

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 5 of 1987
IN THE MATTER OF CAPITAL FINANCE LIMITED

RULING

1. By an order made on 17th March 2009 **Khaminwa J.** allowed the application dated 5th May 2008 in the following manner:-

- i) **That a professional forensic audit of the financial accounts and affairs of the Pioneer Building Society (In Liquidation) be carried out.**
- ii) **That the Official Receiver and Provisional Liquidator of the said Pioneer Building Society (In Liquidation) render a detailed and property account of the affairs of Pioneer Building Society (in liquidation).**
- iii) **That the costs of the professional forensic audit be borne by the Official Receiver and Provisional Liquidator of the said Pioneer Building Society (In liquidation).**

2. On 16th June 2009 the defendant filed the notice of motion under order 44 of the Civil procedure Rules and Section 3A of the Civil Procedure Act seeking for orders of the Review of the orders made on the 17th March 2009. In particular they are seeking for the costs of the forensic audit be borne by the respondent and thereby a time limit for the said audit to be undertaken. This application is based on the grounds that the official receiver has no finances to pay the forensic audit. Secondly, the money available is not enough for the audit. Moreover, it belongs to other creditors contributories and share holders who the official receiver is accountable to and who have not allowed to forensic audit. This application is supported by the affidavit of **P.K. Thoithi Kanyuira** sworn on 11th June 2009. He is the Senior Principal State Counsel with the Official Receiver. It is contended that a forensic audit is an expensive affair. The money held by the official receiver is **Ksh.157,979.10/-** and fixed deposit of **Ksh.2 million** against several creditors owned millions of shillings. There are also shareholders and contributories who have not consented for this forensic exercise to be done. That is why the defendant seeks for an order that the costs of forensic audit be borne by the respondent.

2. This application was opposed; Counsel for the respondent relied on the replying affidavit of **Mugo Mungai** sworn on 12th January 2010. According **Mr. Marete** learned counsel for the respondent there are no new grounds or discovery of new facts to warrants the review of the order by **Khaminwa J.** The applicants has failed to obey the order therefore the official receiver should not any audience before this court. There are issues to be audited regarding the official receiver in the management of the winding up and the liquidation of the company. This application was also faulted for failure to annex the ruling the court or the order sought to be reviewed. For this reason the application was faulted and counsel urged the court to dismiss it. This application seeks for the review of the order of **Khaminwa J.** issued on 17th March 2009. It is trite that an application for review must show there has been discovery of new and important matter or evidence which after due diligence was not within the applicant's knowledge or could not have been produced at the time when the order or decree was passed. An applicant may also show that there is an error or mistake apparent on the face of the record or any other sufficient reason. The ground relied upon by the applicant is that there is no money to carry out the forensic audit. Moreover the money available belongs to the contributory and share holders. It is not stated in the affidavit in support of the application whether this is new matter. However these must have been the issues that were canvassed before **Justice Khaminwa** in the notice of motion dated 5th may 2008. The applicant's should have known that forensic audit is an expensive affair and I believe those were the issues canvassed but the court granted the

application. In my opinion that is not a proper ground for review but an appeal. Proceeding to review the order of **Khaminwa J** on that ground is tantamount to this court sitting on its own judgment.

3. On the issue of the merit of this application it is an established practice that a party seeking to review an order must obtain an extract copy of the orders sought to be reviewed and must annex it to the application so that the court can know the exact order or holding which the applicant is aggrieved of. See the case of **Jiwanji vs Jiwanjai [1969 -30] KLR 34** where it was held that:

“That 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 an issue the formal decree or order.”

4. For the above reasons I find the application lacks merits and it is also bad in law. Accordingly, it is dismissed with costs to the respondents.

RULING READ AND SIGNE DON 23RD JULY 2010 AT NAIROBI.

M.K. KOOME

JUDGE

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