



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE NO.72 OF 2002**

**KIJATA ENTERPRISES LIMITED.....PLAINTIFF**

**Versus**

**KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT**

**RULING**

**Reinstatement of suit**

[1] By a Notice of Motion Application expressed to be brought pursuant to Sections 1A, 1B, 3 and 3A and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and Section 159 of the Constitution, the plaintiff has sought for the following orders:

***1. THAT this Honourable court be pleased to review it's Ruling/Order dismissing the plaintiff's claim for want of prosecution and reinstate the same for hearing or alternatively and without prejudice dismiss the defendant's counter claim and order each party to bear its own costs of the suit and counter claim.***

***2. To do justice to both parties order the Deputy Registrar High Court at Meru to present himself and produce all his notices on fixing of civil cases and his relevant diaries for High Court at Meru Registry from October 2010 to 2012.***

***3. THAT the costs of this application be provided for.***

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

***1. The plaintiff is aggrieved by the order of this court dismissing his case.***

***2. That the Deputy Registrar circulars, notices and the registry diary which are in possession of the Deputy Registrar will show the true position and bad state of fixing of cases at Meru High Court Registry.***

***3. THAT the plaintiff, on his own, could not produce these documents.***

***4. THAT there is a mistake and error which is apparent on the face of the record in view of the new provisions of the Civil Procedure Act and Rules.***

***5. There is sufficient reason for review.***

**6. That the defendant has used the Law and Civil Procedure Rules selectively as it had ignored the provisions of Sections 1A and 1B of Civil Procedure Act provisions of Order 11 of the Civil Procedure Rules.**

**7. THAT the application for dismissal of the suit was premature as the new Rules came into effect on 10<sup>th</sup> September 2010 and the suit was reinstated on 18<sup>th</sup> November 2011.**

**8. THAT the defendant has taken undue advantage as even when the suit was dismissed did not fix the counter claim for hearing**

**9. THAT the application has been brought without delay but the court file has been missing.**

[3] The plaintiff's case was that this case was filed in 2002 but due to some unfortunate incidents especially lack of judges the suit and the defendant's counter claim were not heard. Therefore, it was wrong for the defendant's counsel to have applied for the case to be dismissed on 4<sup>th</sup> June 2008 but leaving the counter claim alive. The plaintiff averred that thereafter he made an application for setting aside of the dismissal and that the application was not heard until 21<sup>st</sup> September 2010 due to the absence of the defendant and that finally a Ruling was made on 1<sup>st</sup> November 2010 dismissing the suit for want of prosecution.

[4] When the matter came up for hearing on 5<sup>th</sup> November 2014, the court directed that the application herein shall be canvassed by way of written submissions. The plaintiff submitted that the grounds proposed for review expresses its grievance which was as a result of dismissal of this suit. The Plaintiff argued that there was discovery of new information as set out in the 2<sup>nd</sup> supporting affidavit by Benjamin Maitima, the plaintiff's advocate court clerk who explained the frustrations caused by failure to get the defendant's advocate to come to court for purposes of fixing a date for hearing of this suit. Thereafter the impossibility of getting a date in the High Court Registry was worsened by; (1) notices by the Deputy Registrar, High Court Meru placing caveats on fixing of cases; and (2) early closing of court diaries. It was further submitted that a review could be granted wherever the court considers that it was necessary to correct an apparent error or omission on part of the court; such error must be self evident and should not require a deliberate argument to be established. According to the Plaintiff, the documents in possession of the Deputy Registrar were self evident of the impossibility of fixing a hearing date and is important evidence that could have not been discovered by the applicant after exercise of due diligence.

[5] The Plaintiff was convinced that in the spirit of the Constitution the court should invoke its inherent powers and reinstate this suit as a way of preserving the ends of justice. They stated that the material before court was sufficient to warrant review of the dismissal order herein which is by any means adverse. They said that there had been no delay in bringing this application and should, therefore, be allowed as prayed.

