



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.190 OF 2015**

*(Formerly Nakuru 365 of 2013)*

*(Before D. K. N. Marete)*

JOSPHAT MUNKE OLE MPOE.....CLAIMANT

VERSUS

DAVID WAIGANJO KOINANGE.....RESPONDENT

AND

CFC STANBIC BANK LIMITED.....OBJECTOR/APPLICANT

**RULING**

This is an application dated 15th July, 2015 by the objector and is brought to court vide a certificate of urgency of even date. It seeks the following orders of court;

1. *That this application be certified urgent to be heard forthwith and ex-parte at the first instance and be fixed for interpartes hearing thereafter.*
2. *That pending the hearing and determination of this Application interpartes the court be pleased to issue an interim order of stay of execution for the attachment and sale of the motor vehicle registration number KTCB 393L.*
3. *That the motor vehicle of the Objector/Applicant attached by the claimant by themselves or through their agents Nasioki Auctioneers or any other agent be released forthwith and unconditionally to the Objector/Applicant.*
4. *That the execution and attachment in respect of the Objector/Applicant's movable property be set aside/raised/lifted.*
5. *That the Honourable court be pleased to review or vary the order made and issued on the 3<sup>rd</sup> of*

July, 2015.

6. *That the costs of this application be provided for.*

and is grounded as follows;

- a. *That the order was wrongly made and is contrary to the provisions of law.*
- b. *That this honourable court erred in law when making the said order by making a ruling based on the fact that the Hire Purchase agreement between the Objector/Applicant and the Respondent was not registered.*
- c. *That there is an error apparent on the face of the record because the Hire Purchase Act at Section 3 (1) provides that where the amount financed is above Kenya Shillings Four million there is no need for registration of the hire purchase agreement.*
- d. *That the Hire Purchase Agreement between the Objector/Applicant and the Respondent is not in any way regulated by the provisions of the Hire Purchase Act given the Hire Purchase Agreement is in excess of Kshs.4 Million.*
- e. *That the Respondent/Judgment Debtor has not paid in full hire purchase price of the subject motor vehicle and the property in the vehicle therefore vests in the objector.*
- f. *That it is trite law that the Hire Purchase Act does not regulate Hire Purchase Agreements in excess of Kshs. 4 Million.*
- g. *That it would therefore be in the interest of justice and equity that the order issued on the 3<sup>rd</sup> of July, 2015 be reviewed by being set aside in order to secure the interests of the Objector/Applicant.*

By a replying affidavit sworn on 21st July, 2015 the claimant/respondent opposes the application and dismisses the same as an abuse of court process, a non starter and one brought out to delay and defeat the cause of justice. This is as follows;

1. ....
2. ....
3. *That the Objector's said Application is an abuse of court process, a non-starter and is brought to delay and defeat the cause of justice.*
4. ....
5. ....
6. *That the Applicant purports to suggest that there is an error apparent on the face of the record because the hire purchase agreement between the respondent and the objector was in excess of Kshs. 4 Million and as such excluded from provisions of the Hire Purchase Act as stipulated under Section 3 (1) of the said Act. That in the Objector's Application of 11<sup>th</sup> June, 2015 which was dismissed and thus giving rise to the current application for review, the Objector never mentioned earlier that the hire purchase agreement was for Kshs. 4.3 Million and/or that the Respondent had been offered asset financing of Kshs. 4.3 Million by the Objector.*
7. ....
8. ....
9. ....

10. *That in any event an error on the face of the record or ruling should not be an error that requires further research on the subject, or an error requiring elaborate arguments to establish it should be an error that is self evident.*

11. ....

12. *That still if a judge's decision could be a possible one in law or if a judge failed to appreciate a substantive provision of the law or even if another judge may have arrived at a different conclusion, then basically there can be no manifestation of an error on record because the judge exercised his discretion judiciously and any question on wrongful exercise of discretion is a ground of appeal.*

The objector/applicant's case is that the respondent took out the banking facilities with the objector/applicant and that the same was secured by a motor vehicle registration number KTCB 393L. This motor vehicle was jointly registered with the names of the respondent and objector after hire purchase agreement was duly executed the objector moved this court by way of objector proceedings in which the court gave a ruling as follows;

*4. That I am aware that the Applicant moved the court by way of Objector Proceedings in which this Honourable court gave a ruling stating "... in this respect, I would endorse and apply the decision by Mabeya J in Geminia Insurance Company Limited V. Sedco Consultants Limited and AR (2013)e KLR and Kasango J in Fidelity Commercial Bank Limited v. AgriTools Limited & 3 Others (2004)eKLR and which were cited by the claimant that a court should not take cognizance of a hire purchase agreement which has not been registered. Such an agreement is unenforceable." A decision by which the Objector/Applicant is aggrieved."*

It is the objector's further case that the Hire Purchase Act applies in certain categories of hire purchase agreements and in any event did not apply to the agreement between the respondent and the objector/applicant as this was well above the monetary ceiling provided for by the Act as this was in excess of Kshs. 4 million.

*6. "That I am advised by my advocates on record which advise I verily believe to be true that the Hire Purchase Act does not apply with regards to the Hire Purchase Agreement between the Objector/Applicant and the Respondent a position which was illustrated in the case of Taawawa Supermarket Limited V Fina Bank Limited Civil Appeal no. 118 of 2002 in which the Honourable court held that;*

*"There is no doubt that the Act would be inapplicable on the basis of the monetary threshold since the subject matter was here beyond the upper limit of Kshs.300,000/= ....."* (now Kshs. 4Million)

and,

*9. "That I am advised by my advocates on record which advise I verily believe to be true that the Hire Purchase Act does not in any way regulate Hire Purchase Agreements in excess of Kshs.4Million. In the case of Amicabre Travel Services Limited v Alios Kenya Finance Limited (2014) eKLR, J. Kamau J, upheld the decision in Civil Appeal No. 285 of 1998 Diamond Trust Bank Kenya Limited and Jaswinder Singh Enterprises (1999) eKLRE that a Hire Purchase Agreement in excess of Kshs.300,00/= (Now Kshs 4 Million) need not be registered to be enforceable and that such agreements would be enforceable as contracts inter se (annexed herewith and marked AKM 3'a' and 'b' are the said quoted authorities.)*

Further, the hire purchase agreement *inter partes* was an agreement duly executed and fully entered between the objector/applicant and the respondent and the court has no power or authority to rewrite or in any way interfere or deal with the same in regard to its obligations and content this therefore makes the attachment of the motor vehicle untenable in law.

*12. That I know as of personal knowledge that the tractor registration number KTCB 393L which was security in a hire purchase agreement between the objector and the respondent for the sum of Kshs.4.3Million has been attached by the Claimant and is scheduled for sale, and that there is no dispute as to the joint ownership of the motor vehicle making it unavailable for attachment as was held in CMC Motors V Garex Kenya Ltd & Another (2001)eKLR.*

The respondent argues and submits that this being the position, the court orders issued on 3rd July, 2015 were adverse as the objector/applicant was not awarded an opportunity to give reasons why his interest in the tractor registration number KTCB 393L needed to be secured. She therefore prays that the orders made by court be set aside add or discharged and the court grants the orders sought in this application.

The claimant/respondent in his replying affidavit rubbishes the application and its purport that there is an error apparent to the face of the record. He further posits and submits that basing this on the ground that the hire purchase agreement between the respondent and objector being in excess of Kshs. 4 million and therefore is excluded from the provisions of Section 3 (1) of the Act is not feasible. It is his further case that the objector's application was dismissed on 11th June, 2015 and even here the objector never notified the court of information and data that the hire purchase agreement was for Kshs. 4.3 million and that she had offered asset financing to the respondent. In any event, Section 3 (1) of the Act provides for the involvement of the minister in the assessment of values applicable in hire purchase agreements like in the instance case.

It is the claimant/respondent's further case that an error on the face of record of necessity requires further research on the subject or better still requires elaborate arguments to establish. It is an error that is self evident. Again, an error on the face of the record requires no long drawn processes of reasoning and a mere reconstruction of a statute and provisions of law cannot be an error on the face of the record. The claimant opines and submits that the judge's failure to appreciate substantive provision of law or in the event another judge has arrived at a different decision on the subject does not exhibit an error on the face of the record as this is an exercise of jurisdiction and a ground of appeal.

The claimant/respondent further case is that the tractor the subject matter of this application was sold by public auction conducted on the 14th July, 2015 and issuance of orders as prayed for by the respondent will be an exercise futility and also prompting the court to act in vain.

The claimant/respondent further attacks the application in the following manner in his written submissions;

*24. That further, the Objector's application is fatally defective for failing to annex a certified copy of the order which is to be reviewed thus making the application incompetent.*

*25. That all in all, the Hon Judge's Ruling of 3<sup>rd</sup> July, 2015 has no error apparent on the face of it and neither are there errors on the face of the record.*

*26. That the ruling considered all facts, issues and arguments raised by respective counsels and as such the same was a well reasoned and meditated judicial decision and if there was a mis-interpretation of the law or misapprehension of the facts then that cannot be a ground for review.*

*27. That the Objector's Notice of Motion as filed has the face of a review application but it is actually created with the heart of an appeal.*

*28. That the Objector's Application raises moot points which might result in reopening arguments made before the judge in the earlier application or result in conducting an appeal before the judge over his own ruling.*

*29. That the Objector's application is basically an abuse of court process, a mismanagement of the court's scarcely available resources and it amounts to a complete wastage of valuable judicial time.*

The objector in her written submissions dated 16th September, 2015 states a case of joint ownership and interest in reiteration of this case rubbishes the submissions and argues that he is largely dishonest in his submissions or in this matter.

*“The Claimant has been very dishonest in this matter. The claimant is trying to impose a sale that did not take place and gag the court in dispensing justice. The affidavit filed and served by the Objector of the respondent's Agent Edward Kibe Wanjohi who was present at the auction yard where the sale is purported to have taken place is uncontroverted and the claimant has been utterly silent about where or how the sale took place. The claimant in his submissions dated 10<sup>th</sup> September, 2015 has evaded mentioning or rebutting the particulars of the affidavit attached in the objectors supplementary affidavit dated 7<sup>th</sup> August 2015 as it remains the mere truth. The claimant has instead solely relied on letters and a certificate of sale and a statement of account which is marred by errors, a fact which has been clarified by the objector in this supplementary affidavit dated 7<sup>th</sup> August, 2015. No sale took place as alleged since it is clear that the claimant has not produced any evidence with effect to that in presenting the attendance list for the alleged auction and the bid tally thereof it's a mere collusion to dupe the court and defraud the objector off its property. In the case of Ng'ang'a and 2 others all T/A Waruhiu Kowade & Ng'ang'a advocates V Lab Construction Ltd & 2 Others (2012) eKLR at paragraph 15 the court held that;*

*“in civil cases, the burden of proof is on him who alleges. My view is, with such evidence by the defendants and the plaintiff, the interested parties required more than just the contradictory insufficient and unsatisfactory evidence they had presented to court to establish their claim. I would have expected for example the auctioneer to present evidence to the effect that she owns a yard at Rehema House Eldoret, produce the attendance list for the alleged auction for the said 24<sup>th</sup> October, 2008 and the bid tally thereof.”*

*The claimant has failed totally to prove where, when and how the sale took place, in this case projecting a highly calculated fraud to dupe the court and defraud the objector and the respondent of their property. This honourable court needs to close its eyes on the fraudulent elements portrayed in the alleged sale that never took place.*

This allegation of dishonesty and impairment of character on the part of the claimant/respondent is not clearly articulated in evidence.

The objector further also seeks to rely on the following authorities in support of this application;

*The interpretation of Section 3(1) of the Hire Purchase Act has been well decided in various recent authorities, the Court of Appeal having upheld in Taawawa Supermarket Limited v Fina Bank Limited (2010) eKLR and Diamond Trust Bank Limited v Jaswinder Singh Enterprises Civil Appeal No. 285 of 1998 (attached in the objectors submissions) that once the monetary threshold exceeds the stipulated Kshs.4 Million in the Hire purchase at and according to Section 3(1) of the hire purchase act then the act should not regulate such hire purchase agreements and are to be interpreted as contracts inter se. We therefore submit that the threshold by the Minister as submitted by the claimant in his submissions of 10<sup>th</sup> September, 2015 is on the alternative given the presence of the word “or” in Section 3(1) (supra) and the court should appreciate that there is no need for an alternative interpretation there being no gazette notice or legal notice from the Minister.*

*It is clear that the hire purchase agreement between the Objector and the respondent was for a sum of Kshs.4.3 Million and was not to be regulated by provisions of the hire purchase act a fact that the learned trial judge failed to appreciate.*

The claimant/respondent relies on the authority of Eastern and Southern African Development Bank – Vs- African Green Fields Ltd and Others (2002)2 E.A pages 377 & 378 in opposition to this application as follows;

*“An order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further, it could not be reviewed on the ground that other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue..... The proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercised of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose. Application dismissed with costs.”*

Again, in the case of Michael Mungai -Vs- Ford Kenya Elections & Nominations Board & 2 Others (2013) eKLR pages 3 & 4 the five (5) judge bench held as follows while adopting the holding of Nyamongo and Nyamongo -vs- Kogo (2001) EA 174:-

*“This court said 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. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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. 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 also possible. Mere error or wrong view is certainly no grounds for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”*

This is again elucidated in the case of National Bank of Kenya Limited -Vs- Ndungu Njau Nairobi C.O.A C.A 211 of 1996 (unreported) pages 150-151. It was held that:-

*“A review may be granted whenever the court considers that it is necessary to correct an 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 in 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 provision of law cannot be a ground for review..... . In the instant case, the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review otherwise we agree that the learned judge would be sitting in appeal of his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”*

This authority marks a distinction between matters amenable to review or appeal.

In the case of Michael Mungai -Vs- Ford Kenya Elections & Nominations Board & 2 Others (supra) the court highlighted on the ground of review for any other sufficient reason and at page 5 it was held:-

*“In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before court. For example in the case of Ngororo -vs- Ndutha & Another (1994) KLR 402, the court of appeal held that any person, though not party to a suit, whose direct interest is affected by a judgment is entitled to apply for review. Such a reason can be “sufficient reason” for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision. In this case, the applicant has not given any reason to warrant the review of the impugned decision on the ground of “sufficient ground”.*

In the case of Damaris Wangechi Kariuki – Vs- Johnson Muturi Muchemi & Another Nairobi Milimani Civil Misc. Application No.74 of 2000 (O.S) (unreported) pages 2,3 & 4 it was held as follows:-

*“It is clear from Order 44 Rule 1 that first what is to be reviewed or what an applicant seeking a review is seeking to be reviewed is a decree or an order. That in effect means in law that the decree or order sought to be reviewed must be extracted and a certified copy thereof annexed to the application. I have perused the entire file and I have not been able to see any order extracted as is required. Certainly, none was annexed to the application as is required by law. If that order sought to be reviewed is yet not extracted and not annexed to the application as is required by law. If that order sought to be reviewed is yet not extracted and not annexed to the application, then it goes without saying that there is in fact nothing for me to review.”*

This is further supported in the authority of Eastern and Southern African Development Bank V African Green Fields Ltd and Others East Africa Law Reports (2002)2 EA 371 (CCK).

*Held- An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further it could not be reviewed on the ground that other Judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue. National Bank of Kenya v Ndungu Njau (1996) LLR 469 (CAK) applied.*

*The proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose. Application dismissed with costs.*

The elaborate submissions and pleadings by the objector do not bring out a case for review and or setting aside of the orders of court as prayed. There is no display of the ingredients for review on grounds of an error on the face of the record. This application would, in the circumstances not suffice. On the contrary, the respondent in his submissions and authorities impulsively brings out a clear case against review. It is therefore not tenable or at all in the circumstances.

A case for review must be distinguishable from one for appeal. A review based on the ground of an error on the face of the record literally means that. There must be an error apparent on the face of the record. This would have to be an obvious and visible error which would not require much effort to establish from the record. It does not call for elaborate analysis of law or facts to establish. This should be outright and glaring on the face of the record. Unfortunately for the applicant, this is not the case here. A look at the case for the applicant this discloses more of a case for appeal than review. I am therefore inclined to dismiss this application with costs to the claimant/respondent.

**Delivered, dated and signed this 9th day of december 2015.**

**D.K.Njagi Marete**

**JUDGE**

Appearances.

1. Mr. Kanyi instructed by Kanyi Ngure & Company Advocates for the Claimant/Applicant.

2.Mr. Okwegu instructed by Sichangi & Partners for the Objector.