



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 32 OF 2013**

**FAST TRACK**

**ATLAS COPCO CUSTOMER FINANCE AB.....PLAINTIFF**

**VERSUS**

**POLARIZE ENTEPRISES LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

The Plaintiff's Notice of Motion application dated and filed on 28<sup>th</sup> May 2014 was brought under the provisions of Sections 1A 1B (sic) and 3A, (sic) of the Civil Procedure Act, Order 45 Rules 1 (1), Order 51 Rule 1 (sic) and all enabling provisions of the law. It sought the following orders:-

**1. THAT the Honourable Court be pleased to review its Orders of 31<sup>st</sup> March 2013 and proceed to dismiss the Chamber Summons dated 13<sup>th</sup> August 2013 with costs.**

**2. In the alternative, this Honourable Court be pleased to review its Orders of 31<sup>st</sup> March 2013 in the following terms:-**

**a. This Honourable Court be pleased to vacate the portion of Order Number 1 directing that the Plaintiffs/Respondents or their agents, assignees or employees be restrained from selling, advertising for sale or disposing or interfering with the Applicant's Motor Vehicle Registration Number KBN 281D or any of the Applicant's goods.**

**b. This Honourable Court be pleased to vacate Order Number 4 in its entirety.**

**c. Costs be awarded to the Plaintiff/Applicant.**

**THE PLAINTIFF'S CASE**

2. The Plaintiff's application was supported by the Affidavit of Joseph Muchina that was sworn on 28<sup>th</sup>

May 2014. Its written submissions were dated 30<sup>th</sup> July 2014 and file on 8<sup>th</sup> August 2014.

3. It pointed out the following contradictions in the court's Ruling of 31<sup>st</sup> March 2014:-

**a. Although the court had stated in its Ruling of 31<sup>st</sup> March 2014 that the amount claimed in the Demand letter was different from the sum shown in the Plaintiff, there was in fact no anomaly as the figure in the demand letter was the amount in arrears while the amount in the Plaintiff was the entire amount that was in default.**

**b. Although the court had stated in Paragraph 35 of its Ruling that the basis for the charge of overdue interest at two (2%) per cent was not shown in the Supplier Credit Agreement, Clause 18 of the Supplier Credit Agreement Appendix 1 General Terms and Conditions had clearly stipulated that the rate of interest would be two (2%)per cent.**

**c. Although the court had set aside all consequential orders which would ideally have meant that the subject Motor Vehicle Registration Number KBN 281D was to be released, it nonetheless declined to release the said motor vehicle causing a contradiction.**

**d. The Plaintiff had already disposed of the subject motor vehicle and the contradictory Ruling and Orders had now caused confusion on the way forward.**

4. It was therefore its contention that there was an error on the face of the court that warranted a review of the orders that were issued on 31<sup>st</sup> March 2014.

#### **THE DEFENDANT'S CASE**

5. In opposition to the said application, on 8<sup>th</sup> July 2014, James K. Mutia, the Defendant's Managing Director swore a Replying Affidavit on behalf of the Defendant herein. It was filed on even date. Its written submissions were dated and filed on 9<sup>th</sup> September 2014.

6. The Defendant's case was that the orders which set aside the interlocutory judgment that had been entered in favour of the Plaintiff against the Defendant and those restraining the sale of the subject motor vehicle by the Plaintiff ought not to be vacated and/or reviewed because it would not only be a miscarriage of justice but that it would also affect its business.

7. It was emphatic that the court had made a sound ruling based on the evidence that was tendered before it and urged it to dismiss the application herein.

#### **LEGAL ANALYSIS**

8. As was correctly submitted by the Plaintiff, the court has power to review orders and/or judgment under Order 45 Rule 1 of the Civil Procedure Rules, 2010 where there is a mistake or error on the face of the court.

9. The court has re-looked Paragraph 34 of its Ruling of 31<sup>st</sup> March 2014 and finds no contradiction in the same. A court cannot pore over affidavit evidence or documents that have been placed before it and make assumptions when the evidence that is sought to be adduced would best be presented to court through oral evidence.

10. Appreciably, the court did not state that the figures in the Demand Letter and the Plaintiff were erroneous because it would never have known the correct position until it had sifted through the evidence adduced in a full trial. Indeed, the court stated in Paragraph 36 that:-

**“The elaborate computation of interest is an issue that this court would want to interrogate further to satisfy itself that the same tallies with the sum claimed in the Plaintiff. This is**

**particularly important because the Plaintiff's advocates had claimed a different figure about five (5) months before the suit herein was filed and the margin between the two (2) figures was very substantial."**

11. Turning to the issue of overdue interest of two (2%) per cent, in Paragraph 35 of its Ruling, the court merely observed that the **basis** (emphasis court) of the charge of the same amount was not shown whereas the fixed rate of eleven (11%) per cent was conditioned on the agreement being duly signed and returned to the Supplier prior to 28<sup>th</sup> May 2010.

12. Notably, there was no evidence that was adduced to show that the said agreement was returned prior to 28<sup>th</sup> May 2010 to tie the levy of interest of two (2%) per cent to the fixed rate to amount to the figures that had been put in the Demand Letter and Complaint. Indeed, these were not facts that the court could analyse by relying on affidavit evidence or the documentation that was adduced by the parties herein without parties setting out their respective cases in a full trial.

13. The assertions by the Defendant could not be deemed to have been mere denials. On interrogation of documents, it was apparent to the court that it was in the interests of justice that the Defendant be given an opportunity to ventilate its case at trial.

14. In Paragraph 39 of its Ruling, the court stated that the Defendant had brought its application seeking to secure the release of the subject motor vehicle under so many orders chancing on whatever order that would be favourable to it. The reasons the court gave why it could not release the said subject motor vehicle despite setting aside the interlocutory judgment that was entered in favour of the Plaintiff against the Defendant were well set out in Paragraphs 40- 46 of its Ruling. In any event, under Order 10 Rule 11 of the Civil Procedure Rules, 2010, the court has discretion to set aside or vary such judgment any consequential decree or order upon such terms as are just, which did not exclude the retention of the subject motor vehicle if circumstances so warranted.

15. It was insincere for the Plaintiff to have asserted that the orders by the court were contradictory. Indeed, the Defendant seemed to have understood the gist of the Ruling of 31<sup>st</sup> March 2014 as it did file an application to give effect to the observations that were made by the court in its said Ruling. The court will say no more of this application as the same is awaiting determination by the court.

16. It was evidently clear in its Ruling of 31<sup>st</sup> March 2014 that the court found it necessary for evidence to be adduced to show how the figures were computed as the computation of the figures was neither set out in the Plaintiff's Replying Affidavit nor its submissions in respect of the Defendant's Chamber Summons application dated 13<sup>th</sup> August 2013. If the matter was that straight forward, the court would have had no hesitation in declining to set aside the interlocutory judgment that had been entered in favour of the Plaintiff against the Defendant.

17. The court was in agreement with the holdings in the cases of **Menzwe Ngoba Mtana & Another vs Zuhura Shaban [2014] eKLR**, **Anthony Gachara Ayub vs Francis Mahinda Thinwa [2014] eKLR** and **Pawiwa Limited vs Co-operative Bank of Kenya Limited [2014] eKLR** that were relied upon by the Defendant and **Wangechi Kimita & Another vs Mutahi Wakibiru [1985] 317** that was relied upon by the Plaintiff whose common thread was that an error or omission on the face of the court had to be self evident.

18. This was also a position that was set out in the case of **National Bank of Kenya vs Ndung'u Njau [1995-1998] 2 EA 249** where the Court of Appeal held that

**"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..."**

19. In allowing an application for a review, a court need not struggle to establish whether or not there was

such an error or mistake because such an error or mistake must be one which should be apparent or manifest on the face of the court record.

20. Having considered the pleadings, the affidavit evidence and written submissions and the case law in support of the respective parties, the court was not persuaded that there had been an error on the face of the court that would warrant it to review its Ruling of 31<sup>st</sup> March 2014. It had found, in the said Ruling, that there were triable issues which was the basis upon which it found that it was in the interest of justice that the interlocutory judgment that had been entered in favour of the Plaintiff against the Defendant be set aside.

21. Appreciably, what the Plaintiff was urging the court to do was for it to look at the matter in a different prism and substitute its own decision, which was clearly not the function of an application for review. If it was not satisfied with the court's decision, then it ought to have moved to the Court of Appeal to set aside its orders.

22. Lastly, on the issue that the court ought not to issue orders in vain, the court did note the holding in the case of **Republic vs County Government of Kiambu & 2 Others Ex parte Kimani Gachungi [2014] eKLR** that was relied upon by the Plaintiff. However, the court does not wish to engage itself on the issue of the disposition of the subject motor vehicle on 6<sup>th</sup> November 2013 as was evidenced in the letter by Keysian Auctioneers dated 7<sup>th</sup> November 2013 to M/S Walker Kontos Advocates on pg 26 of the Plaintiff's present application. This is because on 15<sup>th</sup> August 2013, the court issued orders restraining the Plaintiff from disposing of the said motor vehicle which orders had remained in force at all material times.

23. In the said letter, the said Auctioneers were referring to instructions from the said Advocates in their letter dated 24<sup>th</sup> October 2013 instructing them to sell the said motor vehicle. The Plaintiff cannot therefore contend that as the said motor vehicle had already been sold, the contradictory Ruling and Order of the Court issued on 31<sup>st</sup> March 2014 had caused confusion as to the way forward.

24. Unless there is a good and plausible explanation in respect of the disposition of the subject motor vehicle, the manner in which the Plaintiff has dealt with this issue has left a lot to be desired. This is particularly because as late as 29<sup>th</sup> September 2014 when the court reserved the ruling of this application, its counsel Mr Karungo informed the court that the subject motor vehicle was still stuck in storage and was accruing charges. The court will thus say no more on this issue.

### **DISPOSITION**

25. For the foregoing reasons, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 28<sup>th</sup> May 2014 was unmerited and the same is hereby dismissed with costs to the Defendant.

26. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 22<sup>nd</sup> day of January 2015

**J. KAMAU**

**JUDGE**