REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 102 of 2002

ELIUD I. MWENDWA & 7 OTHERS……..……..1ST
PLAINTIFFS/RESPONDENT

MARK MUKUNDI…….……...2ND
PLAINTIFFS/RESPONDENT

JAMES NDUNGU…….……3RD
PLAINTIFFS/RESPONDENT

MARY NYAMBURA…….……..4TH
PLAINTIFFS/RESPONDENT

MARY WALUMBE…….……5TH
PLAINTIFFS/RESPONDENT

JAMES NJOROGE…….……..……6TH
PLAINTIFFS/RESPONDENT

TOM WAMBUA…….……..……..7TH
PLAINTIFFS/RESPONDENT

STEPHEN N. KAMAU…….……..…..8TH
PLAINTIFFS/RESPONDENT

VERSUS

EGERTON UNIVERSITY…….……..……..DEFENDANT/ APPLICANT

RULING

The defendant/applicant filed an application by way of a Notice of Motion dated 24th May, 2006 brought under **Sections 3A, 63** and **80(e)** of the **Civil Procedure Act** and **Order XLIV Rule 1** of the **Civil Procedure Rules**. The main prayer in the said application was that:-

"***the judgment and/or decree herein dated 5th May, 2006 be reviewed and/or varied.".***

The application was made on the following grounds:-

" ***(i) There is an error or mistake apparent on the face of the record and the defendant desires a review thereof.***

(ii) The defendant/applicant is aggrieved and dissatisfied with the judgment of this court dated and delivered on 5th May 2006.

(iii) That the defendant/applicant has a good defence.

(iv) The defendant/applicant was not given an opportunity to defend themselves at the hearing of the suit herein".

The application was supported by an affidavit sworn by the defendant's advocate, Mr. Otieno-Olola. The plaintiffs opposed the said application and filed grounds of opposition dated 16th June, 2006.

The events that preceded the delivery of the judgment that is now the subject matter of this application before the defendant had testified were set out in pages 8 and 9 of the said judgment. From Mr. Olola's affidavit, it is clear that both the defendant and their counsel knew that the proceedings had come to a close on the 29th of November, 2005 and a date set for delivery of judgment when the defendant had not testified and that was due to their failure to attend court in good time. The judgment was set to be delivered on the 1st of February, 2006 but due to my official engagements in Nairobi over a considerable period of time, the same was delivered on 5th May, 2006 in the presence of the advocates for both parties.

Mr. Olola further deposed that immediately after the closure of the case, the defendant's representative instructed him to try and arrest the judgement to enable the defendant give its side of the case. On 16th December, 2005 counsel filed an application seeking ***inter alia*** a stay of the court's orders of 29th November, 2005. That application was not brought to the attention of the court and neither was it served upon the plaintiff's advocates. The same was put in the court file only after delivery of the judgment and counsel did not give any satisfactory reason as to why no effort was made to prosecute the said application before delivery of the judgment.

It was contended by the applicant that the court relied heavily on a circular dated 18th June 2001 while the said circular was not applicable to the defendants staff and that the defendant intended to call a witness to testify on the full meaning of the circular but the defendant was unable to do so since it did not testify at all. In paragraph 20 of Mr. Olola's affidavit, he prayed for review and/or setting aside of the said judgment although in the defendant's application there was no prayer for setting aside of the judgment.

In reply to the said application, Mr. Kahiga for the defendant/respondent submitted that the application was bad in law, an abuse of the court process and devoid of merit. He went on to state that Order XLIV did not provide for review of a judgment but talked of review of a decree and regarding the decree that was dated 5th May 2006, the applicant had not stated what it wanted to be done to the decree. He further submitted that there was no error apparent on the face of the record and added that an error on the face of the record ought to be so clear as to be without a dispute. He cited the Court of Appeal decision in ***NATIONAL BANK OF KENYA LTD VS NDUNGU NJAU, Civil Appeal No. 211 of 1996 at Nairobi*** where it was held that an error or omission that will be reviewed must be one which is self evident and one which does not require elaborate argument to be established.

Mr. Kahiga further submitted that the applicant had been given an opportunity to present its defence but it failed to seize the opportunity and cannot therefore claim that it was denied an opportunity to do so. He further urged the court to consider the past conduct of the applicant in that it had frustrated fast disposal of the matter by seeking several adjournments. He added that the applicant had never demonstrated any serious intentions of defending the suit and drew the court's attention to the fact that the affidavit in support of the applicant's application had been sworn by a person who was not privy to the circumstances that gave rise to the cause of the action. He submitted that if the applicant was not satisfied with the judgment of the court, the only option that it had was to file an appeal because there were no sufficient reasons for applying for a review of the decree. Lastly, he submitted that there was undue delay in filing

the said application.

I have carefully considered all the affidavits on record and the submissions made by counsel in this matter. In an application for review an applicant must prove to the court that he has been aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed. He should also show that there was one or more of the following:-

(a) 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 order made.

(b) A mistake or error apparent on the face of the record.

(c) Such other sufficient reason as would warrant a review of the judgment.

In this matter, the only reason that has been advanced by the applicant in seeking a review of the judgment is that there was a mistake or error apparent on the face of the record. Where such a ground is advanced the applicant must clearly point out that error or mistake. However, the applicant was not clear as to what mistake or error it was referring to, if any.

The applicant's counsel seemed to argue that the court in its judgment of 5th May 2006 relied heavily on a circular dated 18th June 2001 from the head of public service and that the said circular did not apply to the plaintiffs. If that was the error which the applicant was referring to, with respect, it was not right. That is an issue which can only be taken up on appeal. In ***NYAMOGO & NYAMOGO ADVOCATES VS MOSES KIPKOLUM KOGO Civil Appeal 322 of 2000 (unreported)*** the Court of Appeal quoted the A.I.R. Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition) volume 3 page 3227 where it was stated that:-

"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for review though it be a good ground for an appeal."

The court went on to observe that there was a real distinction between a mere erroneous decision and an error apparent on the face of the record. The court's interpretation of the aforesaid circular in the absence of any other explanation from the defendant was stated in the court's considered judgment and if the defendant was of the view that the said interpretation was wrong then the right thing to do was to appeal against the decision. In ***NJOROGE AND 104 OTHERS VS SAVINGS AND LOAN KENYA LTD AND ANOTHER [1990] KLR 78*** it was held that where the very existence of an error on the record is contestable, such a matter is a ground which should be canvassed on an appeal.

I must reiterate that the application that is before this court is not for setting aside of the judgment that was entered on 5th May 2006 but one of review even though in paragraph 20 of Mr. Olola's affidavit he urged the court to review the judgment or set it aside. The reasons for the defendant's failure to adduce any evidence in defence of its case cannot be considered in an application for review. As earlier indicated, the defendant did not take any steps to prosecute its application of 8th December 2005. I also agree with Mr. Kahiga that the defendant's application was brought nearly three weeks after delivery of the judgment and that inordinate delay in so doing has not been explained. All in all, I find no merit in the defendant's application and dismiss the same with costs to the plaintiffs.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of July, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Karanja Mbugua for the plaintiff and N/A by the defendant.

D. MUSINGA

JUDGE