



**REPUBLIC OF KENYA**

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

**Civil Case73 of 2006**

**DELKAN ENTERPRISES LTD::::::::::::::::::::::::::::::::: PLAINTIFF/APPLICANT**

***VERSUS***

**MASAKU COUNTRY COUNCIL :::::::::::::::::::::::::::DEFENDANT/RESPONDENT**

**RULING**

1. The Application before me is dated 4.3.2008 and it is sought that the orders made on 17.8.2006 by Emukule, J. be reviewed to allow the Plaintiff to deposit Kshs. 90,000/= in court. Further, that motor vehicles KAE 351Z and KAP 014N be released unconditionally to the Plaintiff.
2. The grounds in support of the Application are as follows:-
  - i. That there is no reason for the continued detention of the motor vehicles.
  - ii. That the review is necessary as the Defendant's advocates have refused to open a joint account.
  - iii. That the Plaintiffs have paid the requisite monies into court.
  - iv. That the mechanical condition of the motor vehicles is deteriorating.
3. I have perused the Supporting Affidavit sworn on 4.3.2008 by one Rajan Shah as well as the Replying Affidavit sworn by Pius Mutemi, the Clerk to Masaku Country Council and I gather the following facts:-
  - a. On 18.3.2005, the Defendant's agents seized motor vehicles registration numbers KAF 351Z and KAP 014 N allegedly because the Plaintiff had no business permit to sell bread within the jurisdiction of Masaku County Council. The condition for their release was that the Plaintiff should pay Kshs. 60,000/= to the Defendant.
  - b. On 9.8.2006, the Plaintiff filed an application seeking inter-ali, release of the motor vehicles aforesaid.
  - c. On 17.8.2006, parties appeared before Emukule, J and recorded a consent to the effect that Kshs. 90,000/= would be deposited in an interest earning account in the names of the advocates for the Plaintiff and the advocates for the Defendants. Further, James Singh Advocate was ordered to make certain undertakings to pay the Defendant any money due to it as licence fees for the year 2005 and 2006 as well as parking fees amounting to Kshs. 1000/= per night, per vehicle in the event that the Plaintiff is eventually found to be liable to the defendant.

d. The advocates for the parties were unable to agree on the joint account, hence the present Application. Whereas Mr. James Singh blames Mr. Wambua Kilonzo Advocate for the Defendant for failure to actualise the consent order, Mr. Wambua Kilonzo blames Mr. Singh for the same reason!

4. To my mind, the matter is very simple; a party seeking a review of any order made must meet the conditions set out in order XLIV Rule 1 of the Civil Procedure Rules which provides as follows:-

**“(1) 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 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.”**

5. In this case, it is argued that there is a **“sufficient reason”** for the order of review to be given because when the advocates failed to agree on the opening of the joint account, the Plaintiff on 11.5.2007 deposited Kshs. 90,000/= in court and the undertaking by Mr. James Singh has also been given and in effect, the Plaintiff has practically complied with the consent order aforesaid..

6. In Kimita and another vs Wakaburu [1985] LLR 246 (CAK), it was held as follows:-

**“... ‘any other sufficient reason’ need not be analogous with the other grounds set out in the rule [order XLIV Rule 1] because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or 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 unfettered discretion to review its own decrees or orders for any sufficient reason.***

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

7. Since this court has an unfettered and discretion to grant a review if the facts merit such an order, I am alive to the fact that it is the advocates for the parties who were unable to agree on the simple matter of opening a joint account. It is not my wish to apportion blame to either of them but to look to the wider interests of justice. In this case, the plaintiff has really complied with the order now sought by depositing Kshs. 90,000 in court. The necessary undertaking has been given yet for more than 2 ½ years its motor vehicles have been grounded. It is a serious inconvenience that the situation should be so when for a year now, the entire sum in dispute is in this court. That is more than a sufficient reason why the order of review should be granted.

8. I shall say nothing of the myriad arguments and accusations made by the advocates because they do not go to the exercise of discretion in a matter such as this one (see Mbogo vs Muthoni & Another [2006] IEA 174 (CAK)).

9. I shall grant the review and order that the Plaintiff be obligated only to deposit Kshs. 90,000/= into

court and having done so, motor vehicles registration numbers KAF 351Z and KAP 014N be released to the Plaintiff unconditionally.

10. Parties should each bear the costs of this Application and advocates should now take dates for hearing of this straight forward and simple suit.

11. Orders accordingly.

Dated and delivered at Machakos this **27th** day of **May 2008**

**Isaac Lenaola**

**Judge**

In the Presence of: Mr. Ocho for Applicant

Mr. W. Kilonzo for Respondent

**Isaac Lenaola**

**Judge**