REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE 2148 OF 1987

UCHUMI INSURANCE BROKERS……...PLAINTIFF

VERSUS

KENYA NATIONAL ASSURANCE ……..DEFENDANT

RULING NO. 3

This is the 3rd time this court is being called upon to rule substantively in this matter. The first substantive ruling is the one delivered by this court on 07/03/2008. A scheming through the same in a summary form is as follows for purposes of laying out the background information.

- At page one of the said rulings it is observed that the disputants herein had each filed claims against the other. In HCCC 1946 of 1987 it is the defendant applicant who had sued the Plaintiff/Respondent where as in HCCC 2144/1087 it is the Plaintiff/Respondent who had sued the defendant/applicant.

- It is on record that the two suits were consolidated and heard together. Each was awarded a decree with the defendant/applicant being awarded a lesser amount which was set off against the claims of the Plaintiff/respondent leaving a balance of 15 million in favour of the plaintiff/respondent.

- There was an attempt to appeal which appeal was compromised to almost 50% in favour of the plaintiff/Respondent.

- Execution followed and this led to an application for stay of execution which application gave rise to issuance of orders on payment of the decretal sum through installments. These conditions are serialized at page 4 of the said ruling. Of relevance to the ruling is condition 6 which reads:-

" 6 the defendant to provide security for payment for the balance after payment for Kshs. 1 million on 13/3//95 as will be ordered by court in case of disagreement." Condition 8 on the other hand reads:- *" Mention on orders regarding provision of security and nature of security and regarding quontum of costs and brokers charges."*

- At page 5 it is observed that on 17/3/95 in a ruling delivered by Githinji J as he then was (now JA) reveals that the learned judge was satisfied that the 78, 750 shares from the Kenya Commercial Bank were reliable, security for the balance of the decretal sum.

- At the same page 5, the court, observed that it is on record that the defendant had presented an application on 6th June 1995 for the release of the said security for the reason that they had fulfilled their obligation under the decree and that they be discharged formally from the said decree.

The reason the defendant/applicant sought to be discharged from the decree to the plaintiff is found at page 6 of the Ruling. Reason number 5, which reads:-

" *The defendant has paid a further Kshs. 2,645,211.05 to the Garnishee holder advocates (pages 8.) In* ***HCCC No. 1694 of 1987 KENYA BUREAU OF STANDARDS VERSUS UCHUMI INSURANCE BROKERS LIMITED****, Pursuant to orders made by Hon Lady Justice Aluoch on 6th March (pages 9-17 are copies of the application served upon the defendant by the Gernishee holder, and copies of the judges' order."*

- At page 14 of the said own ruling of 7/3/2008, the court, had observed at line 4 from the top that Githinji J as he then was (now JA) had made observation in his lordships' earlier ruling on an application for the release that: "*It is noted from the proceedings that the defendant /applicant based his arguments on full payment of the decretal sum on the basis of the documentation set out in paragraph 4-5 of the supporting affidavit …..".* The findings of the learned judge as he then was on the first application for the release of the security are set out at page 16 of the ruling of 7/3/2008. A summary of the same for purposes of this ruling are as follows:-

(i). The court had allowed the defendant to litigate the decretal sum herein by way of installments upon depositing of 78,750 KCB shares as security.

(ii). Garnishee order had been made against the plaintiff herein to pay a 3rd party Kshs. 2,643,211.05 owed to that 3rd party by the plaintiff herein HCCC No. 1644/87.

(iii). That the plaintiff had made an application in HCCC 1444/87 to set aside that Garnishee order whose ruling was still pending and could be decided either way.

(iv). That it was the defendant's arguments that by meeting the plaintiffs' obligation under the Garnishee proceedings in 1644/87, the defendant had thereby discharged its obligations under the decree herein.

(v). That there was no proof that the amount ordered under the Garnishee proceedings in HCCC No. 1644/87 had in fact been paid.

(vi). That as at the time the Garnishee orders were made, the defendant was already bound to the orders made herein on 10/3/95.

(vii). That as at that point in time the court was not in a position to tell which way the application for setting aside the Garnishee orders would be decided.

(viii). That without proof that Kshs. 2,643,211.05 had been paid as ordered by the Garnishee orders in HCCC No. 1644/87. It was premature to discharge the defendant and on that account dismissed the application for the release of the shares deposited as security for the reason that the same was premature.

At page 19-20 of the said ruling of 07/03/2008, this court, made a construction as of what it understood, the learned judges orders meant. At page 20 line 6 from the bottom, this court, noted that the defendant had presented an application dated 7th October 2005 seeking the release of the said 78,750 KCB shares deposited as security. Assessment of the rival arguments starts at page 21 through to page 44. Of importance to this ruling is an observation by this court, at page 30 under item 7 by way of an arguments by the plaintiffs; counsel that:

"*That the payment of Kshs. 1,581,397.15 and the alleged payment of kshs. 2,643,211.15 purportedly*

made to Kenya Bureau of Standards were made in breach of the court order of 3rd March1995"

At page 41 line 10 from the bottom this court, made the following observations:-

" further *the execution proceedings show that what was paid before the compromise was not to go towards the liquidation of the 7,197,964.30 as this is not mentioned anywhere in the submissions of both counsels. In fact the working of the installments paid does not include what was paid before to compromise and the court finds that there is no proof of excess payment of the decretal sum."*

At page 42 line 1 from the top, the court, gave in a summary the reason as to why Githinji J as he then was (now JA) declined to free the defendant from liability to the plaintiff on account of that payment. It was because:-

"*Since the defendants commitment to the plaintiff herein had been made earlier in time, the same should have received priority in meeting the same.*

(ii) The defendant did not seek variation of a commitment to satisfy those orders before making payment in pursuance to the Garnishee orders.

