



**REPUBLIC OF KENYA**

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

**THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT**

**CIVIL SUIT NO. 1351 OF 2000**

**PRIME BANK LIMITED.....PLAINTIFF/APPLICANT**

**VS**

**SAMUEL M'NOTI.....DEFENDANT/RESPONDENT**

**RULING**

The court has today heard the Defendant/Applicants Notice of Motion dated 3<sup>rd</sup> September, 2009 in which the applicant seeks orders, *inter alia*, as follows;

- 1. THAT this court be pleased to review the order made by the Honourable Lady Justice Lesiit on 7<sup>th</sup> August, 2009.**
- 2. THAT pending the hearing and determination of this application there be a “stay of execution of the Ruling” and order made by the learned judge on 7<sup>th</sup> August, 2009**
- 3. THAT in the alternative, this court do make such other interlocutory order as it may expedient pending the hearing and determination the application.**
- 4. THAT costs be provided for.**

The application is opposed on the strength of Replying Affidavit of Alka Shahi filed on 28<sup>th</sup> May, 2010 and more so on the grounds that the applicant has not met the conditions for review as provided under Order XLIV rules 1 and 2 which are that

- (1) there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not have been produced by him at the time the (decree or) order sought to be reviewed was mad;**
- (2) That there is some mistake or error apparent on the face of the record**
- (3) The applicant satisfies the court of the sufficient cause warranting the review.**

Under rule 3 of the said Order the court is empowered to dismiss the application for review where it appears that there exists no sufficient ground for such review.

The applicant herein has only stated that he had been unable to comply with the condition set by the

honourable Lady Justice Lesiit that he deposits a sum of Kshs. 3.5 Million when his application for the setting aside of an ex parte judgment entered against him on 13<sup>th</sup> June, 2001 was allowed. He says that when presenting his application for setting aside, he failed to disclose his financial standing before the court, not expecting that the court would impose such a considerable sum as a security. He states however that the court was made aware that the Plaintiff was holding the Defendants' logbook but failed to consider that fact when imposing the conditions. He has included a counterclaim in the defence filed in compliance with the Honourable Lady Justice Lesiits' orders. With due respect to counsel for the applicant, I find that the submissions made herein do not provide sufficient ground for the review. I have carefully read the Ruling of the Honourable Lesiit J in which several considerations were made before arriving at the conclusion that leave to defend should be conditional. The judge also considered several authorities in exercising her unlimited discretion under **Order 1XA Rule 10**. In the judge's opinion the orders made and the terms thereof were just in the circumstances of the case.

Indeed, the deposit of Kshs 3.5 Million was to be made within 30 days "with either party having leave to apply. The Defendant/Applicant waited almost until the expiry of the said period before making the application for review, which, given the circumstances, goes against the requirement or order XL1V Rule 1 (1) that an application for review be made without unreasonable delay.

The above notwithstanding, I am of the considered view that it being apparent that the applicant is in actual fact challenging the learned judge's conditions as being onerous, and also stating that the honourable judge failed to consider some of the applicant's submissions when arriving at her decision, then , in effect, what this court is now being asked to do is to sit in appeal over the Ruling and orders of 7<sup>th</sup> August, 2009 and to find that the learned Lady Justice Lesiit exercised her discretion wrongly. Unfortunately I am not empowered to do so. Not being satisfied therefore, that a case for review has been made, I disallow the application and do hereby dismiss the same with costs to the Respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of NOVEMBER, 2010**

**M. G. MUGO**

**JUGDE**

In the presence of:

Ms Mulwa holding brief for Mr Ochako

For the applicant

Mr Wanjohi

For the respondent