



4. The application is premised on the grounds on the face of the application and the averments of Gibson Maina Kamau in the supporting affidavit sworn on 12<sup>th</sup> August, 2014. The defendants' main gravamen is that although this court awarded the claim for loss of future earning capacity, the said was neither pleaded nor proved. That the said claim was only raised in the plaintiff's submissions and the defendants contested in their submissions. That despite the defendants' submissions on the said point, this court failed to consider the defendants' submissions that the claim should have been specifically pleaded and proved. It is the defendants' position that the aforesaid is an error / mistake apparent on the face of the record and there is sufficient reason to review the judgment.
5. The plaintiff opposed the applications vide the replying affidavit of Rosemary Wangari Chege sworn on 2<sup>nd</sup> September, 2014. She contends that the plaintiff did not introduce the claim of loss of earning at the submission stage. She stated that the claim was all along known to the defendants; that since the position in law is that loss of earning capacity is a claim for general damages, the plaintiff's claim general damages includes loss of earning capacity.
6. This application was dispensed with by written submissions. In their submissions the defendants attempted to define a mistake or error apparent on the face of record. In so doing they relied on ***Draft and Develop Engineers Limited v. National Water Conservation and Pipeline Corporation [2014] eKLR***. The High Court in the said case described an error apparent on the face of the record as that which cannot be defined precisely or exhaustively. They amplified the court's sentiments that; ***"Where an error on a substantial point of law stares one in the face, and there could be reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out..."*** They further relied on ***Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014) eKLR*** where it was held as follows:
 

***"As authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score..."***
7. The defendants lament that the no concise reason for declining to adopt their position with regard to the claim of loss of earning capacity was given.
8. The plaintiff relied on the case of ***Douglas Kalafa Ombeva v. David Ngama (2013) eKLR*** to illustrate the difference between loss of earnings and loss of future earning capacity. In the said case, it was held that compensation for loss of future earnings are awarded for real assessable loss proved by evidence and that compensation for diminution in earning capacity is awarded as part of general damages. The plaintiff cited the case of ***Draft and Develop Engineers Ltd*** (supra) and relied on the following excerpt:
 

***"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."***
9. I have considered the depositions and submissions together with the authorities relied on in respect to this application. Review is provided for under section 80 of the Act and Order 45 rule 1 (1) of the rules so **section 3A** can be invoked. Section 80 provides:

***“Any person who considers himself aggrieved-***

- a. ***By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
- b. ***By a decree or order from which no appeal is allowed by this Act,***

***may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

and Order 45 rule 1 (1) provides:

***“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 pronounced 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.”***

10. It follows that for this application to succeed, the defendants must demonstrate that there is an error or mistake apparent on the face of the record and that the application has been brought timeously. This application was filed close to a month after the pronouncement of the judgment. I am satisfied that it was brought timeously. What is left for this court is to determine whether or not the defendants have demonstrated that there is an error or mistake apparent on the face of the record.

11. The broad working rule for determining what an error apparent on the face of record is has been set out in a number of decisions including ***Hassan Karim and Co. Ltd v. Africa Import and Export Central Corp. Ltd (1960) E.A. 396*** as an error that is obvious and self-evident. An error which needs to be established by a long drawn process of reasoning on points where they may conceivably be two opinions cannot therefore be called a patent error. An error apparent on the face of record has not been precisely defined by law and depends on the facts of each case. In this case the error according to the defendants appears to be the award of the claim of loss of earning capacity. Whereas the defendant's claim that it was not pleaded and proved, the plaintiff contends that it falls under general damages and did not have to be specifically pleaded. What is termed as an error or mistake apparent on the face of record in this case requires extraneous matters to show its correctness. In the circumstances it does not qualify to be termed so. It is in my view a subject of an appeal.

12. In view of the foregoing, this application is dismissed with costs to the plaintiff.

Dated, Signed and delivered in open court this 7<sup>th</sup> day of November, 2014.

J.K.SERGON

**JUDGE**

In the presence of:

Ombete h/b for Chege for the Plaintiff/Respondent

Tugee for for the Defendants/Applicant