(iii) It was on record that the Garnishee proceedings were being challenged.

(iv) There was discrepancy between the amount in the decree that led to the filing of the Garnishee proceedings and the amount paid over in satisfaction of the said Garnishee order"

Then at line 8 from the bottom this court, went on to make the following observations:-

" *One of the issues raised then, was a determination by the court hearing, the application to set aside the Garnishee order in HCCC No. 1644/87 and determine whether or not the Kshs. 2,643,211/05 was due and properly paid. In as much as the defendant/applicant has deponed that this has been satisfied, they have not exhibited a determination by the court, in HCCC 1644/87 either confirming setting a side the said Garnishee orders. In the absence of that, the prevailing circumstances as at 27/6/95 which made this court, decline to release the defendant from its indebtedness to the plaintiff still stands, and or prevail. The court made it clear at line 2 from the top on page 3 of the ruling that: "it would be premature in the circumstances of this case to order discharge of the defendant before the application in HCCC No. 1644/87 is determined"*

The second doubt, or issues as concerned the Garnishee proceedings arose because as observed by the learned judge at line 5 from the top, on the same page 3 "*That although the defendants advocates sent a cheque for Kshs. 2,643, 211.15 to advocates for the decree holder in HCCC 1644/87 by a letter dated 19/4/95……. It had not been confirmed that the cheque had been paid unless it is confirmed that the cheque has been paid then it would be premature to discharge the defendant"*

At page 43 line 5 from the bottom, this court, made observation as to what the court, thought the defendant/applicant needed to demonstrate in order to rely on the payment in pursuance of Garnishee orders in HCCC No. 1644/87 namely:

(i). The amount in the cheque has been ascertained and confirmed to be the correct amount payable to the said decree holder.

(ii). There has to be confirmed that the cheque was not only received but it was also paid by the production of a receipt or same other memorandum proving payment.

(iii). There has to be proof that the challenge to the Garnishee proceedings in HCCC 1644/87 ended in favour of the Garnishee and that the Garnishee orders were confirmed. It is only after complying as a fore mentioned, can the defendant be released from its indebtedness to the plaintiff on account of payment of money on account of the Garnishee proceedings in HCCC 1944.87. The annextures herein have not

demonstrated so.

On the basis of the afore set out reasoning, this court, among others made the following findings in so far as the said findings go to affect the findings in respect of the application subject of this ruling. These are items 4, 5 and 8 and these read:-

"4.*The defendant payment on accounts of Garnishee proceedings in HCCC No. 1644/87 was subject of the defendant attempts to have the shares released on the basis of having fully satisfied the decree in their application filed in court on 6/6/95. The court, declined to accede to the defendants request because:-*

(i). *Objection proceedings to the Garnishee order were pending.*

(ii). *It has not been established whether the Garnishee order had been properly made or not.*

(iii). *There was discrepancy as to the amount in the decree in HCCC No. 1644/87 and the amount paid towards that decree which discrepancy had not been explained.*

(iv). *Proof that the cheque had been paid had not been furnished*."

The defendants have come again relying on the same grounds. This ground had been faulted because the defendant had not complied with the directions given by Githinji J (as he then was now JA).

"5. *In the ruling of 27.6.95 since the validity of the payment in pursuance of the Garnishee order in HCCC No. 1644/87 had not been justified, there is no way the defendant could pin that payment on to the plaintiff. It means that the same is available for the defendants commitments to the plaintiffs decree as per the order of 10.3.95 which have not been varied or set aside. The amount of Kshs. 2,643,211 .15 remains outstanding and owing from the defendant to the plaintiff.*

8. In view of the afore said matters in number 1,2,3,4,5,6, and 7 above, accounts should be taken between the parties before the Deputy Registrar of this court, on a date to be agreed upon by the parties to establish the following:-

(i). *Costs payable since the decree was compromised.*

(ii). *Interest payable at 16% on the amount not proved to have been paid under the Garnishee order in HCCC 1644/87.*

After the figure in No. 8 above is established and fully paid to the plaintiff is when the defendant can move to the court, to have the shares held as security released. For now they will still remain so held as security by the court."

It is against the afore set out background information in prior findings of this court, on the subject in issue that the defendant/applicant has once more sought the intervention of this court, by presenting an application by way of Notice of motion brought under section 3A and 80 of the CPA order XLIV and C of the CPR. The inherent jurisdiction of this court, and all other enabling provision of the law seeking 6 prayers namely:-

1. Spent

2. That pending the hearing and determination of this application this honourable court, be pleased to grant a stay of any further proceeding in this matter, including the taking of accounts before the Deputy Registrar as directed by the high court of Kenya at Nairobi (The Hon Lady Justice Nambuye through its ruling and/or order made and or issued on 7th March 2008 as well as a stay of execution of any consequential orders arising there from.

