



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 476 OF 2009**

**FRANCIS NGIRA BATWARE.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**ASHIMOSI SHITAMBASI T/A ASHIMOSI SHITAMBASI &**

**ASSOCIATES ADVOCATES.....1ST DEFENDANT**

**KEYSIAN AUCTIONEERS.....2ND DEFENDANT**

**ADAN MAALIM.....3RD DEFENDANT**

**RULING**

1. **Francis Ngira Batware**, the plaintiff has presented a notice of motion dated **12th October 2017** (which shall henceforth be referred to as the notice of motion under consideration). He seeks that the court do review and set aside its ruling and orders made on **20th March 2013** and **26th November 2014**. The notice of motion under consideration is brought under section 80 of the Civil Procedure Act Cap 21 and Order 45 Rule 1 of the Civil Procedure Rules.

2. By the ruling of **20th March 2013**, this court dismissed the case against the 1st defendant because the plaintiff had failed to serve the summons on the 1st defendant. By the ruling of **26th November 2014**, similarly this court struck out the suit as against the 2nd defendant because the plaintiff had failed to serve summons on the 2nd defendant for 5 years after the suit was instituted. It is those two orders that the plaintiff seeks their review.

3. The background of this matter is that the plaintiff filed this suit initially against the 1st and 2nd defendants on **3rd July 2009**. There is, in the court file, 5 summons to enter an appearance which although have the Deputy Registrar's stamp, are neither signed nor dated.

4. The 1st defendant moved this court by a notice of motion dated **5th October 2012**, seeking that the suit against him be struck out or dismissed on the grounds amongst others that the plaintiff failed to extract and serve summons to enter an appearance on the first defendant within 24 months of the filing of the suit.

5. This court on hearing that application dismissed the suit against the 1st defendant on the ground that the plaintiff had failed to serve the 1st defendant with those summons.

6. The 2nd defendant also moved this court by notice of motion dated **26th August 2014** also seeking striking out of the suit against the 2nd defendant on the ground that the plaintiff had failed to serve summons on the 2nd defendant.

7. This court by its ruling dated **26th November 2014**, struck out this suit against the 2nd defendant on the ground that the plaintiff had failed to serve the summons on the 2nd defendant.

8. It is therefore the two rulings of **20th March 2013** and **26th November 2014** that the plaintiff's notice of motion dated **12th October 2017** is directed at. The plaintiff relies on the ground that the two decisions were made on the basis of an error apparent on the face of the record because the plaintiff had applied for the issue of the summons to enter an appearance against the defendants but the court had failed to issue those summons. Further that the ruling of **26th November 2014** was on erroneous finding that the plaintiff had not opposed the 2nd defendant's application. The plaintiff also stated that the defendants had actively participated in the proceedings and no prejudice would be suffered if the review was granted. On those grounds, the plaintiff argued that there is sufficient reasons for the review of the said rulings.

9. Before I go further into this ruling, I wish to respond to the 1st defendant's submission that the plaintiff's application under consideration

is defeated by doctrine of res judicata. What the 1st defendant refers to in that regard, is the notice of motion dated **23rd May 2013**, that was filed by the plaintiff which sought review of the ruling of **20th March 2013**.

10. The 1st defendant erred to raise that opposition for two reasons: the first reason is because the record does not show that the notice of motion dated **23rd May 2013** was ever heard and determined as provided under section 7 of Cap 21 which prohibits a court from hearing a matter where the same issue is in a former suit that was heard and finally decided by the court. Section 7 of cap 21 provides as follows:

***“7.No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

11. The second reason I find that the 1st defendant erred is because the notice of motion dated **23rd May 2013** was withdrawn by the plaintiff's learned advocate before court on **19th April 2016**. It was after that withdrawal that the plaintiff filed the notice of motion under consideration.

12. The Court of Appeal in the case **Anthony Gachara Ayub vs Francis Mahinda Thinwa [2014] eKLR** discussed when a party can seek review and stated thus:

*“This court in **Muyodi v Industrial & Commercial Development Corporation & Anor.,(2006) 1 EA 243** held that:*

***“For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.***

13. The plaintiff has not stated that he has discovered new and important matters or evidence. What he has however stated is that the court, in both rulings, made a mistake or error apparent on the record and that because the defendants actively engaged in this proceedings even though they were not served with the summons the suit should not have been struck out against them.

