



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 128 OF 2001

- 1.HARRISON M. KARIUKI
- 2.JOSEPH K. NGUGI
- 3.JOHN M. NJENGA
- 4.EUNICE N. NYAMBATI
- 5.WILLIAM K. KARIUKI
- 6.HEZEKIAH T. DANIEL
- 7.PETER K. GACHURU
- 8.BEN N. MURUNGA
- 9.LAWRENCE K. NJIHIA
- 10.JOSEPH K. MWANGI
- 11.MAINA WACHIRA
- 12.PEGGY I. NYARITA
- 13.SEBASTIAN O. MADIANG'
- 14.JOSIAH EYAMETI
- 15.JAMES L. KANYINGI
- 16.KIBERA MOSOBA
- 17.JOSEPHAT AYADI IMBYOGA (Suing as the administrator
of the estate of JANET KHAVELE JOSHUA (Deceased))
- 18.JOHN WAMBUA MUSYOKIPLAINTIFFS

VERSUS

KENYA FARMERS ASSOCIATION.....DEFENDANT

RULING

May I commence by mentioning that the names of some Plaintiffs' have been stated in the title of application herein and I shall prefer to refer to the Plaintiff's concerned in this application by their names and not numbers to avoid confusion.

The Applicants have filed the Notice of Motion dated 31st March, 2011 under **section 99** of the **Civil Procedure Act**. They essentially seek that this honourable court be pleased to correct an error in the Judgment by Koome J. The application is premised on the grounds found on the face of the application and expounded in the affidavits of **Harrison M. Kariuki** and **Joseph Kamau Mwangi** sworn in support of the application.

In his supporting affidavit, **Harrison M. Kariuki** states that he is entitled to unremitted retirement benefit scheme funds to the tune of KShs. 31,968/= which the judgment erroneously omitted and he prays that this court corrects the alleged error for him to get his full entitlement. He also filed a supplementary affidavit sworn on 17th April, 2012, in which he states that he and his Co-Plaintiffs supplied the court with the requisite table of the amount due and owing which evidence the Court (Koome J.) acknowledged in her judgment. He laments that despite the Court's (Koome J.) acknowledgement, the Judge left out some of the Plaintiff's names to wit, Simon M. Wagathiu, Peter K. Gachuru, John M. Njenga, William K. Kariuki, Hezekiah T. Daniel and Peggy Nyarita. That due to the aforesaid error, it is difficult to execute the decree. He states that no prejudice shall be occasioned to the Respondents if the error is corrected and finally, that if the application is allowed, it will go a long way in serving the ends of justice since the parties that were left out are not strangers to the suit and were entitled to the fruits of justice too.

Joseph Kamau Mwangi on his part states in his further affidavit that it was erroneously indicated in the judgment that he is entitled to KShs. 119,040/= instead of KShs. 188,480/= and he is therefore entitled to a further KShs. 69,440/=. He prays that the alleged error be corrected by this court.

The Defendant opposed the application herein vide grounds of opposition dated 10th October, 2011. The grounds are that; the application is mischievous, misconceived and a blatant abuse of the process of courts that, the application has been overtaken by events, the last payment having been made over one (1) year ago settling the matter herein; that there is no error and/or mistake on the face of the record as the sum claimed now was not awarded by the court; that judgment was delivered over three (3) years ago; that the error, if it existed, on exercise of due diligence, would have been noted earlier and that the application otherwise lacks merit and ought to be dismissed with costs.

I have now considered the rival arguments.

Section 99 of the **Civil Procedure Act** provides that:

“clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”

It follows that this court has wide discretion to correct errors in judgments or decisions.

What is an error apparent on the face of the record? Black's Law Dictionary defines apparent as, "**That which is obvious, evident or manifest.**" The Court of Appeal observed as follows with regard to review and errors in the case of **Nyamogo & Nyamogo Advocates v. Kogo C.A. No 322 of 2000**:

“There is a real distinction between 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 or on points where there may conceivably be two opinions can hardly be said to be an error on the face of the record.... A mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

Although Harrison M. Kariuki states that despite the court’s (Koome J.) acknowledgement, the names of Simon M. Wagathiu, Peter K. Gachuru, John M. Njenga, William K. Kariuki, Hezekiah T. Daniel and Peggy Nyarita were left out and that due to that error it is difficult to execute the decree, a reading of the Judgment at paragraph 1, page 7 clearly reveals that the Judge consciously made a substantive finding on this issue which reads:

“...It is however, apparent from the records that some of the Plaintiffs did not give evidence nor did they give authority for the other Plaintiffs to act on their behalf that is; Simon W. Wagathiu, Peter K. Gachuru, John M. Njenga, William K. Kariuki, Hezekiah T. Daniel and Peggy Nyalitta. Thus nothing turns on their claim which is hereby dismissed...”

In respect to the claim by Harrison M. Kariuki that the retirement benefits were not remitted and the judgment omitted the said claim, the judge in conclusion at page 8 said, ***“with all the evidence on record, which is unchallenged by the defendant, I am satisfied that the plaintiffs have proved their claim for unpaid salaries, three months’ salary in lieu of leave, contributions to NSSF, Provident Fund and RBS as follows:-”*** then followed the tabulation at page 9 of the judgment. That tabulation represents the judge’s findings which findings are not errors that can be corrected but can only be subject of an appeal.

Simon W. Wagathiu contended that his claim was not allowed yet he had given Raphael Gatimu and Erineriko Kirero Mosaba authority to plead and testify on his behalf by an authority dated 5th July, 2005. In addition to my earlier findings that the Plaintiffs who did not appear gave specific authority to Erineriko, the said Simon has not even bothered to demonstrate that he filed such authority. He did not annex any. Further there is a concise explanation on how the Judge arrived at her decision on the amounts due and owing to the remaining Plaintiffs.

Having considered what an error apparent on the face of record is, it is my view that no such errors exist. What is challenged herein are substantive findings made by the Hon. Judge. It would not be proper for me to re-examine and to reconsider the findings made by the Hon. Judge upon consideration of the evidence before her. That in effect would be sitting on appeal against the judge’s judgment which I am not competent to do. The Decree Holder if dissatisfied, ought to have appealed against that judgment.

It is noteworthy that the Applicants have brought their application quite late in the day and have not explained the reason for their delay. The judgment was read on 2/10/09 and this application was not filed till well over one year. The delay is inordinate. The application herein is unmerited. It is hereby dismissed with the applicants bearing the costs.

DATED and DELIVERED this 28th day of June, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Karanja for the plaintiffs

N/A for the defendants

Kennedy – Court Clerk