3. That this honourable court, be pleased to discharge, set aside, vary and or vacate the order by the

high court, of Kenya at Nairobi (The Honourable Lady Justice Nambuye, made and or issued on 7th March 2008 as well as consequential order.

4. That this honourable court, be pleased to order that the 78,750 Kenya Commercial Banks shares deposited in court, as security pursuant to the order of the High court, of the Kenya made and or issued on 17th March 1995 be released to the defendant forth with through its successor in title, Kenya National Assurance Company (2001) Limited.

5. That this honourable court, be pleased to make any further orders with respect to the issue of accounts and/or costs between the parties herein as this Honourable court, may deem fit in the wider interests of justice.

6. That costs of and/or incidental to this application be provided for.

It is to be noted that prayer 2 on stay pending determination of application has already been dealt with in the ruling dated and delivered on 21st day of November 2008. That leaves prayer 3, 4, 5 and 6 be determined.

The defendants/applicants relies on the grounds in the body of the application grounds in the supporting affidavit sworn by one Tabitha Mwaniki Mrs. Sworn on the 20th day of September 2008, annextures in the written skeleton arguments and oral high lights in court. A summary of the same are as follows:-

1. The matter indeed is old as it has dragged on for long which history is captured in the ruling subject of this review.

2. This court, has jurisdiction to hear and rule on the matter effectively.

3. They contend that this court, had no jurisdiction to rule on the issue of the 2.6 million, that is in dispute because Githinji J considered this and then ruled in this courts, ruling where his lordship made a finding that the court, to which an application to set aside the Garnishee orders in HCCC 1644/87 was the one which was to hear and determine all the relevant facts and determine whether that amount had been paid or not.

4. It is on record that the application for setting aside the Garnishee order was heard by justice Pall and dismissed, a fact not brought to the attention of this court ,by either party. They contend that the reason for failing to bring the dismissal of the application to set aside the Garnishee order to the attention by neither party was due in advertence, and or mistake because the order had been made in another file.

5. By reason of what has been stated in number 4 above the Plaintiff/respondent is the one to blame because they are the ones who had moved the court, to set aside the Garnishee orders which should have brought the dismissal order of the application to the attention of the court, and their failure to so disclose was nothing but fraud on the court.

6. They also maintain that the issues raised by the Plaintiff/ respondent herein have been raised before and ruled upon and the defendant is of the view that the continued raising of these issues is simply to delay mislead the court.

7. If the Plaintiff/Respondent had acted prudently, they should have disclosed to the court, that their own application for setting aside of the Garnishee orders had in fact been dismissed.

8. By reason of what has been stated above in number 7, the plaintiff/Respondent who is the ultimate beneficiary of the order made by this court, on the 7th day of March 2008, should not be allowed to benefit from their wrong as the said orders were obtained by fraud and if the orders complained of are not upset, the Plaintiff/Respondent would have been unjustly enriched by the said orders which will be an affront to the dignity of the court.

9. They content that the Defendant/Applicant has offered sufficient reason in the skeleton arguments to warrant this court, to review the said orders.

10. The court, is also invited to take note that the plaintiff/Respondent has not denied the knowledge of the existence of the dismissal orders dismissing the application for setting aside the Garnishee orders, they are in effect saying that they concealed from the court, the content of a ruling which was not in their favour.

11. Lastly that the issue of Resjudicata raised by the Plaintiff/Respondent should be considered in the light of the circumstances relating to the ruling of justice pall.

In response, the plaintiff/Respondent put in a replying affidavit whose content was deponed by one Bonface Kinandu Methenge on the 16th day of October 2008, annextures there to, oral high lights in court, and case law. A summary of the same is as follows:-

1. The application is erroneous because it is supported by affidavit deponed by a person employed by a party not a party to these proceedings. The reason for saying so is because leave to appear and conduct proceedings on behalf of the defendant was granted to the official Receiver and not any other entity. As long as no leave exists for the current entity to appear on behalf of the defendant herein, the application is incompetent.

2. The applicant does not merit the relief for review because they have not satisfied the ingredients for granting the same under order 44 of the CPR because they have not raised new issues which they could not discover after due diligence, the issue raised herein are the same issues raised in the application that gave rise to the ruling sought to be reviewed.

3. The court, is invited to take note that in a previous communication the plaintiff/respondent had demanded from the defendant/applicant among others the ruling now sought to be relied upon which had allegedly dismissed the application to set aside the Garnishee order granted in HCCC 1644/87. They had also asked for the official receipt from the Kenya Bureau of Standards.

4. The court, is invited to take note of the bundle of correspondence, exchanged between the applicant and the respondent even the issue and note that the issue of the ruling now sought to be relied upon never featured and yet it appears all along to have been in the defendant /applicants' possession.

5. The court, is invited to hold that issue of in advertence and mistake does not arise at this belated hour, because the defendant counsel were all along aware of the ruling complained of and as such this court, is invited to hold that there was no excuse of due diligence either by the defendant/applicant or their counsels.

6. The plaintiff/Respondent cannot be accused of fraud and non disclosure of the ruling declining to set aside the Garnishee order because it was not involved in those proceedings and as such the defendant/applicant does not expect them to have argued the case for them and exhibited the evidence of the same herein.

7. The court, is invited to take note that this litigation has been on going for over 20 years and as such it should be brought to an end.

8. The defendant/Applicant should have made sure that payment is made to the proper person with proper leave of court.

In reply on points of law, counsel for the defendant/applicant stressed the following points namely:-

- There is a vesting order transferring assets and liabilities from the defendant to the Kenya National Assurance (2001) Kenya Limited even security sought to be released are so vested and as such the deponent of the affidavit has authority to so depone.

- The court, is invited to consider the effects of the ruling of justice pall.

- Maintain that they have put in sufficient reasons and law to warrant review.

- The plaintiff/respondent have not denied the knowledge of that ruling and as such any attempt to shift blame on to the defendant/applicant herein is nothing but an affront to the dignity of this court.

On case law the court was referred to the case of **TIWI BEACH HOTEL LIMITED VERSUS STAMM (1991) KLR 658** which is a decision of the court of Appeal on non disclosure of material particulars the CA ruled that:-

1. When considering an averment of material non disclosure, it is important that the court, is not left with vacum in the narrative which might be relevant.

2. It matters not upon a point of this narrative, being taken whether the applicant was entitled to or that the court, would have granted the relief sought in any event, that is to say leaving a side the non-disclosure, for it is the affront to the dignity and credibility of the court that is in point."

The case of **REPUBLIC VERSUS KENYA NATIONAL FEDERATION OF CO-OPERATIVES LIMITED** exparte communication commission of Kenya in which in an application for judicial review Ibrahim J ruled inter alia that:-

"*It is essential that parties who seek leave to move for judicial review, should appreciate that they have a duty to make full disclosure of all the potential maters to the court.*

(2) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact issues which were to be decided by the judge on application."

The case of **VERONICAH RWAMBA MBOGOH VERSUS MARGARET RACHEL MUTHONI AND ARTHUR MUNENE MBOGO NAIROBI CA 311 OF 2001** decided by the CA at Nairobi on the 16th day of June 2006. At page 8 of the said judgement line 2 from the bottom it is noted that it was an appeal from a ruling of the superior court on an application made under order 44 CPR. At page 9 line 1 from the top, it is indicated that the applicant sought review from the superior court on the ground of:-

(a) The discovery of new and important matter.

(b) Any other sufficient reason.

At page 13 line 13 from the bottom, the law lords of the CA had this to say:- We think the correct statement of law was that followed by this court in **NARODHCO KENYA LIMITED VERSUS LORIA MICHELLE CIVIL APPEAL NO. 24 OF 1998 (UR)** when it stated

" *There was nothing on record to disprove the defendants allegation to the effect that the said new fact, came to its knowledge only after the decree. The power to review is not confined to mistake or error in the decree. The power is given by section 80 of the civil procedure code (SIC) and order 44 of the CP Rules as was stated by this court in the case of **SHANZU INVESTMENT LIMITED**. This court said:- In **WANGECHI KIMITA AND ANOTHER VERSUS MUTAHI WAKABIRU (CA NO. 80 OF 1985)** (un reported) it was held that, Any other sufficient reason need not be analogous with the other grounds set out in the rule, because such a restriction would be a clog on the un fettered right given to the court by section 80 of the CPA. The court, further went on to hold that the other grounds set out in the rule did not in themselves form a germ or a class of things with which the third general head could be said to be analogous. The current position would then appear to be that the court, has un fettered discretion to review its own decree or order for any sufficient reason.*

In our view it is not incumbent upon the judges at the stage of the hearing of an application of review, such as was before the judge here, to inquire fully in to the correctness of the facts. It would surfice if the court, is satisfied that the facts brought up after the event are such as to merit a review of judgement"

At page 14 line 8 from the bottom, there is quoted with approval the case of **GULAMHUSSEIN MULLA JIVANJI AND ANOTHER VERSUS EBRAHIM MULLA JIVANJI AND ANOTHER (1929-30) KLR 41** where Pickering CJ as he then was, had stated:- "But in my opinion, however grieved person may be at the various expressions contained in a judgement or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgement as a whole, the person cannot under order XLII appear before the judge who passed the judgement and argue whether this or that passage in the judgement is tenable or untenable. The ratio decidend on a judgement cannot be called in question on review unless the resultant decree is a source of legitimate grievance to a party to a suit.

There is also cited the case of **YANI HARYANTO VERSUS E.D AND F (SUGAR LIMITED) NAIROBI HCA 122 OF 1992** decided by the CA on the 6th day of April 1993 dealing with effect of the filing of notice of appeal which has no relevance herein. Also the case of **GITHERE VERSUS KIMUNGU (1976-85) EA 101 (CAK)** which also dealt with the effect of the filing of the notice of appeal. This has no relevance to the argument herein save that on discretion the CA stated: - "*have an un fettered discretion, and not to be too rigidly bound by previous authority which might in certain cases work injustice to one or other of the parties, the discretion is a free one, but it is to be exercised judicially upon principle which are well understood"*

On mistake it was held:-

" *Where there has been a bonafide mistake and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court, should lean towards exercising its discretion, injustice away that no party is shut out from being heard and accordingly a procedural error or even a blunder on a point of law on the part of an advocate and that of his advocates including that of his clerk, such as a failure to take prescribed procedural steps or to take them in due time should be taken with a humane approach and not without sympathy for the parties and in a proper case such mistake may be a ground to justify the court ,in exercising its discretion to rectifying the mistake if the interests of justice so dictate, because the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better, and there is nothing in the nature of such a mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the other side, but whether the matter shall be so treated must depend upon the facts of each individual case"*

