



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 201 OF 2009**

**INFORM CREATIVE INTERIOR LTD.....PLAINTIFF**

**- VERSUS -**

**TELKOM KENYA LIMITED.....DEFENDANT**

**RULING**

1. This long running dispute between the plaintiff and the defendant was finally resolved by this court's judgment dated **2nd February, 2018**. The relationship between the plaintiff and the defendant was contractual, whereby the plaintiff was contracted by the defendant to re-design/refurbish the defendant's business outlet. The plaintiff was required under that contract, to design architectural drawings of the defendant's business outlet.
2. The judgment of the court in this matter of **2nd February, 2018**, is one of the most eloquent and well reasoned judgment I have had the pleasure to read in the recent times. It makes it more poignant because the trial Judge **Justice Onguto**, who wrote that judgment is no longer with us having passed away on **2nd March, 2018**.
3. By that judgment, the judge found the defendant was in breach of contract and proceeded to award various amounts to the plaintiff. The judge also, ordered that interest on those amounts be applied from the date of judgement.
4. The plaintiff has presented a notice of motion application brought under Order 45 of the Civil Procedures dated **19th March, 2018**. By that application the plaintiff seeks to review the judgment of this court. The plaintiff seeks review of three areas of that judgment.
5. The first area, the plaintiff posed it as: whether the honourable court erred in failing to award the plaintiff the dues for dealer shop. In the plaintiff's view, on this head, the plaintiff submitted that the judge erred in determining on this issue and in choosing to entirely rely on terms of the contract signed by the parties and failed to consider some of the other evidence adduced at the hearing.
6. The trial judge by his judgment at paragraph 35, in discussing the written contract between the parties stated:  
  
***“the document (contract) authenticity was thus not in question. It governed the relationship between the parties.”***
7. The trial court in paragraph 41 of the judgment also stated:  
  
***“to construe the contract as covering any other obligation on the parties would be uncommercial because that would not reflect the intention of the parties as gathered from the incorporation of very detailed provisions relating to the parties obligation”.***
8. The trial judge, however, later in the judgment accepted that the plaintiff was entitled to claim for re-designed work it undertook at the request of the defendant, even if it was outside the scope of the contract.
9. The 2nd ground on which the plaintiff sought review is in the finding of mileage reimbursement. The plaintiff was of the view that the trial judge erred in determining that all transport disbursements were only payable upon proof. The plaintiff submitted that the contract between the parties specifically provided that mileage allowance for road transport was calculable at the prevailing AA rates.
10. The trial judge at paragraph 82/83 of the judgement stated:

***“ on disbursements, I would agree with telkom (defendant) that the same was only payable upon proof; that is to say, upon production of disbursement receipts and documents.....ICIL (the plaintiff) did not produce such receipts to telkom and to the court...reimbursement upon claim entails proof of expenditure”.***

11. The plaintiff had relied on invoices, as proof of travel, detailing the milage travelled in different parts of the country.

12. The 3rd ground upon which the plaintiff seeks review is on the award of interest. The trial judge awarded interest from the date of judgment.

13. The plaintiff's view was that the trial court having found that the defendant was in breach of the contract, the court should have proceeded to order interest to accrue from the date it was due. In this regard, the plaintiff referred to the case ***Highway Furniture Mart Ltd vs Permanent Secretary Office of The President and Another [2006] eKLR***, where it was held:

***“the justification for an award of interest on principle sum is to compensate a plaintiff for the deprivation of any money or specific goods through a wrong of a defendant.”***

14. The application was opposed by the defendant. In the defendant's view the application was not within the ambits of Section 80 of the Civil Procedure Act Cap 21 or Order 45 of the Civil Procedure Rules. In the defendant's view for the plaintiff to succeed in its application for review, it needed to satisfy the court that:

***a. There is discovery of new and important matter or evidence which after exercise of due dilligence, was not within the knowledge of the plaintiff or could not be produced by him at the time when the decree was passed; or***

***b. There is some mistake or error apparent on the face of the record; or***

***c. There is sufficient reason to obtain the orders sought.***

15. In the defendant's view, the plaintiff did not satisfy the above requirements and that a plain reading of the plaintiff's submissions revealed that the plaintiff was seeking an appeal of the court's judgment and not review. The defendant relied on the case ***National bank of Kenya Ltd v. Ndungu Njau [1995-98]2EA*** the Court of Appeal held 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 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 ground for review...the learned Judge. He made a conscious decision on the matters in controversy and 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. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”***

## **ANALYSIS AND DETERMINATION**

16. As correctly stated by both learned counsels a review is granted under Section 80 of Cap 21 and Rule 45 of the Rules when there is an apparent error or omission on the part of the court, or where there is discovery of new and important evidence, or where there is sufficient reason. This is as was stated in the case of ***Livingstone Kuninin Ntutu vs County council of Narok & 2 Others [2015]eKLR*** where the court of Appeal held thus:

***“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 rule 1 Code of Civil Procedure...”***

***The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper”.***

17. The plaintiff in my view, has not shown an error apparent in the judgment of the trial court either on the issue of the amount due on the dealer shop, award of milage or award of interest. In my view, the trial judge in considering the above awards, followed his appreciation of this matter but that appreciation cannot amount to an error apparent on the record.

18. The trial judge meticulously examined the evidence submitted in support of those heads and on that basis made his award. To review such findings would in my view be substitution of this court's view of the evidence and that would be tantamount to this court sitting as a Court of Appeal to a judge of coordinate jurisdiction.

19. On the issue of reimbursement of travel the trial court found that the plaintiff should have produced proof, more than the invoices it relied upon. If I may add to the trial court's finding, I would say that even if the contract provided that reimbursement for travel would be at AA rates, the obvious question is: what is that AA rate? The plaintiff did not tender evidence of the same.

20. On the issue of interest, it is important to note that Section 26 of Cap 21 affords the court wide discretion on award of interest. The plaintiff had not stated in the plaint when the interest should start. The trial court in the absence of that prayer exercised its discretion and ordered that it should run from the date of Judgment. Section 26 Cap 21 provides as follows:

*“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*

*(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”*

21. Plaintiff argued that the trial court erred in its finding on the evidence and the law. The court of appeal in the case of Nyamongo & Nyamongo Advocates vs Kogo E.A. [2001] 173 at page 174-5 in part stated as follows:

*“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 of wrong view is certainly no ground for a review although it may be for an appeal.*

*As was said in the A.I.R. Commentaries on the code of Civil Procedure by Chitale and Rao (4th ed.) Vol. 3 at 3227. “A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”*

22. My finding is that the plaintiff has failed to bring its application within the provisions of review and accordingly it will fail. In the end, the **notice of motion** dated **19th March, 2018** is **dismissed with costs** to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2018.**

**MARY KASANGO**

**JUDGE**

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

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant