



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1871 OF 2001**

**HERITAGE A I. I. INSURANCE COMPANY LTD.....PLAINTIFF**

**VERSUS**

**SAVEMAX INSURANCE BROKERS LTD**

**MARTIN G. NDERI.....DEFENDANT**

**RULING**

1. Before me is the Notice of Motion dated 19<sup>th</sup> November, 2012. It is brought under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A and 63 (e) of the Civil Procedure Act (Cap 21) Laws of Kenya. The defendants seek to review the orders of this court of 27<sup>th</sup> July, 2012.
2. The application is premised on grounds on the face of the application and the supporting affidavit of Martin Nderi sworn on 16<sup>th</sup> November, 2012. He deponed that the court considered extraneous matters and failed to consider his defence on merit warranting review of the orders. He submitted that in the circumstances there was an apparent error on record and relied on *Nairobi HCCC No. 269 of 2003, United Insurance Company Ltd v. Interstate 2000 Ltd & Another (U.R.)* and *Nairobi C.A.C.A No. 172 of 1998, Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation v. Firestone E.A. (1969) Ltd (U.R.)*.
3. The plaintiff filed grounds dated 22<sup>nd</sup> April, 2013 in opposition to the application. It was contended that the only issue that the court had to consider was whether the 2<sup>nd</sup> defendant's draft defence had merits and the court relied on the principles set out in *Shah v. Mbogo & Another (1967) E.A. 116* to determine the application dated 4<sup>th</sup> November, 2011. It was argued that the 2<sup>nd</sup> defendant should seek recourse on appeal if aggrieved. On this point they relied in *Eastern and Southern African Development Bank v. African Green Fields Ltd & Others (2002) 2 EA 377 and National Bank of Kenya Ltd v. Ndungu Njau (1996) LLR 469*. It was finally argued that the application herein is a scheme to delay execution and that the delay in filing it is inordinate and relied on *Kenfreight (E.A.) Ltd v. Star East Africa Co. Ltd (2000) e KLR*.
4. I have considered the depositions, submissions and authorities cited by the parties. This application seeks to review the ruling delivered on 27<sup>th</sup> July, 2012. The ruling determined the application dated 4<sup>th</sup> November, 2011 which was seeking among others the setting aside of interlocutory judgment entered on 7<sup>th</sup> May, 2004 and leave to the 2<sup>nd</sup> defendant to file defence. The court delivered a ruling dismissing that application.
5. I have taken the liberty to read the said ruling, among the issues that were considered was the right to be heard. In so doing, the authorities cited by the parties were considered and an opinion was given on the issue. Reviewing the said matter is tantamount to sitting on an appeal. See: *Eastern and Southern African Development Bank* (supra) where it was held:

***“An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/ or that his decision revealed a misapprehension of the laws or that he exercised his discretion wrongly in the case. Further it could not be reviewed on the ground that other Judge of Co-ordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue. The proper way to correct a Judge alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error is apparent on***

***the face of the record and therefore requires no elaborate argument to expose.”***

6. Secondly, this application has been brought four months after the delivery of the ruling. An application for review ought to be filed within reasonable time. To my mind unreasonable delay is such delay as is likely to prejudice the respondent beyond monetary compensation in costs. The applicant has furnished no explanation for the delay and the said delay has halts the respondent’s right to enjoy the fruits of success. In the circumstances I find the delay here to be inordinate and inexcusable. See *Nyamogo & Nyamogo Advocates v. Kago (2001) 2EA 173*.
7. Accordingly, the application is dismissed with costs to the respondent.

Dated, Signed and delivered in open court this 14<sup>th</sup> day of November, 2014.

**J.K.SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

..... for the Defendants