In relation to rules, the following observation was made:-

" *In relation to rules of practice to the administration of justice, that these are intended to be that of a hand maiden rather than a mistress and that the court, should not be so bound and tied by the rules which are intended as general rules of procedure as to be complied to do that which will cause injustice in a particular case, and this is a principle which a court must remember when judicially exercising its discretionary powers"*

There is also quoted the case of **M'MITHIARU VERSUS MAORE AND 2 OTHERS (NO.2) (2008) 3KLR 730** also a court, of appeal decision dealing basically with service of election petitions. But may be holding 8 in so far as jurisdiction of a judge of concurrent jurisdiction reversing the decision of another without being procedurally moved may have a bearing on the application herein. These reads:-

" *8 Because the second judge of the high court, had concurrent jurisdiction as the judge who had allowed alternative service by advertisement, he had no jurisdiction to declare the orders of his fellow judge un lawful and un acceptable. The position would have been different if the high court, had been asked to review the orders made by the first judge who himself was not available to review his orders and the chief justice had given the subsequent judge permission to review the orders."*

On the courts assessment of the facts herein, the court, makes a finding that the rival arguments herein has presented arguments on two fronts namely, the technical front and the merit front. On the technical front the issues raised are as follows:-

1. Whether there is an order or decree in place capable of being reviewed.

2. Whether the application is competent as presented.

3. Whether the issues raised herein are Resjudicata.

4. Whether the application is a non starter by reason of the allegation that it is being championed by a party not properly on record.

5. Whether the judge seized of the matter has jurisdiction to reverse the orders made by Githinji J as he then was (now JA), which orders had granted the defendant/applicant to liquidate the decretal sum owed to the plaintiff/Respondent on condition that the KCB shares sought to be released are deposited in court.

On the first technical issue of whether there is in place a grieving order or decree in place, this court, takes note of the decision of the CA in the case of **GULAM HUSSEIN MULLA JIVANJI AND ANOTHER VERSUS EBRAHIM MULLA JIVANJI AND ANOTHER (1929-30) KCR 41** quoted with approval by the CA in the case of **VERONICAH RWAMBA MBOGOH VERSUS MARGARET RACHEL MUTHONI (SUPRA)**. The principle established by this court, and one that this court has judicial notice of in the course of the discharge of judicial function, emanating from the CA and as dutifully followed by the superior courts is that in order for any litigant to qualify for the grant of a relief of review, the said litigant must have extracted the grieving order and or decree and annexed it to the application for review. Herein there is a bundle of documents annexed as JM6. There is an order exhibited showing the orders were issued on 7/3/2008 and extracted on 26/9/2008 and as such this requirement has been complied with.

As regards the competence of the application, this arises from the mode of titling the heading of the application. Herein it is evident that the heading of the application and its attendant papers are titled in the manner the original pleadings are titled. The stand of this court, has always been that any application titled as such is an incompetent. Normally when the error is detected earlier before argument, the error is usually rectified on an oral application informally in court. When detected after argument, the practice of this court, has been to strike out the offeding application with leave to present a proper one. Indeed herein the error was detected after argument. However in view of the protracted litigation herein instead of striking out the application with leave to present a properly titled one, the court is inclined to invoke its inherent jurisdiction under section 3A CPA and amended the title since the amendment does not go to the root of the application and will cause no prejudice or injustice to the opposite party.

As regards Resjudicata, it is on record that the plaintiff/Respondents counsel is the one who raised this issue, because the issue of the release of the KCB shares deposited as security has been ruled on by Githinji J as he then was, in the ruling delivered on 27/6/95, and by this court, in the application sought to be reviewed of 7/3/2009. It is also the very reason as to why review has been sought.

In order for Resjudicata to hold, the Plaintiff/Respondent has to bring the argument within the ingredient in section 7 of the CPA. It reads:-

"*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court, competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court*"

The ingredients to be satisfied are as follows:-

- There must have been in place a competent court

- There must be in place a second court.

- The first court, must have decided a matter directly and substantially linked to the matter directly and substantially that the said second court is seized of.

- The dispute has to be between the same litigant or any other litigating under the same title or through them.

- The court, that must have decided the matter previously must have been a competent court, to try such a matter.

- The court, seized of the matter intended to be disposed off must also be competent.

- The dispute must have been heard and finally determined.

Applying these ingredients to the Rival arguments herein, this court, makes a finding that the issues of the release of the KCB shares was not finally determined by Githinji J as he then was (now JA) because the learned judge declined to order the release of the KCB shares deposited as security because:-

(a) By the time the Garnishee order on the basis of which the release order was being sought the defendant was already committed to the plaintiff herein.

(b) There was an application pending in the case where the Garnishee order had been made for setting aside the Garnishee order and the learned judge could not tell which way the court seized of the said application would be decided.

(c) There was a discrepancy on the decretal amount in the Garnishee order and the amount ordered to be paid over to satisfy the amount in the Garnishee order.

Turning to this courts, ruling of 7/3/2008 the issue of the release of the shares deposited as security was not finally determined because the release order was declined because:-

(a) There was no evidence as to what had become of the application to set aside the Garnishee order.

