



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 541 of 1999

P. S. BHANGRA.....PLAINTIFF

VERSUS

AUSTIN S. KITOLOLODEFENDANT

RULING

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1.

On 24th July 2009 Lesiit J, made the following orders:-

- “1. That the judgment debtor be and is hereby granted leave to pay the decretal sum by installment.**
- 2. That the Judgment Debtor should pay the decretal sum by installment of Kshs.200,000 effective from 31st July 2009 and thereafter on 30th of every month until payment in full or until further orders of the court.**
- 3. That order No. 2 above will be subject for review to be increased upwards on application by either party.**
- 4. That Kshs. 1 million deposited in court by the Judgment debtor be released to the decretal holder.**
- 5. That the cost of this Application be in the cause.”**

2. On 8th April, 2010, the Plaintiff filed a notice of motion seeking to review the above orders in particular the monthly installments being paid by the Defendant to the Plaintiff which they sought to be increased from the sum of Kshs. 200,000/- to Kshs. 500,000/-. This application is supported by the grounds that if the Defendant continues to pay Kshs. 200,000/- while the decretal sum are currently standing at Kshs. 22 million, it will take along time to settle the debt. Moreover the installment amount is not even enough to cover the interest accruing on the decretal sum.

2. This application is also supported by the affidavit of the Plaintiff sworn on 6th April 2010. It was further submitted that the Plaintiff's claim was for Kshs. 9.5 million from May 1999 which continues to attract interest at the rate of 12%. Since the decree was issued in 2005, the Plaintiff began execution proceedings which culminated in the arrest for committal to civil jail of the Defendant. That is when the defendant gave a proposal but failed to comply with the terms of the consent. The Defendant filed an application dated 1st July 2009 in which **Lesiit J** granted the above orders and also granted liberty to any party to apply for the monthly sum to be increased upwards.

3. This application was opposed; **Mr. Kigano**, learned counsel for the Judgment debtor faulted this application which invokes the powers of this court to review its orders. He submitted that the Applicant failed to point out the specific orders that they are seeking to review. The Applicants also annexed documents which were not before **Lesiit J**, when the application dated 1st July 2009 was considered. The powers donated under **Order 44** of the **Civil Procedure Rules** are about the review of the record. Counsel for the Applicant failed to adduce evidence from the documents they seek to rely on when the matter was under consideration. They did not file any replying affidavit thus those documents cannot be relied on to seek review of the

court orders.

4. Thirdly, the Judgment Debtor's application seeking to pay the decretal sum by installments was not opposed. The Judgment Debtor is now seeking for an opportunity which they squandered before **Lesiit J.** This application was also brought after what can be termed as inordinate delay. The ruling sought to be reviewed was delivered on 24th July 2009, and this application was filed nine months later. Lastly, it was argued that there is no error apparent on the record, as contemplated by the provisions of order 44 of the Civil Procedure Rules. An error must be manifest at a glance. It is not to be established by lengthy and protracted arguments. The Defendant has remitted the monthly sums of Kshs. 200,000/- since the court order. The Defendant adjusted his financial circumstances. The Applicant should not be allowed to disorganize and destabilize the Judgment Debtor.

5. This application seeks for review of an order of this court which is an exercise of this court's discretion. It is principally sought under the provisions of Section 80 of the civil procedure Act and more specifically under rule 44 of the civil Procedure Rules which provides as follows:

“Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

6. For an applicant to succeed in application for review, they must point out a mistake or error apparent on the face of the record. I agree with counsel for the Defendant that the error must be manifest and does not require any examination in order for this court to review its own order. According to the Applicant, the order by **Lesiit J.**, gave liberty to any party to apply for the review of the payment of the decretal sum in installment of kshs.200,000/- upwards. This is the basis upon which this application is brought although counsel for the Applicant also pointed out that there was an error in the ruling of **Lesiit J.**, when the Judge accepted an explanation that the Judgment Debtor had deposited 20% of the decretal sum in court. Although the sum he had deposited in court was only one million.

7. I find there is an issue of accounts which should be taken before the Deputy Registrar for determination. It is important to establish the decretal sum that was awarded, the amount that as so far been paid to the Decree Holder, and what was deposited in court. For this court to determine whether to review the payments of the decretal sum from Kshs. 200,000/= to 500,000/- per month, it is necessary that decision be informed by the actual sum that remains outstanding. With that information the court will be able to determine whether to increase the installments or not. This can only be done when accounts have been taken. This is because there is a variance between what the applicant claims in his supporting affidavit, a whopping sum of 22 million while the Judgment Debtor claims that the decretal sum was 5 million.

8. There are also discrepancies in various decrees that are on record which can be reconciled easily by the Deputy Registrar. Accordingly I direct the parties to appear before Deputy Registrar; after the accounts are taken, the matter can be brought back for the determination of the application for purposes of clarity the judgment debtor shall continue to pay the decretal sum as ordered by **Lesiit J.**

There will be no order as costs.

RULING READ AND SIGNED ON THE 1ST OCTOBER 2010.

**M. K. KOOME
JUDGE**