



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Case 3 of 1998**

**JACKSON NZOMO MUTISYA (suing as the legal representative of the estate of  
TOM MUTISYA MUINDE- DECEASED).....PLAINTIFF/APPLICANT**

**VERSUS**

**1. SAMUEL NDIBA KIHARA**

**2. JOSEPH MUTURI GITAU.....DEFENDANTS**

**RULING**

1. Before me is an Application premised on Order XLIV Rules 1(a) (b) and Rule 6 thereof as well as Section 3A of the Civil Procedure Rules. The Applicant, Jackson Nzomo Mutisya seeks orders that ***“the order made on 30.10.2007 be varied, reviewed and/or amended to the extent that time for service of the application for amendment dated 7<sup>th</sup> day of November 2007”*** is extended and as a consequence, it is also prayed that all subsequent and resultant orders be set aside. It is further sought that costs of the application be in the cause.

2. From the grounds in support and in the affidavit sworn by B.M.Mungata, advocate, it is the Applicant’s case that this suit is partly heard and there is in fact a partial judgment against the Defendants and the remainder of the suit is limited to the claim for enforcement of the contractual penalty clause. That since the original Plaintiff had since died, the present Plaintiff was substituted in his place and on 30.10.2007, he was allowed 14 days to amend and serve his Plaint and while he filed the application, and by a mistake on the part of his advocate and advocate’s clerk, a hearing notice was served instead of the application for amendment. That subsequently the suit was dismissed for failure to file and serve the application for amendment within time.

3. In his Replying Affidavit, Samuel Ndiba Kihara depones that no new issue has arisen which requires that the earlier orders be reviewed and that in fact the Application is wholly incompetent and fatally defective.

4. This Application at face value looks simple and deceptively so, but if one were to look at the history of the suit, then it clearly brings out the difficulties a court of equity faces when exercising discretion. I say so because the history of this suit is as follows, and I do reproduce it as a background to the application under consideration;

5. In the Plaint filed on 9.1.1998, the Plaintiff sought judgment in the sum of Kshs. 4,475,000/= as part

purchase price for land parcel number Mavoko Town Council 2/151. In a statement of Defence filed on 6.5.1998, the Defendants while admitting that there was a sale agreement involving the suit land, denied that they owed the sum claimed. On 12.2.1998, the Plaintiff filed an application for summary judgment against the Defendants in the sum aforesaid.

6. On 11.8.1998, Etyang, J. entered judgment for Kshs.3,850,000/= and directed that the case should proceed for “ **hearing and determination on the balance of Kshs. 650,000/=.**” On 21.9.2000, Mwera,J. entered judgment for the Plaintiff in that sum after hearing the Plaintiff ex-parte.

7. On 3.11.2000, the Defendants sought to set aside the judgment of Mwera, J. It appears that the Application was allowed but in the meantime the Plaintiff died and his son, Jackson Nzomo Mutisya applied to be substituted in his place by a Chamber Summons dated 12.3.2004. The same was allowed by consent on 23.9.2004 and on 30.10.2007, Sitati, J. ordered the Plaintiff to amend the Plaint by filing a “**formal application for leave to amend within 14(fourteen) days**” from that date. The learned judge also ordered that failure to comply with that order would mean that the “**Plaintiff’s suit stands dismissed with costs to the Defendants.**” The Application was indeed filed on 9/11/2007 but it is agreed that what was served was a hearing notice and not the Application and on 13.3.2008 and for that reason alone, I dismissed the suit as was prayed by the Defendants. The Plaintiff then instituted the present Application.

8. I have taken into account submissions by counsel and although I would have otherwise thought that there is no basis for reviewing the orders of 30.10.2007, on reflection, I think that there is now a sufficient reason to do so. Order XLIV Rule 1 of the Civil Procedure Rules provides as follows:-

“(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 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.”(emphasis added)**

9. In this case, the Plaintiff’s advocate has admitted that the error in serving a hearing notice and not the application was made by his clerk. The Plaintiff had no role in the episode. It is completely human and understandable that the error was made and I do not see that where a party merely serves the wrong document, his suit which has partly succeeded should be wholly dismissed. Further, the matter in issue is not of substance but a purely procedural one to rationalise the Plaint with its new Plaintiff who in any event is now properly before court as such. There is surely a sufficient reason in the meaning of the law of review to allow him to have his day in court. I do not think that justice ever intended that litigation should be conducted in any other way.

10. I shall without much ado allow the Application dated 9.4.2008 but Mr. B.M. Mung’ata Advocate will pay costs which I assess at Kshs. 15,000/= to the Defendants. The Application to amend the Plaint should be served within 7 days of today’s date. Parties at liberty to apply.

11. Orders accordingly.

Dated and delivered at Machakos this **8<sup>th</sup>** day of **May 2008.**

**ISAAC LENAOLA**

**JUDGE**

In the Presence of: Mr. King'ara for Respondents

No appearance for Applicant

**ISAAC LENAOLA**

**JUDGE**