**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.144 OF 2003**

**LILIAN MWERU THUITA……..…….....…...…APPLICANT/ PLAINTIFF**

**VERSUS**

**SAMUEL THUITA WANJAMA…….....….....RESPONDENT/DEFENDANT**

**RULING**

The court dismissed the applicants' application to be joined in this cause as the plaintiffs in place of the deceased plaintiff having been appointed her legal representation. In dismissing the application, the court observed that by operation of the law, the plaintiff's suit abated following her death and no application having been made within one (1) year for substitution.

That decision aggrieved the applicants who have now moved the court under the provisions of **Order XLIV Rule 1(1)** of the repealed **Civil Procedure Rules** yet the **2010 rules** were in place when the application was brought. Those provisions are not different from those in **Order 45 rule 1** of the **2010 rules.** The applicants seek in the main suit the review and setting aside of the orders made on 27th July, 2010 dismissing their application for joinder of parties. It is their contention that there was an error on the face of the ruling as regarding the finding that the suit had abated yet one year was not over and further that there cannot be an abatement of a suit which has been concluded and execution commenced.

The application was opposed by the respondent who has submitted that a review cannot be ordered merely for the reasons that there was a wrong interpretation of the law as contended in this application; that when the deceased died, there was no execution pending but only a judgment; that the argument that the application for joinder was filed on 24th January, 2007 was factually inaccurate.

A court will review its decree or order if any person who considers himself aggrieved by such decree or order, discovers a new and important matter or evidence which could not be produced at the time when the decree was passed or order made, or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.

It is also a requirement under **Order 45 rule 1(1)** that the application for review be brought without unreasonable delay. The application is expressed to be brought under the ground that there is a mistake or error apparent on the face of the record and also that there are sufficient reasons to review.

The mistake or error on the face of the record has been identified as the finding that, in terms of **Order XXIII rule 3(2)** of the repealed **Civil Procedure Rules** the suit had abated – whereas **Order XXIII rule II** under which the matter fell, provided an exception to that rule.

One of the leading authorities on the law of review of decrees or orders has explained what constitutes a mistake or error on the face of the record as follows:

**"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reaching an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."**

See **National Bank of Kenya Limited** V. **Ndungu Njau**, Civil Appeal No.211 of 1996.

The application before me clearly raised the issue of interpretation of **Order XXIII rules 3(2)** and **II** of the repealed **Civil Procedure Rules**. In Terms of the above authority, the applicants' recourse is in an appeal as I personally find no mistake or error which is apparent on the face of the record.

The record is clear that the application for joinder was filed on 24th January, 2008 (and not 24th January, 2007 as claimed by the applicants). The plaintiff died on 16th March 2006, as is evidenced by a copy of the Death Certificate. The suit abated by operation of the law one year upon her death. She died during the pendency of the judgment. Unbeknown to Kimaru, J, the plaintiff had died three months earlier as he prepared the judgment. At this stage, the cause was still active and alive. The legal representatives in good time obtained the grant of representation on 8th December, 2006 but instead took several months before bringing the application to be joined in the cause.

A judgment cannot by any stretch of interpretation be the same thing as execution. When a judgment is pending, the matter is not concluded.

In the result, I find no merit to review the earlier orders, not even under the rubric *"any other sufficient reason."* The application is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 14th day of March, 2012.**

**W. OUKO**
**JUDGE**