(b) There was discrepancy in the amount in the decree in the Garnishee proceedings which differed from what was being alleged to have been paid in satisfaction of the decree therein.

(c) There were no documents from the recipient of the Garnishee money to show that, that money had indeed been received by them.

(d) As at the time the Garnishee order were made the defendant had already committed itself to pay the decretal sum to the plaintiff and the said orders had not been set aside and or varied.

By reason of what has been stated above, the issue of the release of the KCB shares deposited as security herein has not been finally decided and finally determined. As such the plea of Resjudicata does not apply.

As regards the application being a non starter, because the deponent of the supporting affidavit to the application is by a person employed by a stranger to the proceedings, the defendant/applicant has exhibited an order contained in a bundle of documents marked TMI issued on 19th day of March 2002 and extracted on the same date showing that indeed when the defendant was placed under Receivership, its functions was entrusted to the official Receiver. There after the official Receiver transferred the assets to the employer of the deponent. This being the case, as long as those orders stand, the defendant is rightly being represented herein by the Kenya National Assurance (2001) (K) LTD and as such the

supporting affidavit is competent.

Turning to the issue of jurisdiction and in line with the CA decisions of **M'MTHIARU VERSUS MAORE AND 2 OTHERS (NO.2) (2008) 3KLR (EP)** in the holding relevant to this ruling a superior court judge has no jurisdiction to vary and or set aside or act contrary to another superior courts' orders in the absence of an application for review, and setting aside having been presented to him. The relevance of this holding to this ruling is that the orders to deposit the shares sought to be released as security in order to guarantee the defendant/applicants right to liquidate the decretal sum by installments were made by Githinji J as he then was. These orders are still on record. As long as they stand, this court, can only have jurisdiction to interfere with those orders, vary or set aside the same upon request being made to it by way of review.

Having disposed off the technical aspect of the ruling, the court, now proceeds to deal with the merits. On the merits, there is no doubt that the inherent jurisdiction of the court, has been cited by reason of the citing of section 3A of the CPA. This reads:-

" *Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the proceeds of the court".* It is evident from the reading of the said section that the yard stick to be used to determine the circumstances in which the inherent jurisdiction is to be invoked are not in built in the section. It is however now trite law and this court, has judicial notice of the same, that this yard stick has now been provided by case law decided by the CA and as dutifully followed by the superior court. The principles enunciated by them is that the power and or jurisdiction can only be invoked by way of application by the litigants or on the courts' motion when there is no other provision of law applicable through which the litigant beneficiary can use to access the relief sought.

The foregoing being the case, this court can only invoke the said powers where it is demonstrated that review provisions are either absent or in adequate. Herein the relevant review provisions cited by the litigant are section 80 CPA and order 44 CPR. Section 80 donates the general power to apply for review. It reads:- *" Any person who considers himself aggrieved-*

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

(b) *By a decree or order from which no appeal is allowed by this Act may apply for review of judgement to the court, which passed the decree or made the order, and the court, may make such order there on as it thinks fit"* This general donating power does not have the yard stick to be applied when seeking review, in built in it. This therefore makes it imperative to turn to the rules enshrined in order 44 CPR.

The relevant portion is rules 1(1) and 1 (2) of the said order. They read:-

"*Order 44 V. (i) 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 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 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 judgement to the court, which passed the decree or made the order without unreasonable delay"

Applying the above provisions to the arguments herein, it is clear that in order to avail itself of this relief, the applicant has to demonstrate the following:-

(a) That the application has been presented without undue delay

(b) That there is discovery of new and important matter which exercises of due diligence was not within their knowledge or could not be produced by him at the time when the decree was pass and or made.

(c) Existence of some mistake or error apparent on the face of the record.

(d) Or any other sufficient reason.

When these ingredients are applied to the applicants arguments herein it is apparent that the applicant has stressed relevance *"on any other sufficient reason"* as demonstrated by the grounds in the body of the application, supporting affidavit and annextures.

The sufficient reason being that the two previous ruling in which the court declined the release of the security was because the court, was under a mistaken belief that the application for setting aside the Garnishee proceedings had never been heard and disposed off. It is their stand further that the plaintiff/respondent was the party which prosecuted that application in HCCC 1644/87 and costs. They were all along aware of the said ruling but they kept this fact from the court and according to the defendant/applicant, the intention was to commit fraud on the court. It is also their stand that had the court had this information placed before it, they have no doubt the court, would have ruled differently. Further that the failure to lift the Garnishee order fortifies their stand that the plaintiff/Respondent decree has been fully satisfied and as such the shares held as security should be released to them. In response to that arguments the plaintiff/respondent has asserted that they did not participate in the Garnishee proceedings, and the party who should have brought the results of these proceedings to the court, should have been the defendant/applicant. That they sought that information way back in the year 2005 from the defendant as shown in their annexture BKMI from the defendant but the same has never been given to them. They are surprised the defendant has now provided the same to the current application. As such if any party is guilty of any concealment then it is the defendant who should take the blame.

