



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE 80 OF 2005**

**REV. JEREMIAH MUKU.....PLAINTIFF/RESPONDENT**

**V E R S U S**

**METHODIST CHURCH IN KENYA**

**TRUSTEES REGISTERED..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**REV. DR. STEPHEN KANYARU M'IMPWII...2<sup>ND</sup> DEFENDANT/APPLICANT**

**Civil procedure Practice**

ü Review application for – grounds for allowing review- whether review can be ordered on the ground of discovery of new matter- or ground of any other sufficient reason-whether to be analogous to other grounds for review - Civil Procedure Act (Cap 21 Laws of Kenya) Section 80, Civil Procedure Rules Order XLIV Rule 1.

**R U L I N G**

By a notice of Motion premised upon the provisions of Section 3A of the Civil Procedure and Order XLIV Rule 1 of the Civil Procedure Rules the Defendants herein, sought two orders that:

**(a) this court do review the ruling and decree herein delivered and issued, respectively on 19<sup>th</sup> March 2004,**

**(b) Costs of this application be provided;**

The Motion was supported by the Affidavit of Rev. Dr. Stephen Kanyaru M'Mpwii Presiding Bishop of the 1<sup>st</sup> Defendant /Petitioner the Methodist Church of Kenya sworn on 30<sup>th</sup> October 2008, and the grounds on the face of the Motion.

When the Motion was urged before me on the 22<sup>nd</sup> day of June 2009 Mr. Gicheru, learned counsel for the Defendants/Applicants relied upon the said supporting affidavit and the grounds on the face on the Motion Counsel also relied on the case of **Kimita and Another vs Wakibiru [1986] K.L.R 578** as to the review of any order on the grounds of “**any other sufficient reason**” under Order XLIV rule 1(1) of the Civil Procedure Rules.

On his part, Mr. Mutula Kilonzo (Junior) who opposed the application relied upon the Replying Affidavit of the Rev. Jeremiah Muku, the Plaintiff/Respondent herein. Said counsel relied on decided cases, namely (1) **Touring Cars (Kenya) Ltd vs Munkanji [2000] E.A [261** (2) **Yusuf Vs Nokrach [1971] E.A. 104** (3) **Barclays Bank of Kenya Ltd Vs. Abdi Abshir Warsame & Another [2006] EK.L.R.** (4) **Ndirangu vs Commercial Bank of Africa [2002] K.L.R 603** and (5) **Origo and Another vs Mungala [2005] K.L.R. 307.**

As observed earlier, the Motion herein is premised upon the provisions of Sections 3A and 80 of the Civil Procedure Act, and Order XLIV Rule (1) of the Civil Procedure Rules. I will examine each of these provisions and as necessary refer to the relevant authorities cited above.

Section 3A of the Civil Procedure Act reiterates the Court's inherent power to make such orders as may be necessary for the ends of justice to prevent abuse of the process of Court. Section 80 of the said Act enables any party which considers himself aggrieved-

(a) **by a decree or order for which an appeal is allowed by the Act but from which no appeal has never 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 XLIV is made pursuant to Section 81 of the said Act and rule (1) thereof provides:-

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 was 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 review to the court which passed the decree or made the order without unreasonable delay.**

The three conditions for applying for a review of either the decree or order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as – **Firstly** the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order was made;- **secondly** on account of some mistake or error apparent on the face of the record, or **thirdly**, any other sufficient reason.

In the case of **Kimita and another vs Wakibiru** (supra), the Court of Appeal held inter alia that the third ground “**any other sufficient cause**” under Order XLIV Rule 1(1) enabling a party to apply for review is not necessarily confined to the kind of reason stated in the two preceding heads, namely error and discovery of new evidence neither do those heads form a genus or class of things which the third general head would be analogous to.

The Court of Appeal further held in the same case that the Civil Procedure Act (Cap 21), Section 80 confers an unfettered right to apply for review and so the words “**for any other sufficient reason**” need not be analogous with other grounds specified in the order. This holding negated the holding by Phadre J. in the Ugandan case of **Yusufu vs Nkkachi [1971] E.A. 104**, following Mulla on Indian cases, held that the third ground “**Any other sufficient reason**”, means reason of a kind analogous to the two set out in the rule.

