



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 321 of 2003**

**KENYA OIL COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**FLEUR INVESTMENTS LIMITED.....DEFENDANT**

**RULING**

On 11<sup>th</sup> November 2008, when this suit was listed for full hearing, the plaintiff's counsel sought adjournment on the grounds that it wished to amend its plaint so as to incorporate fresh averments therein. The application for adjournment was objected to by counsel for the defendant. He told the court that he was ready to proceed with the case and in the event the court was inclined to grant adjournment, its counsel should be paid the costs for the day and the getting up fees. P. Kihara Kariuki J after considering the application, granted the application for adjournment sought by the plaintiff. He ordered the plaintiff to pay the defendant's costs for the day together with getting up fees of Kshs.100,000 /=. The said sum was ordered to be paid within thirty (30) days of the order.

It appears that the plaintiff did not pay the amount to the defendant within the period directed by the court. On 30<sup>th</sup> January 2009, the defendant filed an application seeking to compel the plaintiff to pay the said sum of Kshs.100,000 /= within a period of seven days from the date the court shall issue the order or in default thereof the defendant be granted leave to commence execution proceedings against the plaintiff. The said application is yet to be heard. On 16<sup>th</sup> February 2009, the plaintiff filed a notice of motion pursuant to provisions of Section 80 of the Civil Procedure Act and Order XLIV Rule 1 of the Civil Procedure Rule seeking orders of this court for the review of its orders of 11<sup>th</sup> November 2008 and thereafter make an order reversing or setting aside the order that mandated the plaintiff to pay getting up fees to the defendant. The plaintiff contends that there was an error or mistake apparent on the face of the record. The plaintiff complained that the court had acted in excess of its jurisdiction when it granted the said order. The plaintiff was of the view that there were sufficient reasons to justify reviewing the said order in that the same was based on misstatement of facts, was otherwise unfair, unjust and oppressive to the plaintiff because it denied the plaintiff the right to equal treatment before the court. The application is supported by the annexed affidavit of Desterio Oyatsi, the advocate for the plaintiff.

The application is opposed. Fredrick Ngatia, the advocate for the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff was indolent in filing the application for review and therefore was not deserving of the orders sought. He swore that the application should not be allowed in view of the plaintiff's willful disobedience of the order of the court that required the plaintiff to pay the amount ordered within thirty (30) days. He swore that the plaintiff had conceded that the defendant was entitled to be paid the costs of the day but was unwilling to pay the amount legitimately assessed by the court. He stated that the costs awarded by the court were far less than the amount the defendant was entitled to under the remuneration order. He swore that the amount assessed by the court was a product in which both counsel participated and in the circumstances the plaintiff should not be allowed to resile from the decision reached by the court from the exercise. He was of the view that the motion was not founded on the grounds set out under Section 80 of the Civil Procedure Act. He further stated that the fact that the plaintiff was not awarded costs in the past when the defendant had sought adjournment should not be a reason for the plaintiff not to pay the costs awarded to the defendant by the court. He deponed that the plaintiff was re-litigating issues which the court had considered and thereby rendered its decision. He urged the court to dismiss the application.

At the hearing of the application, I heard the rival submissions made by Mr. Oyatsi for the defendant and Mr. Ngatia for the plaintiff. I have carefully considered the submissions made including the authorities cited by the said counsel. The issue for determination by the court is whether the plaintiff established a case to entitle the court review its decision on the ground that there was mistake or error apparent on the face of the record. It is now settled that in determining whether there has been mistake on the face of the record the court is not required to engage in a long drawn process of reasoning or consider points where there may be conceivably be two opinions. The mistake or error on the face of the record, in my view, is the one that stares at the face of the court. Mere wrong or the holding of a wrong view of the law or fact is no ground for review but is good ground for appeal. (See John Francis Muyodi vs Industrial & commercial Development Corporation & anor [2006] eKLR).

In the present application, although the plaintiff did not present his application for review without undue delay as

stipulated by the rules, it was clear to the court that the plaintiff has a case when it states that it was treated unfairly in the seat of justice. The defendant had previously applied for adjournment. The plaintiff applied to be awarded costs for adjournment. It was denied. On the one instance that the plaintiff applied for adjournment, it was ordered to pay costs for the day and further ordered to pay getting up fees. I think what applies to the goose must also apply to the gander. If the plaintiff had been denied getting up fees on a previous occasion, then, it follows and it is only just that the defendant be equally denied getting up fees in the instance when it was unjustly awarded. I agree with the plaintiff that parties are entitled to equal treatment before the law. In this case, it was clear that the plaintiff was treated in a manner that was clearly unfair and unjust. The defendant was entitled to adjournment cost for the day and no more. I therefore hold that the plaintiff has established, to the required standard, that there is an error that is apparent on the face of the record that should accordingly be reviewed.

The plaintiff's application for review is therefore allowed. The order issued by this court on 11<sup>th</sup> November 2008 is hereby reviewed and set aside. The order that the plaintiffs pays getting up fees to the defendant to the sum of Kshs.100,000/= within a period thirty (30) days is set aside and substituted by an order of this court awarding the defendant adjournment costs for the day which I have taken the liberty to assess at Kshs.5,000/=. The said amount shall be paid within seven (7) days of today's date in default thereof the defendant shall be at liberty to execute. It is so ordered.

DATED IN NAIROBI THIS 24<sup>th</sup> DAY OF JUNE 2009.

**L. KIMARU**

**JUDGE**