Due consideration has been made by this court, of the rival arguments mentioned and considered them in the light of the documentation exhibited herein and the court, makes the following findings on the same:-

1. Indeed annextures BKMI enumerates items that the plaintiff/applicant had requested to be supplied by the defendant/applicant. These are

- *Acetified copy of the decree showing computation of Kshs. 2,643,211.00 payable to Kenya Bureau of Standards*

- *A certified copy of the purported Garnishee order nisi*

- *A certified copy of the purported Garnishee order absolute.*

- *A copy of the original official Receipt from Kenya Bureau of Standards evidencing payment of a mount alleged to have been paid.*

- *A copy of the purported consent order obtained under rule 34 (2) (c) as read together with 67(1) and (2) of the court of Appeal rules.*

The content of the subject heading of the said annextures, shows that the request had been made following the mention of the said documents in the defendants application dated 7th day of October 2005 which this court, has no doubt was seeking the release of the said shares, which had been deposited as security. The same is dated 10th may 2006. It is annexed to the replying affidavit. The court, notes from the content of the further affidavit that in response to the replying affidavit, the defendant/applicant dealt mainly with issues of law, and why this court, should exercise its discretion and grant the review sought in its favour and why additional security should not be furnished pending the disposal of the application subject of this ruling. This court has not traced any deponement by the defendant/applicant denying the

sending of the said request to them by the plaintiff. Neither has this court, traced any deponement or correspondence emanating from the defendant/applicant to the plaintiff/respondent forwarding the said documents. This being the case the court, makes a finding that the information in BKMI was never supplied as requested.

The foregoing findings not withstanding, the court, cannot loose sight of the existence and finality of justice palls ruling in the Garnishee proceedings in HCCC 1644/87. This ruling has been annexed in the bundle of documents exhibited by the defendant/applicant as exhibited TM6. It is dated 27th day of November 1995.

The salient features of the same for purposes of the record are as follows:-

- *The participating parties to the proceedings were the Kenya Bureau of Standards and Uchumi insurance Brokers, the plaintiff herein.*

- *The amount of the decree obtained was Kshs. 1,436,963.00*

- *That on 10/3/95 the decree holder there in had applied to attach the debt owed by the defendant herein to the plaintiff/respondent herein.*

- *That on 16/3/95 the Garnishee admitted the debt and Aluoch J as she then was now (JA) ordered the Garnishee to undertake to pay the decretal amount with interest.*

- *That the Garnishee had already complied with the said order giving of an undertaking to pay.*

- *Non service of the order nissi does not render the order which had already been granted exparte null and void.*

- *Even if the order nisi had been served on the applicant, he had no role to play as it is only the Garnishee who could dispute liability.*

- *The Garnishee could not have opposed the order so long as the decree issued against him remained unsatisfied.*

- *The procedural rules are hand maids of justice. Failure to comply with the requirements of these rules in respect of time, place and manner, form or content in any other respect, cannot nullify the proceedings, unless by that failure the applicants position has been prejudiced. It shall be treated as an irregularity.*

- *The decree had remained un satisfied for 8 years. The appeal preferred has not been prosecuted. As such the sole reason for applying to set aside the Garnishee order was to delay the decree holder as much as possible from reaping the fruits of the judgement in his favour.*

- *There is no provision in order 22 which empowers the judgement debtor to have a Garnishee order set aside particularly when the decree had been unsatisfied for seven or eight years.*

- *The court can in its inherent powers set aside any order granted exparte if it is satisfied that the order should not have been granted and the order has seriously prejudiced the applicant and has worked injustice to him.*

- *The Garnishee had already paid in obedience to the court order.*

In addition to the content of that ruling, in the same bunch of annextures, there, is traced under JMI, the ruling of Aluoch J of 16th day of March 1995. The centrol theme in the same is that the Garnishee did not dispute holding money for the decree holder, and by reason of that the court, ordered the said Garnishee to give an undertaking to pay the said sums. Next to this ruling is found a decree in HCCC 1644 of 1987.

In its heading it shows clearly that the claim was for Kshs. 1,355,62.95 among others. At the bottom of the decree it is indicated that the defendant was ordered to pay Kshs. 1,436,963.60 with interest. At page 2 of the said decree the particulars given were as follows.

Particulars

Principal amount Kshs. 1,355,625.95 interest at 12% per annum from 222/4/1987 to 22/10/1987 Kshs. 81,337.60.

The total came to Kshs. 1,436,963.55.

The decree was issued on the 22nd day of October 1987 and issued on 14th day of March 1995.

This court, has not traced among the document exhibited a variation of that decree to the figure alledgely paid of Kshs. 2,643,211.15.

This is the information that this court, has been called upon to use to determine whether the defendant/applicant indebtedness to the plaintiff/respondent had been fully discharged and by reason of this had this court, been presented with this information at the time it made its orders of 7/3/2008, it would have arrived at a different conclusion and therefore the end result would have been an order releasing the deposited shares as opposed to an order declining to release the same.

When making the said determination this court, is enjoined to uphold the following principles of law namely:

- That invocation of the inherent jurisdiction of the court, is only meant to meet ends of justice to both parties and to avoid injustice to the same parties and prevent abuse of the due process of the court.

- Review and setting aside of a provision order involves the courts exercise of its discretion which discretion is said to be unfettered. By reason of this un fettered effect of the exercise of the courts discretion, the court, is enjoined not to fetter itself unnecessarily. But it has to note that the exercise of the said discretion has to be exercised judiciously, with reason and within the accepted principles of law applicable.

