IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 290 OF 2015

BETWEEN

CHRISTOPHER MUSYOKA MUSAU…….....……APPELLANT

AND

1. N. P. G. WARREN

2. D. J. C. MCVICKER

3. L. W. MURIUKI

4. K. H. W. KEITH……RESPONDENTS

5. Z. H. A. ALIBHAI

6. RUIBINA DAR

7. A. BHANDARI

8. S. RAVAL

T/A DALY& FIGGIS ADVOCATES

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Odunga, J.), dated 18th January, 2013

in

H.C.C.C. No.1100 of 2003 (O.S.)

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JUDGMENT OF THE COURT

The appellant, by an amended originating summons asked the High Court to order **N. P. G Warren**, **D.J.C MC Vicker**, **L.W Muriuki** and **K.H.W Keith** t/a **Daly & Figgis Advocates** to honour their irrevocable and unconditional professional undertaking given to the appellant on behalf of their clients in

relation to a sale transaction of a parcel of land known as **L.R No. 11066 Machakos Town** belonging to the appellant. The appellant alleged that the respondents undertook to release 60% of the purchase price to his advocates upon receipt of a duly executed transfer and 30% or Kshs.11,568,790 upon receipt of a certificate of completion from the Engineer confirming that the roads and water works were complete on the suit property. We note that 10% deposit had been paid directly to the appellant's selling agent. It was further his contention that, although he performed his part of the bargain by releasing to the respondents the grants of the sub-divisions in respect of the suit property and whereas the purchasers through the respondents had paid the 60% of the purchase price as agreed, the purchaser failed to pay the balance of Kshs.11,568,790, constituting 30% of the balance of the purchase price, arguing that they would only do so upon receipt of a certificate of completion from the Engineer. The appellant caused the certificate prepared by M/S Blueline Construction Company Limited to be forwarded to the respondents. Upon receipt of the certificate, the respondents raised another unrelated issue wanting to know if the Engineer had been fully paid for his services. Even after confirming this, and despite several demands by the appellant to the respondents to settle the balance of the purchase price, the latter refused to do so, yet for eight years the purchasers have been in continued use of the suit property while the respondents have unjustly continued to retain and enjoy the balance of the purchase price.

For these reasons, as we have said the appellant sought in the summons to enforce the undertaking, or for an order directing the respondents to pay him the sum of Kshs.11,568,790 together with interest till payment in full. In further alternative the appellant prayed that the respondents be ordered to surrender to him all the title documents in respect of the suit property.

The respondents opposed the application and denied that the firm of Daly & Figgis Advocates gave any professional undertaking: that indeed it was agreed that only upon receipt of the grants in respect of the sub-divisions of the suit property would the respondents pay 70% of the purchase price and the balance retained until the Engineer issued a certificate confirming that the roads and water works were complete, a condition with which the advocates for the appellant agreed; that later parties agreed that 60% of the purchase price would be released on informal transfers and upon delivery of the deed plans to the respondents accompanied by the consent of the Commissioner of Lands; that it was the appellant's advocates that gave professional undertaking that they would refund to the respondents 60% of the purchase price in the event the grants in respect of the suit property were not released within two months of lodging the informal transfers as described above; that pursuant to this latest arrangement the respondents proceeded to release the 60% of the purchase price upon receipt of the informal transfers with the understanding that the balance would be released as soon as the Engineer's certificate of completion of roads and water works was delivered; and that the certificate that was eventually presented was only in respect of the road works for which he had been paid. The respondents denied that they were holding any funds for the balance of the purchase price.

After hearing the arguments by both sides Odunga, J expressed the view that the respondents gave their undertaking to release the balance of 30% on condition that a certificate of completion in respect of road and water works would be issued by the Engineer. The learned Judge acknowledged that the final certificate completion transmitted to the respondent by the appellant's advocates' letter dated 30th July 2003 was in respect of only the road works. The learned Judge concluded his judgment with this statement;

> **"With respect to the issues whether or not the road works and the water works were completed to the specifications, those were not issues contained in the undertaking. Whereas those issues may constitute a basis for a cause of action for breach of contract, a professional undertaking is not dependent on the original contract since it is not affected by the existence of consideration in the main contract. It is a means of enforcing discipline among officers of the Court. Before an advocate gives a professional undertaking, it is always advisable to ensure that he has his client's money in his bank account. If he decides to gamble with the undertaking he will be doing so at his own risk.**
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> **It is therefore my view that there is no reason why the defendant firm cannot be compelled to honour its professional undertaking. Accordingly the defendant is granted 45 days from the**

date of this judgment to honour its professional undertaking to the appellant by paying the outstanding sum of Kshs.11,568,790.00".

The respondents were also ordered to pay interest on the sum. In default of payment, the learned Judge directed that the appellant would be at liberty to execute. In the further alternative to this, he directed the respondents to, within 45 days, surrender to the appellant all the documents of title of the sub-division issued to their clients.

The respondents were aggrieved by this decision and evinced their intention to challenge the whole of it on appeal to this Court by filing a notice of appeal dated 24th September, 2012. They however appeared to have changed their mind for on 2nd October, 2012 they withdrew the notice of appeal and instead on 1st

November, 2012 took out a notice of motion under **section 80** of the Civil Procedure Act and **Order 45 rule 1** of the Civil Procedure Rules in which they asked the court below to stay the execution of the orders of 20th day of September 2012 and also to review the judgment. The application was premised specifically on two grounds; one, that there were mistakes and or errors apparent on the face of the record on account of the following matters:

a) That there was assumption in the judgment that the appellant carried out and completed water works on the suit property;

b) An assumption that a certificate had been issued confirming that water works on the sub-divisions of the suit property were complete;

c) An assumption that a "complete certificate" issued by Blueline Construction Company (the Contractor) in the year 2003 dealt with water works.

The second ground was that there were sufficient reasons for review of the judgment, including the following:

a) That the court had taken the sale of the sub-divisions of the suit property as one transaction whilst there were actually several transactions;

b) The total balance of the purchase price for the subdivisions purchased by the respondents' clients was much less than the amount of Kshs.11,568,790/= claimed by the appellant and that there was need to establish precisely the sums so far paid and by who and the balance;

c) There was a need for a determination based on the facts and circumstances of the case;

d) There was need for a substantial justice.

The appellant opposed the application and contended the issue of non-completion of road works and water works was dealt with at the trial and could not therefore constitute an assumption by the court that the appellant had carried out or completed waterworks on the suit property; that the learned Judge took into account all the issues that were placed before him by the parties; that since all conditions for payment were met, there was no mistake or error apparent on the face of the record to warrant review; and that the application did not meet the threshold for review of a judgment.

After making reference to **Mulla on the Code of Civil Procedure, 17th edn. Vol. 4 page 4116 to 4121**, and numerous authorities, including **Mbogoh v. Muthoni & Another** [2006] 1 KLR 199, **Kisya Investments Ltd v. Attorney General and Another** Civil Appeal No. 31 of 1995, **Jivanji v. Jivanji** [1929-1930] KLR 41, **Uhuru Highway Development Ltd v. Central Bank of Kenya & Others** HCCC No. 29 of 1995 and **Bernard Githii v. Kihoto Farmers Co. Ltd**

NBI HCCC No. 32 of 1974, all in support of various legal propositions relevant to the issues raised before

him, the learned Judge isolated the two grounds upon which the application for review was made; that there was an error apparent on the face of the record and that there were sufficient reasons disclosed to warrant the review of the decision. We do not intend to go into the second ground as it has not been raised in this appeal.

The learned Judge reproduced the provisions of **section 80** and **Order 45 rule 1** aforesaid and guided by this Court's decision in **Nyamogo & Nyamogo Advocates v. Moses Kipkolum Kogo** [2001] 1 EA 173 and **Muyodi v. Industrial and Commercial Development Corporation and Another** [2006] 1 EA 243, among others, in which the Court drew the following parameters for the exercise of discretion in an application for review. That 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; that there is a distinction between a mere error and an error apparent on the face of the record; that 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, neither can a view which is adopted by the court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal.

Setting out at great length passages of his impugned judgment the learned Judge agreed with the respondents and came to the conclusion that he erroneously held that the respondents were bound by their professional undertaking on the basis of a final certificate of completion; that there was an error in his judgment as he made no specific finding as regards the status of water works; that as a matter of fact there was no certificate to confirm the completion of water works; that the certificate alluded to in the letter referred to in the judgment only expressly mentioned the completion of the roads works. He said;

> **"The issuance of the Engineer's certificate confirming the completion of both the water works and the road works was a pre-condition to the satisfaction by the defendants of the professional undertaking and that condition cannot be transferred to the original contract. As was rightly submitted on behalf of the defendants, an error apparent on the face of the record has an element of indefiniteness inherent from its very nature and must be left to be determined judicially on the facts of the case. I do also agree that it is incumbent upon judges at the stage of the hearing of an application for review to inquire fully into the correctness of the facts and that it would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgment. On the face of the record it is in my view clear that the judgment was arrived at as a result of inadvertence arising from the fact that there was clearly no averment or evidence that the water works as opposed to the roads works had been completed and a certificate to that effect issued. This error appears on the face of the record and does not require a long drawn process of reasoning on points on which there may conceivably be two opinions. In arriving at the judgment it is clear that the issue of whether or not the water works had been completed, an issue that was central to the professional undertaking was not addressed and from the evidence on record, there is no evidence that the said water works were completed and a certificate to that effect issued. Failure by the Court to address an issue central to the decision as opposed to addressing the issue and arriving at a wrong conclusion can properly be a subject of an application for review. In my respectful view the issue fell within the former category. I accordingly agree that there was an error apparent on the face of the record that led to the entry of judgment in favour of the plaintiff….. having found that there was an error on the face of the record I am satisfied that the decision of this Court made herein on 20th September 2012 ought to be reviewed. Accordingly, the same is hereby reviewed, the said judgment set aside and substituted therefor an order dismissing the Originating Summons herein with costs to the Defendants. The Defendants will also have the costs of this application".** (Our emphasis).

