2 (KAPLABA)/138 yet no eviction order was granted. He further depones that the orders that were granted were ambiguous and incapable of being effected. According to him the orders granted had the effect of finalizing the case without hearing him which was contrary to the rules of natural justice. He therefore depones that there was an error apparent on the face of the record hence the orders ought to be reviewed.

Counsel for both parties made oral submissions. Mr. Maengwe learned counsel for the applicant relied on the applicant's affidavit. He submitted that the court had issued an ex parte permanent injunction thus effectively determining the issues raised in the main suit. This, he submitted prejudiced his client. He further submitted that there was a mistake on pages 3 and 4 of the Ruling as the court did not specify which prayer was allowed leaving it open for the applicant in that application to interpret the orders granted and as a result of this mistake the surveyors went overboard by marking he access road following which the defendant was evicted.

In his submissions, Mr Nyambegera learned counsel for the respondent submitted that the plaintiff's application came up for inter partes hearing on the 27th September 2016 when both the defendant and his advocate failed to attend court despite having taken the hearing date by consent. The application proceeded for hearing and Honourable Justice Sila Munyao reserved his ruling for the 28th October 2017. On the said date he delivered his ruling in which he granted the application and stated as follows:

> "*I do issue an order of injunction stopping the defendant from interfering in any way with the surveyor's exercise of determining whether a road of access exists and further issue an order of injunction stopping the defendant from blocking the surveyor or other officers from opening up such road. I further direct the Kericho District Surveyor to proceed to the ground and open any*

road of access between the two suit properties. The OCS Kipkelion is hereby ordered to provide security to the plaintiff and the District Surveyor, while conducting the exercise."

Mr Nyambegera further submitted that under Order 45 of the Civil Procedure Rules, a review would be based on the grounds of fraud, misrepresentation or an error apparent on the face of the record, none of which had been demonstrated by the plaintiff. He refuted the claim the orders were ambiguous or that they were similar to the orders sought in the main suit as the main suit sought a permanent injunction while the plaintiff's application sought a temporary injunction to restrain the defendant from interfering with the work of the surveyor in marking the access road for use by the plaintiff pending the hearing and determination of the suit.

The case of **Jeremiah Muku V Methodist Church of Kenya Registered Trustees and Another (2009) eKLR** gave the threshold for an application for review as follows:

"In an application for review it is incumbent upon the applicant to show that there has been discovery of a new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at the time or he must show that there is some mistake or error apparent on the face of the record or that there is any other sufficient reason."

Further in the case of **Anthony Gachara Ayub V Francis Mahinda Thinwa (2014) eKLR** *the Court of Appeal held as follows:*

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness 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 an 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 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 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"

I have looked at Justice Munyao's Ruling and I do not agree with counsel for the defendant that there is an error on the face of the record as it is in conformity with the prayers sought in the Notice of Motion dated 27th July 2016.

I also do not agree that the orders granted amounted to determining the main suit. The order clearly states that the injunction is to restrain the defendant from interfering with the work of the surveyor in determining the access road while the final prayer in the Plaint is for a permanent injunction restraining the defendant from interfering with the plaintiff's right of access to a public road adjacent to the defendant's land. Furthermore, nowhere in the Ruling or in the Plaint is eviction mentioned. Therefore, if the plaintiff went ahead and demolished the defendant's premises and wrongfully evicted her then that would constitute a separate cause of action which cannot be attributed to an error in the court's ruling.

I have carefully considered the application, affidavits and annextures filed herein as well as the rival submissions of counsel and relevant authorities and come to the conclusion that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

Miss Koech for Nyambegera for the Defendant/Respondent

Both parties present in court

Court Assistant; Rotich