



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Winding Up Cause 52 of 1998**  
**IN THE MATTER OF SUMMIT TEXTILES LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT**

**RULING**

On 19<sup>th</sup> June 2009, this court in delivering the ruling that is the subject of this application for review, noted that if the parties in the dispute had the spirit and willingness to resolve the outstanding issues between them, this matter would long have been resolved. In allowing the application, the court noted at page 6 of its ruling as follows:

*“As stated earlier in this ruling, it was clear that the appointed date of 31<sup>st</sup> March 2001 was important in the determination of the value of the said shares. It therefore naturally follows that upon valuation of the said shares as at that date, interest is payable in view of passage of time and inflationary trends. The arbitrator is therefore granted mandate, after determining the value of the said shares, to determine the interest that shall be paid. Further, the natural consequence of making any award in regard to the payment of any amount is that the period should be specified upon which the ascertained amount shall be paid. The arbitrator is therefore granted mandate, on ascertaining the sum to be paid, to make an order within what period such sum shall be paid.”*

In view of the history of this matter, it was not a surprise that one of the parties was aggrieved and sought to have the said decision reviewed and set aside. By its amended notice of motion filed in court on 18<sup>th</sup> September 2009, purportedly made pursuant to the provisions of **Order XLVI Rule 1** of the **Civil Procedure Rules**, the applicant, Summit Textiles Ltd sought to have the said ruling of this court reviewed and set aside. The applicant was of the view that there was an error apparent on the face of the record in that the court made a ruling determining that interest was payable on the share valuation sum whereas the applicant had sought orders to give the arbitrator the said power to deal with and determine the issue of interest on the ascertained value of the minority shareholders' shares. The applicant was aggrieved with the court's observation to the effect that if the value of the said shares would be determined, interest would be payable in view of the passage of time and inflationary trends.

The respondent filed grounds of opposition in objection to the application. The respondent noted that there was no error that was evident and apparent on the face of the record. The respondent was of the opinion that the extracted order specified the order that was to be served to the arbitrator, which order would not change even if the court were to review the application. The respondent was of the view that the conclusion reached by the court did not constitute an error on the face of the record but rather a ground for appeal.

At the hearing of the application, I heard rival arguments made by Mr. Chacha for the applicant and Mr. Munyu for the respondent. The parties to this application were agreed on the principles to be considered by this court in determining whether or not to allow the applicant's application that sought to

review the ruling of this court. In **John Francis Muyodi vs Industrial & Commercial Development Corporation & Anor [2006] eKLR**, the Court of Appeal held at page 5 as follows:

*“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”*

In the present application, the order that is sought to be reviewed was in respect to an application made by the respondent that sought the variation of the order issued by Hewett J on 3<sup>rd</sup> April 2001 which sought to give the arbitrator further two mandates which included the power to deal with, hear and determine the issue of interest on the ascertained value of the minority shares, and secondly to order payment on the ascertained value of the shares and the interest thereon, if any. It was therefore clear that the thrust of the respondent’s application sought the court’s intervention to grant the arbitrator with jurisdiction to make an award in regard to the interest that would be paid, if the arbitrator made a finding that the interest would be due and payable. The order that was extracted by the respondent reflected the decision of this court. It appears that the applicant read a sentence in the said ruling in isolation of the context of the entire ruling. I am of the view that the applicant’s application is yet another attempt to frustrate the determination of the pending dispute between the applicant and the respondents by arbitration as directed by the court.

I find no merit with the said application that sought to review the ruling of this court delivered on 19<sup>th</sup> June 2009. The applicant has failed to establish that there is error apparent on the face of the record that is so evident or that stares at the face of the court that this court has no option but to review it. The applicant’s application is hereby dismissed with costs to the respondent.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2009**

**L. KIMARU**

**JUDGE**