In contrast to the decision **Kimita and Another vs Wakibiru** (supra) in **TOURING CARS (K) Ltd vs Mukanji [2000] I E.A. 261**, the Court of Appeal held;-

....**Order XLIV rule 1 of the Civil Procedure Rules provides for these heads under which a review may be applied for produced where a judge finds the new and important evidence has been produced he is under a duty to consider whether this evidence could not have been discovered after the exercise of due diligence by the party seeking to produce it. In the circumstances of the case and if this ground was to be considered the new evidence was not of a kind that Munkanji could not have discovered during the hearing of the suit.**

In **Barclays Bank of Kenya Ltd vs Abdi Abshir Warsame and Darare Transporters Limited [2006]** e.K.L.R. Kasango J. referred to the case of **John Francis Munyooli Vs Industrial And Commercial Development Corporation** and Another where it was held-

**In an application for review it is incumbent upon the applicant to show that there has 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 or he must show that there is some mistake or error apparent on the face of the record or that there is any other sufficient reason.....An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.**

In **Ndirangu vs Commercial Bank of Africa [2002] 2 KLR. 603**, Oguk J. held inter alia:

- 1. An application for review can only succeed if the applicant proves an error or mistake apparent on the face of the record discovery of new evidence or any sufficient reason.**
- 2. An application for review on the ground of new evidence will succeed only if the applicant proves that he did not have it in his possession at the time and would not have obtained it despite due diligence.**

Finally in **Origo vs Mungala [2005]2 K.L.R. 307** the Court of Appeal held inter alia:-

- 1. A person who makes an application for review under the Civil Procedure Rules Order XLIV Rule 1 has to show that there has 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; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The applicant must make the application for review without unreasonable delay.**
- 2. An erroneous conclusion of law or evidence is not a ground for review but may be a good ground of appeal.**
- 3. A person who files a Notice of Appeal which is struck out cannot thereafter proceed by way of review as rule 1 (1) (a) of the Civil Procedure Rules Order XLIV applies to an order from which an appeal is allowed but from which no appeal has been preferred there was no basis for the appellant's application for review.**

In light of both Section 80 of the Civil Procedure Act and order XLIV rule 1 (1) of the Civil Procedures Rules and the authorities cited the Applicants Motion raises but one issue, whether there is adequate ground for review of the Preliminary Decree dated 19<sup>th</sup> March 2004 and issued on 25<sup>th</sup> March 2004.

From Paragraph 21 of the Affidavit of Rev. Dr. Stephen Kaniaru M'Impwii, the sole ground for the application is the apparent discovery of new and important evidence – **“that the Plaintiff/Respondent was born on 15<sup>th</sup> March 1943”**, and to prove, this averment is annexed a bundle of documents including the Plaintiff's personal employment data in annexure **“SKM7”**, and that he attained the compulsory retirement age of 65 years on 15.03.2008, and that the court should therefore review and

vacate the order requiring the 1<sup>st</sup> Defendant/Applicant to pay the Applicant the monthly salary of Ksh.15,400/-

Although Mr. Gacheru learned Counsel for the Applicants relied on the case of **Kimita & Another vs Wakibiru** that an order may be reviewed for any other sufficient reason, neither the Affidavit in support, nor counsel advanced “**any other sufficient reason**” whether or not analogues to the two first grounds for review on which the court may exercise its unfettered discretion under section 80 of the Civil Procedure Act, or indeed Order XLIV rule 1(2) of the Civil Procedure Rules. Indeed all the authorities cited above may be summarized as saying that an application for review can only succeed if the Applicant proves an error on the face of the record, discovery of new matter or evidence or any other sufficient reason. For instance in **Kimita & Another vs Wakibiru** (supra), the Court of Appeal allowed “**a review on the ground of any other sufficient reason**” being an error in the acreage of the land and the consent order was review to rectify that error

In this case, there is not an iota of doubt that the new evidence, that is to say, the personal employment data showing the Plaintiff’s date of birth as being 15<sup>th</sup> March 1943, is a matter which was always available with the 1<sup>st</sup> Defendant being the Plaintiff/Respondent’s employer and which with a little exercise of diligence its staff should have produced way back at the commencement of the proceedings herein in the subordinate court in 2003. The Application fails on that ground alone.

There is however another ground why the application for review should fail a person who files an appeal and abandons that appeal cannot proceed by way of review as rule 1(1) (d) of Civil Procedure Rules Order XLIV applies to an order from which an appeal is allowed but from which no appeal has been preferred see the case of **Origo vs Mungala** (supra).

In this case, the Applicants annexure 3 is a Memorandum of Appeal. That Appeal is pending.

Lastly the authorities suggest and it is good practice, that an application for review be brought without unreasonable. An application dated 30.10.2008 to review an order made on 19<sup>th</sup> March 2004 and issued on 25<sup>th</sup> March 2004 is inordinately delayed, and cannot be said to be made in good faith.

Both on the law and the authorities, the application lacks merit, and the same is dismissed with costs to the Plaintiff.

It is so ordered.

**Dated Delivered and Signed at Meru this 3<sup>rd</sup> day of July 2009**

**M. J. ANYARA EMUKULE**

**JUDGE.**