LIQUIDATED CLAIM

JUDGMENT IS FINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.35 OF 2000

NICONA CONSTRUCTION COMPANY LIMITED…….....…PLAINTIFF/APPLICANT

VERSUS

KEN SOUTH PLASTIC COMPANY LTD…...…….....1ST DEFENDANT/RESPONDENT

ANNE KILELE…….....……...…...2ND DEFENDANT/RESPONDENT

THE ESTATE OF THE LATE WALTER KILELE.....3RD DEFENDANT/RESPONDENT

RULING

The applicant brought a suit against the respondents claiming Kshs.9,112,920.90 being the cost of constructing a go-down and an administration block on plot No.LR BLOCK 8/65 Nakuru Municipality.

The respondents having failed to enter appearance, the applicant obtained a default judgment on 14th April, 2000. The respondents however, entered appearance on 20th April, 2000, six days after the entry of the judgment. A decree was drawn and issued on 19th April, 2000.

It would appear, the court moving *suo moto*, dismissed the suit for want of prosecution on 1st July, 2005 even after judgment had been entered and a decree issued. It took the applicant nearly three years from the date of the dismissal to bring the present application. In it, the applicant seeks in the main stay of execution of the decree and all consequential orders and a review, setting aside or vacation of the dismissal order. The prayer for stay of execution is clearly misplaced.

The application is brought pursuant to **Order 44 rules 1** and **2** of the revoked **Civil Procedure Rules**. That provision deals specifically with review of decrees, orders and judgments and not setting aside or vacation of orders. A review can be granted where, among other things, there is a mistake or error apparent on the face of the record. The applicant has argued that there is a mistake or an error on the fact of the record because the suit was dismissed for want of prosecution when there was a judgment and a decree.

The respondents have filed two grounds of opposition and a replying affidavit the combined effect of which is that the 3rd respondent was never served with the plaint and summons to enter appearance; that the application is an afterthought and has no merit; that the decree requires authentication; that the applicant took inordinately long period to execute the decree; that there is no error or mistake on the record; that the court has no jurisdiction to entertain the application as the 1st respondent is under receivership and no leave of the court was obtained; that there is cause of action against the 2nd respondent, Mrs. Anne Kilele and that the estate of the later Walter Kilele has been distributed.

Most of these grounds are not relevant to the present application while some of them are not backed by evidence. For instance there is no evidence that the 1st respondent, Ken South Plastic Company Limited is under receivership or that the estate of the late Water Kilele has been distributed. That leaves only two grounds - there are no sufficient grounds to warrant the grant of the orders sought and that the application has been brought after inordinate delay.

In their written submissions, the respondents have also argued that the entry of judgment did not preclude the court from dismissing the suit for want of prosecution as the applicant had failed to set the case down for formal proof. The answer to this issue is found in the provisions of **Order 9A rules 3** and **5** of the revoked **Civil Procedure Rules**. I will also make reference to the decision of the Court of Appeal in the case of **Coach Safaris Limited** V. **Gusii Deluxe Limited,** Civil Appeal No.177 of 1996.

Order 9A rule 3 provides as follows:

"3.(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No.26 of Appendix C, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs."

Rule 5 on the other hand relates to a claim for pecuniary damages or for detention of goods with or without a claim for pecuniary damages. In such a case, there will be interlocutory judgment as opposed to judgment in terms of **rule 3.** It is interlocutory judgment because the judgment is only final with regard to liability and interlocutory with regard to proof of quantum. See **Felix Mathenge** V. **Kenya Power and Lighting Company Limited**, Civil Appeal No.215 of 2002. The court's judgment in the instant case was based on a claim for a liquidate demand and was final. There was no need for formal proof.

The Court of Appeal in **Coach Safaris Limited** (supra) put this question to rest when it stated that:

"……the Deputy Registrar purported to enter "*interlocutory*" judgment in default of defence but in actual fact it should have been a final judgment in terms of rule 3 above this being a liquidated demand. That being the case there was no necessity for formal proof. ……. So whatever followed thereafter by way of formal proof was a nullity and a complete waste of judicial time."

Turning to the merit of the application, I reiterate that it is based on the ground that there is an error or mistake on the face of the record. The mistake or error has been identified as the dismissal of a suit where there was a final judgment and a decree when the suit was already determined.

It is established that for the court to grant the orders of review on this ground,

"…..the error or omission must be evident and should not require an elaborate argument to be established."

See **National Bank of Kenya Limited** V. **Ndungu Njau**, Civil Appeal No.211 of 1996. It is apparent that the court in dismissing the suit for want of prosecution was not aware that there was a final judgment and there was no suit to prosecute. In an application for review, it is also a requirement that the

application be brought without unreasonable delay.

It is indeed strange that after the decree was issued on 19th April, 2000, the applicant took no action to execute. Even as the suit was purportedly being dismissed on 1st July, 2005, five (5) years later, no steps had been taken to execute. After the dismissal, it took the applicant three years to bring this application.

There was no explanation for delay except that it was when the applicant perused the file on 1st August, 2008, that it was discovered that the suit had been dismissed. In other words, when the applicant discovered the dismissal on 1st August, 2008, it took only nine (9) days to bring this application.

I have already noted that it would appear the court moved *suo moto* in dismissing the suit. It is not clear whether in doing so it moved under **Order 16 rule 2** or under **rule 5** or even **rule 6** of the revoked **Civil Procedure Rules.** In the first two instances, there must be a notice to the parties before dismissal. In the latter, there is no such a requirement. It cannot be assumed that the court moved under the last provision. It is therefore possible that the applicant had no notice before the dismissal. The rules also did not provide for means of notifying the party whose pleading had been dismissed of such dismissal.

Although the delay was long, but for the reasons stated, there is no basis to hold that the delay was unreasonable in the circumstances. With the provisions of **Article 159(2)(d)** of the **Constitution** and the enactment of **sections 1A** and **1B** of the **Civil Procedure Act**, it is important that courts must avail opportunity to the parties to ventilate their cases without undue regard to technicalities. There is no prejudice to the respondent in allowing this application.

The application is allowed and the orders of dismissal reviewed and set aside. The suit is reinstated even though the dismissal was of no effect for the reasons stated earlier.

I award costs to the respondent for the long period the applicant took to bring this application.

Dated, Signed and Delivered at Nakuru this 24th day of January, 2012.

W. OUKO

JUDGE