



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO.91 OF 2001**

**ALEXANDER KARITHI.....APPLICANT**

**VERSUS**

**LUCY WERU.....DEFENDANT**

**RULING**

[1] Before me is a Notice of Motion Application dated 15<sup>th</sup> October 2010 brought pursuant to Sections 1A,1B,3A, 80 1&2 and Order KLIV (I believe the Applicant meant XLIV) Rule 1,2 and 3 of the Civil Procedure Rules CAP 21 of the Laws of Kenya in which the Applicant seeks the following orders:

***1. That court set aside and or review the orders made on 14<sup>th</sup> December 2009 and direct that the judgment and/or decree to be executed against Jamii wholesalers Limited.***

***2. That costs be provided for.***

[2] The said application is premised on the following grounds:

***1. The suit was filed against Lucy Weru through a plain dated 2<sup>nd</sup> September 1999.***

***2. Before the pleadings were closed, the plaint was amended and amended plaint dated 10<sup>th</sup> September 1999 was filed on 13<sup>th</sup> September 1999.***

***3. Service was effected upon the defendant of which Lucy Weru was director cum shareholder and an advocate filed appearance and defence for the defendant.***

***4. The suit was subsequently heard and was pending execution.***

[3] The Applicant elaborated upon these grounds that the aforesaid amendment removed Lucy Weru as a person and replaced her with Jamii wholesalers Limited. Lucy Weru was merely a shareholder cum director of the Jamii wholesalers Limited. Therefore, according to the Applicant his interest was to pursue execution against Jamii wholesalers Limited against whom there is a judgment which has not been satisfied. He stated that the omission of Jamii Wholesalers Limited as the defendant in the judgment and decree was a typing error. He was categorical that judgment herein was against Jamii wholesalers and not Lucy Weru. In fact, there was no judgment against her as she had been removed as a party. Consequently, the Applicant contended that it was only fair if execution proceeds against the company.

[4] The application was opposed via Grounds of opposition filed in court on 10<sup>th</sup> October 2011 in which the defendant contended *inter alia*; that the Application did not comply with the mandatory provisions of Order 45 of the Civil Procedure Rules 2010; and that the plaintiff's proper remedy was to commence proceedings against the party against whom it seeks judgment and decree and consequential execution. Consequently the defendant urged the court to dismiss the Application with costs to the defendant.

[5] When the Application came up for hearing on 9<sup>th</sup> December 2015, it was agreed that the Application be canvassed by way of written submissions. The Applicant in his submissions reiterated the contents of his supporting affidavit and the grounds set out above. It was further submitted that it was imperative to note that the judgment delivered by Hon Kasanga Mulwa on 17<sup>th</sup> December 2002 indicated the defendant to be Lucy Weru despite the amendment which removed her name as a party which he attributed to typographical mistake.

[6] The Respondent also reinforced their above positions but emphasized that Application defied Order 45 of the Civil Procedure Rules in that it was filed seven months after the purported orders were issued, the delay had not been explained and that the Applicant had not exhibited the purported orders of the court. For this proposition, the Respondent sought to rely on the case of **IBENCHO LERO V COOPERATIVE INSURANCE COMPANY LIMITED (2010) eKLR**. It was further submitted for the Respondent that the Application was incompetent and an abuse of the court process as it was supported by an affidavit sworn by counsel for the plaintiff who did not state that he had any authority to swear it. On that basis, the Respondent submitted that the Applicant's proper remedy does not lie in these proceedings and as such the application ought to be struck out and dismissed with costs.

## **DETERMINATION**

[7] I have carefully considered this Application and the rival submissions by the parties. This Application is essentially for review under Order 45 of the Civil Procedure Rules CAP 21 of the Laws of Kenya. But I must say that the turns of events in this case presents difficult circumstances as shall become clear later. Meanwhile, whereas I agree that advocates should not depose contentious matters in an affidavit, I do not consider the matters the deposed to be of contentious character especially given the fact that they were made to show there is an error apparent in the face of the record which in law should be readily discernible without much probing. I will, not, therefore, disregard the averments thereto.

