



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 115 OF 1999

THOMAS OWEN

ONDIEKIPLAINTIFF

=VERSUS=

NATIONAL BANK OF KENYA LTD.....
DEFENDANT

RULING

This application has been brought under Sections 3, 3A and 63(e) of the Civil Procedure Act, Order XLIV rules 1, 2, and 3(4) of the Civil Procedure Rules and all other enabling provisions of the Law. It is for review of the judgment of this Court delivered on 25th May, 2004, and for an order releasing to the applicant Kshs 119,120/= deposited in the joint names of the parties' advocates on 11th September, 2007.

The grounds of the application, as stated in the body of the application, are that the said judgment did not include interest; that the respondent has unilaterally frozen or blocked the applicant's account without an order of the court; that the respondent deposited Kshs 523,605.50 in the applicant's account with the intention of the same being accessed by the applicant but the respondent thereafter blocked the same; that the said sum should attract compound interest and be accessed by the applicant and that the sum of Kshs 119,120/= was deposited in the joint account because there was an alleged appeal which appeal has never been filed.

There has also been filed, in support of the application, an affidavit by the applicant in which the above grounds are elaborated. On behalf of the respondent, **M/s Nyairo & Company** Advocates have filed Grounds of Opposition. The respondent has also filed a replying affidavit through **Z.K. Mogaka**, its General Manager - Legal and Regional Management Division. Both documents challenge the application on both factual and legal basis. In a nutshell, the respondent contends that the applicant is not entitled to a review of the said judgment.

When the application came up for hearing before me on 26th January, 2011, counsel agreed to file written submissions which were in place by 16th March, 2011. The submissions reiterated the stand-points taken by the parties in their respective affidavits/Grounds of Opposition.

I have considered the application, the affidavits, Grounds of Opposition and the Submissions of counsel. I have also given due consideration to the authorities cited. Having done so, I take the following view of the matter. For a review application to succeed, the following set of circumstances must prevail:-

The applicant must be a person aggrieved by:

- (a) a decree or order from which an appeal is allowed but from which no appeal has been preferred; or
- (b) a decree or order from which no appeal is allowed; and

Who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason.

The applicant, in his affidavit and in the submissions of counsel, has not shown that any of the above circumstances exists and consequently the application clearly lacks merit.

The application also suffers from a fatal omission. Annexed to the affidavit in support, is a copy of a ruling of **Gacheche J**, on the respondent's application for stay of execution, a copy of a cheque for Kshs 119,120/= in the name of the parties' advocates and a copy of a Notice of Appeal lodged by **M/s Mainye & Company Advocates**. However, the applicant seeks a review of the judgment delivered on 25th May 2004. That judgment is not annexed nor is an extracted decree exhibited. The omission to exhibit the extracted order clearly offends the provisions of Section 80 of the Civil Procedure Act. In the case of **G.M. Jivanji & J.M. Jivanji –vs- E.M. Jivanji and another, Pickering, C.J.** delivered himself as follows:-

“ Apart from any consideration whether the course adopted by the learned Judge in relation to the ex-parte order of 8th July, 1930, was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review of judgment under Order XLII. A person applying for review under that order must be “aggrieved by a decree or order.” The words “decree” and “order” are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree, his application should be for a review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The *ratio decidendi* expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings, no resultant decree on the 29th August, 1930, had yet come into existence. Indeed no attempt to draw up any has as yet been made. It is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the Court to draw up and issue the formal decree or order”.

The views of **Pickering CJ.** have been followed in subsequent decisions of both the High Court and the Court of Appeal. **Nyarangi J.**, as he then was, stated as follows in the case of **Bernard Githinji –vs- Kirate Farmers Co-opeative Ltd [HCCC No. 32 of 1974] (UR)**:

“The applicant should have applied for a decree to be drawn up and issued. At this stage there is nothing upon which the court's judgment can be reviewed.”

Ochieng J, was of the same view in **Iyadi –vs- Wamalwa [2008]1 EA 137-** where he held as follows:-
“**Unless a decree is drawn and attached to the application for review, then the application for review is incompetent and the same must be dismissed.**
..... **the Law requires that an application for review be accompanied by a copy of the decree or order that the applicant seeks to have reviewed. This decree or order must be extracted by the applicant himself and it matters not whether such a decree or order is in the court file.”**

So, in view of what is stated above, the failure by the applicant to extract a formal decree was fatal to the application and it should on that basis fail.

Order XLIV Rule 1 of the Civil Procedure Rules also requires that an application for review be made “**without unreasonable delay.**” In this case, the judgment sought to be reviewed was passed on 25th May, 2004. This application was lodged on 23rd September, 2010, over six years later. The delay, in my judgment, is inordinate.

The primary basis for the application is the alleged failure to capture the element of interest in the judgment. Under section 26 of the Civil Procedure Act, interest is at the discretion of the Court. The section reads in part as follows:

“26 (1) Where and in so far as a decree is for payment of money, the court may, in the decree order interest”

It was therefore within the learned Judge’s discretion to award or not to award interest. If she did not, that parse cannot constitute an error on the face of the record. In any event, annexure “**Tool**” i.e the ruling of **Gacheche J.**, on the respondent’s application for stay of execution, was made after hearing both counsel. The applicant must have, by then, known that interest had not been captured in the judgment. Judge Gacheche’s **ruling** was delivered on 23rd March, 2006. It has taken the applicant five (5) years to realize the apparent error on the face of the record. In the premises, I agree with the respondent that this application is an afterthought.

Finally the applicant has, in the application sought release of Kshs 119,120/= deposited in the joint names of the parties’ advocates which was an order made by **Gacheche J**, aforesaid pending the hearing and determination of the intended appeal. That order has not been set aside. The respondent has explained the delay in lodging its appeal. The delay may or may not be reasonable, but if the applicant is unhappy with the same, he is at liberty to apply to strike out the Notice of Appeal.

The applicant has rather in an unorthodox manner sought an order of the court to access Kshs 523,605.05 deposited on his account by the respondent. I say unorthodox because the application for review contains no such prayer and it is settled that parties are bound by their pleadings. In any event, such an order would probably be in execution of the judgment which was stayed by **Gacheche J**. If the deposit is not related to the judgment sought to be reviewed, then the applicant is setting up another cause of action in the grounds of the review application. That with respect is mischievous.

In the end, as already observed the applicant has made no attempt whatsoever to bring himself within the confines of Order XLIV rule 1 of the Civil Procedure Rules. The applicant is not only incompetent, but also misconceived and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET LTHIS 13TH DAY OF APRIL, 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

1. **Mr. Miyienda** for the Plaintiff and
2. **M/s Khayo** for the Defendant

F. AZANGALALA

JUDGE

13/4/2011