14. The plaintiff submitted that the summons were presented to the court by him when this suit was filed but that the court failed to issue them to him for service upon the defendant. This the plaintiff states was one of the errors evidence in those impugned rulings.

15. As stated before, there are summonses that are in the court file which are stamped with the DR's stamp but are neither signed nor dated. They however bear the year 2009.

16. **Justice G.K. Kimondo** by his ruling of **20th March 2013** was in my view alive to the status of those summonses. The learned judge in that ruling stated:

***“I have seen four original sets of unexecuted summons to enter appearance dating back to the year 2009, the year of the suit. There is no affidavit of service of summons to enter appearance upon the 1st defendant. This contravenes order 5 Rules 1 (6) and Rule 2 (7) of the Civil Procedure Rules 2010. Where the summons are not renewed, in 24 months their validity expires”.***

17 The learned judge continued to state as follows in that ruling:

***“without the summons there is no suit to proceed with. The nexus is obvious. It is the summons and their service that activate the suit: they bring the proposed defendants to defend the action by entering an appearance and defence within the prescribed time. It is incumbent upon the plaintiff to ensure that the summons filed are signed, sealed and collected for service”.***

18. **Justice Fred A. Ochieng** by his ruling of **26th November 2014**, while considering the 2nd defendant's application for striking him out the suit for lack of summons stated after quoting from the ruling of **Justice G. K. Kimondo** as follows:

***“in respect to the applicant, (who is the 2nd defendant) the situation is similar to that of the 1st defendant. There is no proof of service of summons to enter appearance, upon the applicant. Secondly, the unexecuted summons are already more than five (5) years old. They cannot therefore be revived”.***

19. The learned judge proceeded to strike out the case against the 2nd defendant.

20. The plaintiff by the notice of motion under consideration submitted that the learned judges made their rulings on the basis of error apparent on the record, that is, that although the plaintiff applied for the summons it is the court that failed to issue those summonses.

21. In the case of **Anthony Gachara Ayub (supra)** the Court of Appeal considered the term error apparent on the record and stated as follows:

***“In the case of Draft and Develop Engineers Limited vs National Water Conservation and Pipeline Corporation, Civil Case No. 11 of***

2011, the High Court correctly stated that:

***“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.***

22. Is there an error in the subject rulings, which stares one in the face? In my humble opinion the answer is no. The learned judges were aware that the summons on the court record were bearing the year 2009, when this suit was filed, and that they were unexecuted by the Deputy Registrar of this court. Despite noting that, the learned Judges formed the view that the plaintiff had failed to serve the summons on the defendants. There is therefore no error which is self evident.

23. A relevant case, in this regard, is National Bank of Kenya Ltd vs Njau (1995-98) 2 EA. Where the court stated:

***“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 an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”***

24. Both learned judges in their ruling of 23rd May 2013 and 26th November 2014, exercised their discretion in dismissing the suit against the 1st and 2nd defendants and their decision can only be subjected to an appeal before the Court of Appeal.

25. It is because of the above finding that I will quote and rely on the finding of the case African Green Fields Limited & 2 Others Civil Suit No. 1189 of 2000 where it was stated:

***“I am tempted to say that although the plaintiffs application has the face of a review application is has the heart of an appeal.”***

26. The plaintiff also sought review of the two rulings on the basis that there was sufficient reason shown because the defendants had actively participated in the proceedings.

27. Justice G. K. Kimondo did allude to the plaintiff’s replying affidavit where the plaintiff pointed out that the 1st defendant had participated in the proceedings by filing an appearance: but despite that, the learned Judge proceeded to find that the 1st defendant’s application must succeed.

28. It follows, for the above reasons, the review sought by the plaintiff cannot be granted on the basis that there is sufficient reasons.

29. The plaintiff also sought review on the ground that he had filed a replying affidavit to the 2nd defendant’s application, one that was sworn on 26th September 2014. I have looked at that replying affidavit attached to the notice of motion under consideration. It does seem that that affidavit did not bear the correct case number because there seems to be alteration, by hand, to the copy attached to the notice of motion under consideration. That would explain why that affidavit is not on court record and why Justice Ochieng did not have sight of it.

30. For the above reasons, the notice of motion dated 12th October 2017 fails. It is dismissed with costs to the 1st and 2nd defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.**

**MARY KASANGO**

**JUDGE**

***Ruling read and delivered in open court in the presence of***

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

**MARY KASANGO**

**JUDGE**