- That rules of procedures are meant to be hand maids of justice and these should not be allowed to become mistresses or bad masters where strict adherence is likely to course prejudice, hardship and injustice to one party, the court, should opt for substantial justice to be done to the parties.

This court thus employs the above principles and proceeds to employ them to the application herein. In doing so the court, has to bear in mind the fact that before it declined to grant the relief sought namely to release the security deposited in its ruling of 7/3/2008, another judge of concurrent jurisdiction, Githinji J had declined to grant the same in 1995. the reason why Githinji J declined to release the security deposited was because of the pendence of the application for setting aside of the Garnishee order.

This court in its ruling of 7/3/2008 also declined to order release of the security deposited for the same reason as that advanced by Githinji J as he then was then added the following:-

1. The order to pay by installments was still standing and had not been varied and as such it had to be upheld.

2. There is a discrepancy in the amount forming the decree that was the basis for the Garnishee proceedings of Kshs. 1,436,963.55 and the amount alleged to have been paid by the defendant on behalf of the plaintiff of Kshs. 2,643,211.55 and there had been no explanation from the defendants as to how the increased figure arose.

3. There was no proof of receipt of the payment by the beneficiary of the Garnishee proceeds.

This being the case, it follows that in order for this court, to justify upsetting its orders of 7/3/2008 in so far as the order for the release of the security deposited is concerned, it has to be demonstrated that all these reasons have been fully demonstrated or satisfied by the applicant. Due consideration has been made by this court, and the court proceeds to make the following findings:

1. Indeed the applicant has demonstrated that it was an error for the court, to decline to order release of the security deposited because the result of the application for setting aside the Garnishee orders had not been known. The error arises because in fact the said application had been dismissed way back in 1995. What the court, is left with is the explanation of how the figure in the Garnishee proceedings rose from Kshs.1, 436,963.55 to 2,643,211.15. It should be noted that the money that was to be paid in satisfaction of the Garnishee order was part of the money that was due to the plaintiff/respondent. This being the case, it follows that unless there is an explanation of how the defendant applied the same on behalf of the plaintiff defendant cannot be released from their indebtedness to the plaintiff.

As regards payment of the same to the Garnishee order beneficiary, indeed Pall J as he then was made an observation that the liability had been satisfied, but did not mention how much had been paid, and how this had been proved as no receipt was mentioned. Since this was one of the reasons as to why the release order was declined by this court, in its ruling of 7/3/2008, it was imperative upon the defendant/applicant to demonstrate proof of payments by production of receipt. Indeed observation had been made of the existence of a letter dated 20/4/95 acknowledging receipt of a letter containing a cheque for Kshs. 2,643,211.15 contained in the bundle. This court noted that content but declined to accept and upheld the arguments of the plaintiff that they should furnish a receipt. This court, still holds the same view. This could simply have been satisfied by the defendant/applicant seeking a supporting affidavit from the Kenya Bureau of Standards as to how the amount in the decree, almost doubled, and that the same was received. No explanation has been given as to why this was not resorted to.

(4) The other issue was whether the court could interfere with Githinji Js order (as he then was (now JA)which were earlier in time and still stand, and as long as they stand they require to be complied with. It therefore follows that upon satisfaction of full payment of the said amount, on behalf of the plaintiff, the defendant/applicant would be required to have asked the court, to interfere with Githinji Js orders.

That not withstanding this court, is alive to the inherent jurisdiction of the court, and the applicants plea that the court, do proceed to make such other orders as the court may deem fit to grant. It is the opinion of this court that had the applicant proved how the decretal sum due under the Garnishee proceedings had been increased and satisfied that indeed this had been duly paid, it the court would have proceeded to make appropriate orders to bring the litigation to an end without interfering with Githinji Js orders as it has not been moved procedurally to review and or vary the same. But it would have been appropriate to declare the decree satisfied and order closure of the proceedings in the interest of justice to both parties.

In conclusion the application for review and setting aside of the order of this court made on 7/3/2008 has been declined by reason that although Pall J, as he then was in his ruling said that, the Garnishee order had been satisfied, it was necessary to demonstrate how that had been satisfied by production of a receipt or deponement from the recipient to that effect. It was also necessary to demonstrate the justification for the increase in the amount payable to the beneficiary of the Garnishee orders. Until that is done, the defendant/applicant will not have the release order in his favour.

As for presentation of the application without undue delay, indeed the application herein was presented almost 7 months later. This may be in ordinate, but this court, has judicial notice of the case law on the subject, that what matters is the explanation given for the delay. Even if the delay is one month, and no good explanation is given, a litigant can be denied the relief. Herein it is not known when the ruling was sourced but in view of the fact that the file was alive, and other activities were taking place on it, a period of 7 months cannot be taken to be in ordinate delay.

There was also assertion of fraud and concealement. This courts observation on this is that both parties should have made efforts to get the results of the said ruling. The defendant should take the greater

blame in that had they responded to the request for the supply of the documents, by the plaintiff, may be this application would have been rendered unnecessary as all issues would have been considered in the ruling of 7/3/2008.

For the reasons given the application dated 30th and filed on 2nd is refused.

(2) Costs will be paid to the respondent to it.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY 2009

R.N. NAMBUYE

JUDGE