[9] I now turn to the substantive issues. In this case, the Applicant has claimed that there is error or mistake apparent on the face of the record. Such error should be one in the plain eye-sight of the court and should not require much probing or copious explanations to discern. **See the case of MWIHOKO HOUSING COMPANY LIMITED v EQUITY BUILDING SOCIETY [2007] 2 KLR**, where the court sated as follows:

***“It is trite law, and we reiterate, that 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.***

Note also that such errors could be rectified by the court on its own motion. Now that the legal threshold is set, I will simply consult the record to ascertain whether there is such error. I see an amendment was made to the plaint and an amended plaint dated 10<sup>th</sup> September 1999 was filed on 13<sup>th</sup> September 1999. The court also permitted the defendant to amend defence on 25.4.2002. By that amendment, Lucy Weru was removed as a party in the suit and Jamii Wholesalers Limited became the defendant. As a matter of law and procedure, all further proceedings including the final judgment and decree of the court ought to be against Jamii Wholesalers Limited. The proceedings proceeded and liability was settled by consent on 24<sup>th</sup> June 2002. But for unknown reason parties continued to intitule their pleadings with Lucy Weru as the Defendant and not Jamii Wholesalers Limited. This error or mistake was carried over in all the proceedings including the judgment. Clearly, the judgment delivered by the court (Hon Kasanga Mulwa) on 17<sup>th</sup> December 2002 and all pleadings subsequent to the amendment herein carry a patent error or

mistake which I should think was inadvertent as I have not seen or been told of any ill motive to perpetuate an erroneous state of affair by any of the parties. As a result of this error, execution by way of arrest was issued against Lucy Weru. This action prompted her to apply vide application dated 14<sup>th</sup> December, 2009 for stay of execution of the warrants of arrest. The court (Kasango J) granted ex parte stay orders on 15<sup>th</sup> December 2009 and confirmed the orders on 8<sup>th</sup> March 2010. The court also set aside the judgment against Lucy Weru but allowed the Plaintiff leave to apply for further orders. In handling the application by Lucy Weru, the court's main concern was that the warrants issued in execution of a decree in this suit in which she was not a party. The error did not only affect a person who is not a party but also affected a non-party. This is regrettable. I note that there were attempts to rectify the error but for some reason or other the efforts were not successful. Without insinuating any ill-will on anybody, I should think that the error could have been resolved through a reconciliation of the record without having to engage in circumlocutions. But even with these facts, the defendant's advocate still argued that the remedy for the Plaintiff does not lie in these proceedings. This argument is completely oblivious of the above stated facts, the nature and import of amendment of pleadings as well as rule against multiplicity of suits. Of significance, the advocate admitted that there had been an amendment to remove Lucy Weru and join Jamii Wholesalers Limited as the Defendant. Therefore, with respect I do not agree with this submission.

[10] As I pointed out earlier, the events in this case present a sort of a squirm. I find myself in a dichotomy. I see two options in this case; either I order this suit to start de novo or order a rectification of the record. I am minded to note that only proper parties should suffer the consequences of a judgment of the court. Similarly, the record of the court should always reflect the true position of things; including the parties. The error I have described above completely distorted these proceedings and obscured the true description of the defendant. In addition, the error became a major source of injustice to the Plaintiff who holds a judgment that he cannot execute; he is divested of justice. His journey started in 1999 in the lower court and continued in this court in 2001 to date; it is far from crystalizing. In these circumstances and the spirit of substantive justice; I am enjoined to taking a broader approach to justice in applying prescriptions of the law here. Accordingly, I think I should order a rectification of the record as well as the judgment herein to read and relate to Jamii Wholesalers Limited as the Defendant. I need not remind that Lucy Weru was never synonymous with Jamii Wholesalers; a limited liability company and quite separate from those who compose it. On this, see the famous case of **SALOMON vs. SALOMON**. Therefore, correcting the record is important so that the proper party in a suit is condemned in a judgment and execution is levied against such party. In this case, it would be most unfair and an injustice not to allow the request made by the Applicant. This is such one case which carries an erroneous description of a party as a result of a mistake or error apparent on the record. It is, however, a case which requires extreme judicial brevity to reconcile. For those reasons, I shun the easier rout especially given the injustice that will be visited upon the Plaintiff. I order the record to be rectified in the interest of interest. But whether the judgment will be executable or not is for another day as the Plaintiff will have to surmount matters to do with applicable limitation periods as well as the orders issued in Miscellaneous No 1345 of 2005 on matters of United Insurance Company, if they still subsist. I will not make any order as to costs. It is so ordered.

**Dated, signed and delivered in court at Meru this 6<sup>th</sup> day of June 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwirigi advocate for Mr. Thangicia advocate for defendant.

M/s. Meme advocate holding brief for Mr. Kiome advocate for the plaintiff.

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**F. GIKONYO**

**JUDGE**