



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 473 OF 1998**

**MBARUK KHAMIS MOHAMED.....PLAINTIFF**

**-VERSUS-**

**AMIR KHAN SARDAR KHAN & 13 OTHERS.....DEFENDANTS**

**RULING**

1. The Application before Court is the Notice of Motion dated 16th September 2013 in which the 3rd and 7th Defendants/Applicants are seeking an order that this court be pleased to review or vary its order made on 6th September 2013. The Application is supported by the Affidavit of Ushwin Khanna sworn on 16th September 2013 and is based on the ground that there is a mistake or apparent error on the face of the record.
2. The mistake or error that the Applicants say is apparent on the face of the record is that this court in its ruling of 6th September 2013 (hereinafter “**the impugned ruling**”) dismissed the suit for want of prosecution against the 3rd and 7th Defendants yet it ought to have dismissed the suit against all the Defendants.
3. The Applicants argue that the Application dated 1st September 2011 which lead to the impugned ruling had a prayer for the suit to be dismissed for want of prosecution. That the dismissal ought to have been against all the Defendants and not against the 3rd and 7th Defendants only. Mr. Karega, learned counsel for the 3rd and 7th Defendant's/Applicants submitted that under **Order 17 Rule 2** of the Civil Procedure Rules, the court cannot order dismissal of the suit as against a certain defendant only because inactivity is in respect of the entire suit.
4. Mr. Omollo, learned counsel for the 1st and 2nd Defendants associated himself with the Applicant's submissions. He submitted that once the application for dismissal had been made by the 3rd and 7th Defendants, the 1st and 2nd Defendants chose not to make a similar application but filed an affidavit on 5th September 2013 in support of the application for dismissal.
5. Order 45 Rule 1 (1) provides that:

**“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.”

6. The Court of Appeal in the case of Muyodi –Vs- Industrial And Commercial Development Corporation and Another E.A.L.R[2006] 1 EA 243 at pages 246-247 described an error or mistake apparent on face of the record as follows:-

**“In Nyamogo and 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 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 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.”**

7. In the case of Michael Mungai –Vs- Ford Kenya Elections & Nominations Board & 2 Others [2013] eKLR, the High Court held as follows:

**“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see.”**

8. The Application dated 1st September 2013 was filed by the 3rd and 7th Defendants. It was not filed by all the Defendants. This court stated as follows at paragraph 6 of the impugned ruling:

**“As stated above the Plaintiffs having delayed in the prosecution of this suit that delay as deponed in the affidavit is causing the 3rd and 7th Defendants prejudice.”**  
(emphasis added)

9. The Court was aware when delivering the ruling that it is only the 3rd and 7th Defendants who had deponed to being prejudiced by the Plaintiff's delay in prosecution of the case and it is only the said defendants who had filed the application for dismissal. In deed the court observed at paragraph 3 of the impugned ruling that the 10th and 11th Defendants had filed an application seeking for the dismissal of the suit as against them for want of prosecution but the same was later withdrawn, a probable indication that they were not prejudiced by the Plaintiff's non-prosecution of the case.

10. The court made an order in favour of the parties who had applied

only. That a court of law can make an order in favour of the party who has made an application only and leave out those who have not applied is a legal possibility. It may be well that the Applicants wanted the order to be made in favour of all the Defendants but the court was of the view that only parties that had applied be granted the order. As was rightly held in the Muyodi

**Case (supra), if a view adopted by the court is a possible one, it cannot be an error apparent on the face of the record even though another view is also possible.** The court's decision to grant the order in favour of the parties who had applied only is not a mistake that is there for the whole world to see. The same cannot be a mistake or error apparent on the face of the record. In my view, if the Applicants are of the view that the court was wrong, then the only remedy available to them is appeal.

11. For the foregoing reasons, the application is dismissed with no orders

as to costs.

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**