[6] The Defendant opposed the motion and submitted that the plaintiff was merely abusing the right to review because he had been granted leave to appeal but he did not utilize that opportunity. The defendant relied on the case of **MURITHI GACHUHI & ANOTHER vs. MUTUGI MWANIKI NYERI CIVIL APPEAL NO. 23 OF 1994** to support the foregoing proposition. The Defendant further argued that the application did not meet the threshold under Order 45 Rule 1 of the Civil Procedure Act as; (1) there was no discovery of new and important matter of evidence that was not within the applicant's knowledge after exercise of due diligence; (2) the affidavits in support of the application did not allude to any error on the face of the record; and (3) there was no sufficient cause. It was contended that the allegation that the Learned Judge struck out the suit without checking the registry cannot be a sufficient cause. Finally it was submitted that there was nothing that prevented the applicant from summoning the Deputy Registrar at the time of the hearing of the application. They posit that this court cannot sit on appeal against its own orders. Consequently the defendant contended that the application lacked merit and accordingly urged the court to dismiss the same with costs.

## **DETERMINATION**

[7] Much was submitted upon on review. But upon carefully consideration of this application, the rival submissions of the parties and the authorities relied upon by the parties; I take the following view of the matter. The remedy of review is provided for in order 45 of the Civil Procedure Rules in the following terms:

1. ***(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 a 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.***

***2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the dependency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”***

[8] My reading of Order 45 rule (1) of the Civvil Procedure Rules, an application for review must satisfy the following requirements:

***(1) That there has been a discovery of new and important matter or evidence.***

***(2) Even after exercising due diligence, the new and important matter discovered must not have been in the knowledge of the applicant or could not be produced by him before the decree was passed or***

***(3) That there is a mistake or error apparent on the face of the record, or***

***(4) There is any other sufficient reasons to order review; and***

***(4) The application should be made without unreasonable delay.***

### **Discovery of new and important matter or evidence**

[9] The test for this ground of review is that the new and important matter in issue could not have been in the knowledge of, or produced by the Applicant at the time of the decree. The echo of the sense of the law in using the term ‘new’ in Order 45 of the Civil Procedure Rules is explained by ***The Black’s Law Dictionary 7<sup>th</sup> Edition*** which defines “new” as “***something that has recently come into being***” or “***recently discovered***”. Applying this test, and with tremendous respect, the notices by the Deputy Registrar on hearing dates and early closure of court registry diary cannot be **said to have “recently come into being” or “recently discovered.”** There cannot be a discovery of new and important in the sense of Order 45 of the Civil Procedure Rules of those notices issued by Registrar of court. It is impossible to show that the Plaintiff has now discovered them and that he could not, even with due diligence have had knowledge of, or produced them at the time the suit was being dismissed. Other than the generalized statements made by the Plaintiff, there was no evidence to show the alleged impossibility in obtaining hearing dates in Meru High Court. Therefore, as long as the Plaintiff is relying on the arguments on the notices by the registrar the ground of discovery of new and important material fails flat. let me discuss the other ground on alleged mistake or error apparent on the face of the record.

## **Error or mistake apparent on the record**

[10] For this ground to succeed, the error must be in the plain eye-sight of the court; one which is easily and readily discernible and does not require copious explanation or much probing to establish. See the following cases on this point. **In the case of NYAMOGO & NYAMOGO ADVOCATES vs. KOGO (2001) EA 170, the Court of appeal rendered itself thus:**

*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 as 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 appeal.”*

Similarly, in the Case of **MWIHOKO HOUSING COMPANY LIMITED v EQUITY BUILDING SOCIETY [2007] 2KLR**, the court stated 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. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of 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. See Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).*

*In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”*

[11] The Plaintiff argued that the judge dismissed the suit without consulting the record or the registry and it that had he done that, it could have occurred to the judge that it was impossible to obtain a hearing date due to the notices which were in possession of the Deputy Registrar and also due to failure to procure the attendance of the Defendant’s advocate to fix a hearing date. I could see strain in the Plaintiff’s attempt to fit these facts into the head of ‘*error or mistake apparent in the face of the record*’. And I was anxious to understand how those facts would amount to ‘*error or mistake in the face of the record*’. Ultimately, the plaintiff did not show the particular errors or mistake which was apparent on the face of record. The ground, therefore, fails.