The appellant now brings this appeal aggrieved by the decision which, in his view amounted to the learned Judge sitting in appeal on his own decision; that the grounds upon which the review application was based and decision founded were suitable for an appeal; that the issue of the completion of water

works was a highly contested matter and its resolution in the judgment could not be the subject of a review application; and that having properly warned himself that the existence of an error apparent on the face of the record need not be established by a long drawn process, the learned Judge contradicted himself by engaging in a long drawn "trial".

From these grounds the appellant in his written submissions identified only two issues for our determination, whether the learned Judge misdirected himself when he reviewed the judgment and whether this Court should interfere with the exercise of that discretion. On the first issue, the appellant urged us to find that the grounds relied on by the Judge to review the judgment were most inappropriate and that the grounds for review under **Order 45** were not satisfied; that even under the rubric "for any other sufficient reason", the grounds relied on by the respondents did not at all fall within section 80 or rule 45 as they were neither analogous nor *ejusdem generis* the other grounds. For those reasons the appellant invited us to interfere with the decision of the learned Judge.

The respondents for their part submitted that the learned Judge correctly observed that he had omitted to determine in the judgment an essential pre-condition to the professional undertaking, whether the water works were complete in their view this was a fit ground for review and not appeal.

The only point for our consideration in this appeal is whether the respondents made out a case for review of the judgment and order dated 20th September, 2012. In other words, whether the respondents satisfied the criteria under **Order 45.**

This Court has repeatedly held that the jurisdiction and scope of review is not the same as that of an appeal and that the jurisdiction of review can be entertained only if the three conditions stipulated in **Order 45 rule 1** are met, that is, where, one, there is discovery of new and important matter or 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, two on account of some mistake or error apparent on the face of the record, or three, for any other sufficient reason.

The impugned decision turned on the ground that there was a mistake or error apparent on the face of the record, which was identified to be the manner the learned Judge treated the evidence on completion certificate; that he erroneously failed to make a determination on the status of the water works.

The learned Judge having outlined the circumstances under which a court can review its judgment as eruditely discussed in **Nyamogo & Nyamogo Advocates** [supra] **and Muyodi vs. Industrial and Commercial Development Corporation and Another** (supra), among other decisions, contradicted those decisions by ignoring the definitive limits imposed by **Order 45** and those authorities to the exercise of the power of review. He allowed the issues he had already conclusively determined, whether wrongly or properly to be re-agitated and re-argued in the application as if for the first time. In doing so the learned Judge ignored the *dicta* in all the authorities he himself relied on, that an error apparent on the face of record must be such an error which must strike one on merely looking at the record and does not require any long-drawn process of reasoning on points where there may be two different opinions. Nothing demonstrates this departure better than the length of the ruling. While the judgment where the main arguments were presented was only 28 pages the ruling on a simple question on review ran into 34 pages following protracted arguments. The reasoning in the ruling amounted to the learned Judge sitting in appeal on his own decision. The final orders made by the learned Judge that the judgment **"…. is hereby reviewed, the said judgment set aside and substituted therefor an order dismissing the Originating Summons herein with costs"** can only be reached on appeal. The learned Judge in the impugned judgment made a conscious and conclusive decision on the matters in controversy before him. He found in favour of the respondent that directing the respondents to honour its professional undertaking within 45 days from the date of the judgment by paying to the appellant the outstanding sum of Kshs.11,568,790.00. If his conclusion was wrong, and as judges we err, but it cannot be for the judge, as the learned Judge did to correct the error by overturning himself. The appellate system of the courts exist for correcting such mistakes where they occur.

As the issue in question had been strongly contested before the learned Judge, we think it was erroneous

for him to resort to this unprecedented course. The effect of what happened in this case was explained by the Court in **Pancras T. Swai V Kenya Breweries Limited,** Civil Appeal No. 275 of 2010 as follows;

> **"If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction".**

A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the courts below. The power of review cannot be stretched, as the learned Judge did to reverse and overturn his own judgment under the garb of review. Having misapprehended the evidence regarding the status of the roads and water works, by concluding that the question was not relevant in determining whether the respondents were in breach of their professional undertaking, the learned judge had no jurisdiction to reconsider the question.

We come to the conclusion that this was not a proper case for the learned Judge to purport to exercise his discretion in the manner he did. He misdirected himself materially on the application of **Order 45** with the result that he arrived at a wrong conclusion. The alleged error was not as patent as to be detected at one glance hence the long drawn arguments by either side before the learned Judge and his lengthy ruling.

The appeal has substance and for the foregoing reasons we have given the appeal is allowed with costs. We also award costs of the application in the court below to the appellant.

Dated and delivered at Nairobi this 12th day of May, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR