



**Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & another v Higher Education Loans Management Board & 2 others (Environment & Land Case 59 of 2014) [2023] KEELC 17450 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17450 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 59 OF 2014**

**OA ANGOTE, J**

**MAY 18, 2023**

**BETWEEN**

**THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF  
RETIREMENT BENEFIT SCHEME ..... 1<sup>ST</sup> PLAINTIFF  
KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HIGHER EDUCATION LOANS MANAGEMENT BOARD ..... 1<sup>ST</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT  
THE DIRECTOR OF SURVEYS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Plaintiff has filed a Notice of Motion application dated April 25, 2022, in which it has sought for the following orders:
  - a. This honourable court does review the orders issued on November 8, 2022.
  - b. 1<sup>st</sup> plaintiff's Advocates be readmitted to the record and the Amended Plaint dated September 25, 2019 be reinstated for hearing.
  - c. Costs of this application.
2. The application is premised on the grounds on the face of the application and the supporting affidavit sworn by the 1<sup>st</sup> plaintiff's advocate who deposed that he filed a Chamber Summons application dated July 18, 2022 seeking leave to cease acting for the 1<sup>st</sup> plaintiff on the ground that he did not have instructions to continue acting in the matter, and that on the morning of November 8, 2022, Mr. Isaac Sila, the Chief Executive Officer of the 1<sup>st</sup> plaintiff, requested him to continue acting for the 1<sup>st</sup> plaintiff.



3. The 1<sup>st</sup> plaintiff's counsel deponed that their counsel, Ms. Jacinta Ndanu Martha, was unaware of these developments and failed to relay these instructions and to withdraw the application to cease acting and that consequently, this court issued orders allowing the 1<sup>st</sup> plaintiff's advocate to cease acting and dismissed the 1<sup>st</sup> plaintiff's suit for want of prosecution.
4. It was deposed that the 1<sup>st</sup> plaintiff's advocates have learnt that the Chamber Summons dated July 18, 2022 for leave to cease acting was not served upon the 1<sup>st</sup> plaintiff nor was an affidavit of service filed and that this represents an error apparent on the face of the record.
5. The 1<sup>st</sup> plaintiff's advocate deponed that the foregoing was occasioned by errors and/mistakes for which the 1<sup>st</sup> plaintiff was not privy to; that had the 1<sup>st</sup> plaintiff been aware in good time that its advocates intended to cease acting, it would probably have instructed an alternative counsel or appeared in court in person and that the 1<sup>st</sup> plaintiff has not lost interest in the suit and is ready to proceed with the hearing in accordance with this court's directions.
6. The 1<sup>st</sup> defendant opposed the application vide a replying affidavit sworn by its Corporation Secretary and Head of Legal Services, who deponed that the application dated July 18, 2022 was not served until November 7, 2022, a day before the hearing date of the main suit; that the 1<sup>st</sup> plaintiff's Advocates failed to represent the 1<sup>st</sup> plaintiff when the matter came up for mention on November 21, 2021, February 22, 2022 and May 9, 2022 and that on May 23, 2022, when the matter came up for mention to certify it ready for hearing, the 1<sup>st</sup> plaintiff's advocate intimated to the court that it did not have instructions to continue acting for the 1<sup>st</sup> plaintiff.
7. The 1<sup>st</sup> defendant's Corporation Secretary deponed that the matters sought to be explained do not constitute errors and/or mistakes that would warrant a review but rather, a deliberate and intentional disinterest which led to the dismissal orders and that the 1<sup>st</sup> plaintiff itself has not sworn an affidavit to demonstrate that it has an interest in the suit.
8. It was deposed that this suit was not dismissed on account of cessation or lack of representation by Counsel but by the fact that no credible reason had been given why the 1<sup>st</sup> plaintiff was not available to prosecute its suit. It was deponed that any further delay in the conclusion of this matter is prejudicial to the 1<sup>st</sup> defendant.
9. No submissions were filed by the parties.

### **Analysis and Determination**

10. This court has considered the application and the response filed by the 1<sup>st</sup> defendant. The issue before this court for determination is whether the orders issued by this court on November 8, 2022 should be reviewed.
11. The record shows that the 1<sup>st</sup> plaintiff's Advocates filed an application dated July 18, 2022 seeking to cease acting for the 1<sup>st</sup> plaintiff. The court allowed the application on November 8, 2022 and because the 1<sup>st</sup> plaintiff was not in court, the court dismissed its suit for want of prosecution.
12. The 1<sup>st</sup> plaintiff's Advocate has deposed that these orders were entered erroneously because on the morning of November 8, 2022, he had received instructions from his client to continue representing it; that the mistake he made was in failing to relay these instructions to their counsel, Ms. Jacinta Ndanu Martha and that further, the application dated July 18, 2022 was not duly served on the 1<sup>st</sup> plaintiff.



13. The expression of the Supreme Court in *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, whilst dealing with an application for review is instructive:

“A review of exercise of discretion is not as a matter of course to be undertaken in all decisions ...., review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court; an Application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application, in an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically, During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review, the Applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result a wrong decision was arrived at; or it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

14. The remedy of review is provided in section 80 of the *Civil Procedure Act*:

“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 a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

15. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 similarly provides as follows:

“1.

- (1) Any person considering himself aggrieved-
  - 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.”



16. From these provisions, the grounds upon which an application for review may be granted are: (a) discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed; (b) on account of a mistake or error apparent on the face of the record or (c) for any other sufficient reason. This position was upheld in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

17. The 1<sup>st</sup> plaintiff has sought a review of the orders of this court on the ground that there is a mistake or error on the face of the record. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“In *Nyamogo & Nyamogo v 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

18. The courts have held that a mistake or error apparent on the face of the record is not the mistake of a party or counsel but the inadvertent mistake of the court. This was aptly stated in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR:

“When on a review application a party invokes the ground of a mistake or error apparent on the face of the record, it is not the mistake of the party or Counsel that is being referred to, it is the inadvertent error or mistake of the court that is being alluded to....The court made that determination based on the facts before it and on the basis of submissions by counsel.

I find it untenable and flawed when it is argued that where counsel has made a mistake, the court too must be taken to have made a mistake in its findings. That is an argument that I am unable to accede to. Where counsel makes a mistake and on the basis of such mistake and oblivious of the mistake the court makes a finding it cannot then be said that there is an error on the face of the record.”



19. The court in *Alvin Mbae & 2 others v Edwin Nyaga Mukatha & 2 others* [2022] eKLR made a similar finding:

“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Act. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

20. This court is duly guided by the foregoing decisions. In this case, the plaintiff has claimed that there are two errors or mistake on the face of the record: first that the plaintiff’s counsel was not aware that the plaintiff had issued instructions on the morning of November 8, 2022 and secondly, that the 1<sup>st</sup> plaintiff was not served with the application by its advocates seeking to cease acting. By their nature, these errors constitute errors by the 1<sup>st</sup> plaintiff rather than errors by the court.
21. The defendant has deponed that the 1<sup>st</sup> plaintiff has not been a diligent litigant. This court agrees. Looking at the record, the 1<sup>st</sup> plaintiff has failed to prosecute its suit diligently. While there were instances when the parties herein were engaged in out of court negotiations, the 1<sup>st</sup> plaintiff failed to issue instructions to its advocates accordingly such as when the matter came up for mention on November 21, 2021, February 22, 2022 and May 9, 2022.
22. After all, a case belongs to a litigant and not his advocates. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, the Court of Appeal held thus:
- “It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of litigation...parties have responsibility to show interest in and follow up their cases...”
23. The attempts by the 1<sup>st</sup> plaintiff to issue instructions on the morning of November 8, 2022, if at all, when the application by its advocate to cease acting was to be heard, is indeed a distinct coincidence. Could it really be argued that the 1<sup>st</sup> plaintiff was not aware of the application before this court? It is doubtful.
24. This court is not persuaded that there is any error on the face of the record. The 1<sup>st</sup> plaintiff or its advocate has failed to prove that this court exercised its discretion or authority erroneously or whimsically or that this court arrived at a wrong decision.
25. On this basis, this court finds the plaintiff’s application dated April 25, 2022 to be unmeritorious. The application is dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF MAY, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;



Ms Omwenga for 2<sup>nd</sup> Plaintiff

Mr Maruti for 1<sup>st</sup> Defendant

Mr. Mange for Attorney General

Mr. Kioko for Applicant/1<sup>st</sup> Plaintiff

Court Assistant - Tracy

