



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI Civil Case 17 of 2009**

**STEPHEN CHEGE WAWERU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF**

**WAWERU KANINI ALIAS WAWERU KENINI).....PLAINTIFF/RESPONDENT**

**VERSUS**

**EPHANTUS MWANGI & OTHERS.....DEFENDANT/APPLICANT**

**RULING**

On 16<sup>th</sup> November 2009, this Court struck out the Defendants' defence on the basis that the same is incompetent as it was found to have been filed in Murang'a Senior Principal Magistrate's Court. On 17<sup>th</sup> day of November 2009 the Plaintiff applied for entry of interlocutory judgment against the Defendants in default of defence. The Deputy Registrar of this court entered judgment in terms of the request of 24<sup>th</sup> November 2009. When the Defendants learnt of this entry of interlocutory judgment, they took out the Notice of Motion dated 2<sup>nd</sup> January 2010, pursuant to the provisions of *Order IXB rule 8*, *Order VIA rule 3* and *Order XLIV rule 1 & 2, Sections 3A and 80* of the Civil Procedure Act, in which they applied for the following orders:

1. *An order of stay of execution from the orders made on 24<sup>th</sup> Nov. 2009 pending the hearing of the suit.*
2. *An order to review the orders made on 16<sup>th</sup> November 2009*
3. *An order to set aside the exparte judgment made on 24.11.09*
  
4. *An order granting the applicants leave to amend the defence dated 17<sup>th</sup> November 2009.*
5. *Costs of the application.*

When the motion came up for hearing the Plaintiffs raised the Preliminary Objection against the application. The Preliminary Objection is the subject matter of this matter.

Mr. Mindo, learned advocate for the Plaintiffs, urged this court to dismiss the motion because the same does not meet the requirements for an application for review. Secondly it is argued that there was no order capable of being stayed and thirdly, that there is no defence which this court can amend. Learned advocate pointed out that the mistake sought to be reviewed was made in the offices of the advocate hence it is not a mistake apparent on the face of the record. Mr. Wachira, learned advocate for the Defendants, abandoned the prayer for stay of execution and pursued the remaining orders. Mr. Wachira was of the view that if the order for review is given, then there will be a defence to be amended. He was also of the view that the mistake pointed out is on the face of the record hence the same is capable of being reviewed.

I have considered the submissions of both learned counsels. I have also perused the Notice of Motion plus the affidavits filed in support and the grounds contained in the Notice of Preliminary Objection. The main issue in dispute is whether or not the mistake which led to striking out of the defence was a mistake apparent on record. It is admitted by learned counsels that the defence indicated that it was meant to be filed in Murang'a Principal Magistrate's Court and on the basis of that the Hon. Mr. Justice Makhandia struck out the same. It is the submission of the defendants that the defence had been filed in the correct court but it had wrongly described the court on its

title hence that was a typographical error apparent on the face of the record. Under *Order XLIV* of the Civil Procedure Rules, an application for review must be based on the discovery of new and important evidence which was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of record. The applicant for review must strictly prove the grounds for review except for review on the grounds of mistake or error apparent on the face of record failure to which the application will not be allowed. When the issue touching on the defence was raised before Mr. Justice Makhandia, Mr. Wambugu, learned advocate, informed the court that he was not aware of the issue. This prompted the Hon. Judge to proceed to strike out the defence. Can this be said to be a mistake which was not within the knowledge of the Applicant? I do not think so. I am convinced this application does not meet the requirements for review. The other prayers is dependent on the application for review in that if the application for review is allowed, it means that the order striking out the application would be set aside and the defence with its typographical errors would be reinstated. If well advised there are other avenues through which the applicant can seek redress but not through such an application. The Preliminary Objection is upheld. Consequently the motion is ordered struck out with costs.

*Dated and delivered at Nyeri this 23<sup>rd</sup> day of April 2010.*

**J. K. SERGON**

**JUDGE**