## **Any sufficient reason**

[12] **The Plaintiff pleaded with the court to reinstate this suit in the interest of justice.** The tag ‘*In the Interest of Justice*’ often falls in our lips, but sometimes we attribute to it an all-cure stature even for deliberate lapses and omissions that we have authored. But that aside, is there **any other sufficient reason which could justify a review in this case?** **The Plaintiff argued that the Defendant took undue advantage in applying for dismissal of the suit but leaving his counter-claim intact; he has also not set down the counter-claim for hearing. The Plaintiff also argued that the defendant used the law selectively in ignoring the provisions of sections 1A and B of the Civil Procedure Act and the provisions of Order 11. But the Plaintiff did not demonstrate**

the exact manner the law was ignored or selectively applied by the Defendant. I need not state that a counter-claim is own action with a life of its own; it is not affected by dismissal or withdrawal of the suit. Therefore, the alternative prayer in the application is self-serving and selfish. The prayer was styled as follows:-

*1. ...or alternatively and without prejudice dismiss the defendant's counter claim and order each party to bear its own costs of the suit and counter claim.*

I must repeat also that the Plaintiff did not demonstrate the alleged "bad state of filing cases at Meru High Court Registry" or impossibility in obtaining hearing dates in Meru High Court. These allegations were left at very high level of generalization and without a foot to stand; they cannot be sufficient reason for review. In any event and as was rightly submitted by the defendant, there was no reason why the plaintiff did not apply to have the Deputy Registrar to explain the matters that the applicant is now raising. As a matter of fact it would appear from the record that the plaintiff raised similar issues before Makau J who considered the allegations and dismissed the suit on 1<sup>st</sup> November 2012; see what the judge remarked *inter alia* at page 6:

*"...the respondent's allegation of directive that only old matters were set down for hearing has not been proved to have been issued nor has the respondent demonstrated if such direction was issued, was issued by who and over what matters, and whether this suit was included in the alleged directive."*

Sufficient reason must be deduced from the facts of each case and the facts of this case do not disclose any sufficient reason to justify a review of the order of the court herein. See the case of **MICHAEL MUNGAI v FORD KENYA ELECTIONS & NOMINATIONS BOARD & 2 OTHERS [2013] eKLR** where the Court stated:

*"A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of NGORORO v NDUTHA & ANOTHER [1994] KLR 402 the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgment is entitled to apply for review. Such a reason can be 'sufficient reason' for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision.*

### **The upshot**

[13] It is quite clear the direction the court is taking. Except I must say that I am alive to the fact that summary dismissal of a suit without hearing the merits is most draconian a judicial act, comparable only to the proverbial drawing of the Sword of Damocles. However, despite the unpleasant nature of the dismissal order, if it is the only appropriate measure to take in a proceeding, the court should not hesitate to take it. See what was stated in **ALLEN vs. SIR ALFRED MC ALPINE [1968] All ER 543**:

*"To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain."*

**Accordingly, the upshot of my analysis in this case is this.** There has been a discovery of new and important matter or evidence, which, even after exercising due diligence could not have been in the knowledge of or *produced by the Plaintiff at the time* this suit was dismissed. There is no a mistake or error apparent on the face of the record, or any other sufficient reasons to order review. The dismissal of the suit was in order. Accordingly, I dismiss **the application dated 12<sup>th</sup> January 2013. There will be no order as to costs.**

Dated, signed and delivered in open court at Meru this 2<sup>nd</sup> day of June 2016

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Mbaikiata advocate for plaintiff

Mr. Wahome Gikonyo advocate for defendant.

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**F. GIKONYO**

**JUDGE**