



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 723 OF 2010**

**DAVIS NJUGUNA KAMAU.....PLAINTIFF**

**VERSUS**

**CFC STANBIC FINANCIAL SERVICES LIMITED.....DEFENDANT**

**RULING**

1. The **Notice of Motion** dated **14<sup>th</sup> October, 2014** was filed herein pursuant to Sections 1A, 3A, 27 and 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 45 Rules 1 and 2 (1) as well as Order 51 Rule 1 of the Civil Procedure Rules, 2010, for review and setting aside of the Ruling and Orders of 4<sup>th</sup> July, 2014 with the object of allowing the Defendant to pursue and recover costs already awarded to it in the Rulings delivered herein on 16<sup>th</sup> February, 2012 and 8<sup>th</sup> November, 2012. The grounds relied on are that:

1. By the Ruling of the Court dated 8<sup>th</sup> November, 2012 the matters that are the subject of this suit were referred to arbitration, which arbitration commenced and is ongoing.

2. The matter then came up on 4<sup>th</sup> July, 2014 for notice to show cause why the suit should not be dismissed for want of prosecution, whereupon the Court ordered that the file be closed with no order as to costs ostensibly on the basis that the matter was under arbitration.

3. That the Defendant had been previously granted costs herein on 16<sup>th</sup> December, 2012 in respect of the application dated 29<sup>th</sup> April, 2011 that sought the setting aside of the default judgment; and the Ruling of 8<sup>th</sup> November, 2012 in respect of the application dated 8<sup>th</sup> November, 2010 that sought orders referring this dispute to arbitration.

4. That there is an error apparent on the face of the record and sufficient cause to review the order of 4<sup>th</sup> July, 2014 whose effect is that the Defendant is not able to pursue and recover the costs already awarded by the Court.

5. That it is in the interests of justice that the orders of 4<sup>th</sup> July, 2014 be varied and/or reviewed to allow the Defendant pursue costs already awarded.

2. The application was supported by the affidavit sworn by Evanson Mugwe on 14<sup>th</sup> October, 2014

annexed thereto.

3. Section 80 of the Civil Procedure Act provides the remedy of review for any person who considers himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed.

4. Order 45 Rule 1 of the Civil Procedure Rules not only amplifies the provisions of Section 80 of the Civil Procedure Act but also sets out the specific grounds upon which an order for review can be granted. These are:

**1. Discovery of new and important matter or evidence which after the exercise of due diligence, was not with the Applicants knowledge or could not be produced by him at the time when the decree was passed or the order made.**

**2. Mistake or error apparent on the face of the record.**

**3. Any other sufficient reason**

It is noteworthy that it is a requirement of Order 45 Rule 1 that that such an application should be made without unreasonable delay. In this regard it is noted that order complained of was made on 4<sup>th</sup> July, 2014, while the instant application was filed on 17<sup>th</sup> October, 2014. Whereas the application cannot be said to have been filed with due dispatch, the delay was not inordinate in the circumstances.

5. The ground relied on by the Applicant is that there is an error apparent on the face of the record. What amounts to an error apparent on the face of the record was considered in the case of *Nyamogo & Nyamogo Advocates Vs Kago (2001) 1 EA 173* in which the Court of Appeal had the following to say:

***“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 adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal.”***

6. Looking at the Court record, it is clear that on 4<sup>th</sup> July, 2014 when the order sought to be reviewed was made, there was representation for both parties by Learned Counsel. In particular Miss Nyamira appeared for the Defendant. It was brought to the attention of the Court that the matters in dispute had earlier been referred to arbitration and that an order of stay had been issued in the interim. Indeed, reliance was placed by Counsel on an affidavit sworn by Evanson Mugure on 25<sup>th</sup> June, 2015 to support the prayer by the Plaintiff, which was consented to by the Defence, that the order of stay remains in force pending the filing of the arbitral award. Ms. Nyamira for the Defendant specifically urged that the suit was not one for dismissal.

7. The Court having listened to the parties ordered thus:

***“If the parties are engaged in arbitral proceedings, it is not necessary for this file to remain open. Any award will be forwarded to the Court by way of a Miscellaneous File. The suit serves no purpose by being kept alive. In the circumstances, I hereby order that the file be closed and the records at the Registry be marked accordingly.”***

8. Clearly, by ordering the closure of the file, the Court did not close all avenues for relief. It was noted

that an approach could be made when the arbitral award was ready via a miscellaneous application. Any outstanding aspects of costs could very well be ventilated in that cause. Additionally, the arbitral proceedings themselves similarly lend themselves to a discussion and settlement of the costs expended in this closed file. Clearly therefore, there being other options available it cannot, in the circumstances be said that the view expressed by the Learned Judge is necessarily erroneous as to warrant a review for the sole reason of pursuing costs.

9. In the premises, I find no merit in the application and would dismiss it, but make no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2015**

**OLGA SEWE**

**JUDGE**