



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 108 OF 2004**

**CECILIA WAMUYU KABU.....1<sup>ST</sup>  
PLAINTIFF/APPLICANT**

**FRANCIS WACHUGA KABU.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ZIPPORAH WANGUI KABU.....DEFENDANT/RESPONDENT**

**RULING**

Pursuant to the provisions of *Order XLIV rule 1 (1) (a)* of the Civil Procedure Rules (now order 45), **CECILIA WAMUYU KABU** and **FRANCIS WACHUGA KABU**, being the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively took out the Motion dated 6<sup>th</sup> August 2010 whereupon they sought for the following orders:

- (1) THAT the Honourable Court be pleased to review the orders made on the 26<sup>th</sup> November 2009 dismissing the applicants' suit.**
- (2) THAT upon prayer number one above being granted, the Honourable Court be pleased to reinstate the plaintiffs' suit for hearing and determination on merits.**

The Motion is supported by the affidavit of Cecilia Wamuyu Kabu sworn on 6<sup>th</sup> August 2010 plus three other affidavits. **ZIPPORAH WANGUI KABU**, the Defendant herein, filed grounds of opposition to resist the Motion.

Mr. Kebuka Wachira, learned advocate for the Plaintiffs, urged this court to allow the Motion because the Plaintiffs have explained the reasons which prevented them attending court for the hearing of the case on 26<sup>th</sup> November 2009. It is said that the 1<sup>st</sup> Plaintiff fell ill and on that particular day she was on bed rest. The 2<sup>nd</sup> Plaintiff is said to have come to court late because the motor vehicle he was travelling in had a mechanical problem. The relevant documents were attached to the deponent's affidavits filed in support

of the Motion. It is the submission of Mr. Wachira that the aforesaid reasons should persuade this court to exercise its discretion in favour of the Plaintiffs. Mr. Muthui, learned advocate on the part of the Defendant, was of the view that the Plaintiffs have lied to court by relying on documents tailor made for purposes of this application. The Defendant's advocate further pointed out that there was inordinate delay in filing this Motion. The Plaintiffs argued that the delay in filing the current application was due to the fact that the previous application was struck out hence they were prompted to file the current one.

I have considered the rival submissions presented by learned counsels plus the grounds set out on the face of the Motion and the facts deponed in the affidavit of support. I have also considered the grounds of opposition. The application before this court is that of review. The principles to be considered are well settled. Those principles were aptly summarized by the Court of Appeal in **NATIONAL BANK (K) LTD –VS= NDUNGU NJAU C.A. NO. 211 OF 1996 (unreported)** at page 8 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 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 of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached at an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”***

It is not in dispute that the Plaintiffs' suit was dismissed on 26<sup>th</sup> November 2009 for want of evidence. Initially the Plaintiffs' advocate had applied for adjournment. He pointed out that the 1<sup>st</sup> Plaintiff was sick and that the 2<sup>nd</sup> Defendant was in Nairobi. The Honourable Mr. Justice Makhandia refused the application for adjournment on the basis that there was no evidence to show that the 1<sup>st</sup> Plaintiff was sick. He also found that the 2<sup>nd</sup> Plaintiff's absence was not explained to court. The Plaintiffs have now presented documents to court showing that the 1<sup>st</sup> Plaintiff was actually sick. That information had not been passed to the Plaintiffs' advocate to present it to court at the time of arguing the application for adjournment. The 2<sup>nd</sup> Plaintiff has deponed in his affidavit that the motor vehicle he was travelling on had a mechanical breakdown. The Plaintiffs' averments have not been controverted. They remain as credible affidavits evidence in the absence of any replying affidavit. The Applicants have presented new evidence which were not presented to court by their learned advocate because the aforesaid evidence had not reached the learned advocate. That is one of the considerations to be taken into account in review applications. I am satisfied by the reasons given by the Plaintiffs that the Motion should be allowed. The reasons now given were not within the knowledge of Mr. Mugo, learned advocate for the Plaintiffs at the time he applied for the adjournment of hearing of the case. The Defendant has accused the Plaintiffs of bringing the Motion too late in the day. It is said the delay is inordinate. The record shows that the Plaintiffs' suit was dismissed on 26<sup>th</sup> November 2009 and the Plaintiffs filed the summons dated 4<sup>th</sup> December 2009 to have the dismissal order set aside. The aforesaid application was heard and ordered struck out on 28<sup>th</sup> June 2010. The current Motion was filed in Court on 2<sup>nd</sup> December 2010. There was a delay of about five (5) months yet the Motion is dated 6<sup>th</sup> August 2010. It would appear the Plaintiffs gave their advocates instructions to pursue the matter in the month of August 2010, that is about 30 days from the date of the dismissal previous application. The Plaintiffs' learned advocates were duty bound to explain the reasons for the delay in filing the Motion in view of the fact that the law requires that an application for review should be filed without unreasonable delay. A delay of five months in my view is inordinate in the circumstances. Again, the court must look at the entire case to see to it that the client does not suffer for the mistakes of his advocate. I have already stated that there is evidence that the clients (Plaintiffs) gave their advocates instructions to file the current Motion on time but the learned advocates chose to take their sweet time. They delayed for five months. Though the delay is inordinate I will excuse the Plaintiffs on the basis that they were thoroughly led down by their learned advocates. I will allow the Motion as prayed save that the Plaintiffs must pay the Defendant costs of the Motion assessed at Ksh.5,000/= within a period of 30 days in default the Defendant is at liberty to execute without prior reference to court.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of February 2011.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Wachira for applicant and Mr. Muthui Kimani for Respondent.