



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1747 of 1997**

**FRANK OWEN WAINAINA ..... PLAINTIFF**

**V E R S U S**

**ENOCK TUITOEK.....1<sup>ST</sup> DEFENDANT**

**REENO HIDES & SKINS LTD .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

Consent judgement was entered in this case on 4<sup>th</sup> October, 2000 and decree subsequently issued on 9<sup>th</sup> September, 2002. It was ordered in the decree as follows:-

” 1. That the Defendants do provide another property acceptable to the Plaintiff to replace the property, L.R. No.209/12563, Nairobi, and the Defendants do avail all the particulars and title documents to such new property to the Plaintiff within 30 days from today.

2. That in the alternative, the Defendants do refund to the Plaintiff the sum of KShs. 3,500,000/00 together with costs and interest.

3. That in default by the Defendants to comply with either of the above (orders) the Plaintiffs be at liberty to execute for the KShs. 3,500,000/00 together with costs and interest.

4. That upon compliance with either of the above, (the) property L.R. No.209/12563 to revert to the Defendants.

5. Te Defendants do pay to the Plaintiff the costs of this suit to be taxed and certified by the taxing officer of this court.”

As it happened, the Defendants neither provided an alternative property acceptable to the Plaintiff nor refunded him Kshs. 3,500,000/00 together with costs and interest. From October 2002 the Plaintiff has tried to execute the decree for these sums. He has not been successful. At one time the court file disappeared. It was reconstructed by order of the court in the year 2004. Since then there have been a number of applications, most of them concerning execution of decree.

The Defendants have now come to court by notice of motion dated 19<sup>th</sup> April, 2007. They seek a review of the consent judgement of 4<sup>th</sup> October, 2000. The application is brought under Order 44, rule 1 of the Civil Procedure Rules (the Rules). The grounds stated on the face of the application are:-

” a).....

- b) That due to financial difficulties the (Defendants) have been unable to refund the (purchase price) or replace the suit property with another (as ordered in the decree).
- c) That the (Plaintiff) is still holding the title to the (suit) property while the (Defendants) are in possession and have made developments (thereon).
- d) That after the (Plaintiff) refused to take possession (of the suit property) though holding the title, the decree against the (Defendants) has attracted a colossal interest, and it would be impossible for the (Defendants) to refund the amount unless this..... court intervenes and have the property sold or charged.
- e) That the (Plaintiff) has previously declined to accept two other properties offered by the (Defendants).
- f) That....in 2003 the Ministry of Lands released a circular that undeveloped land shall not be sold without obtaining consent, making it more difficult for the (Defendants) to get any funds for refund.
- g) That the (Plaintiff) is in the process of executing the said decree by way of having the (1<sup>st</sup> Defendant) committed to civil jail while he still holds the title to the property.
- h) That is it fair and just that the (judgement of) 4<sup>th</sup> October, 2000 be reviewed”.

There is a supporting affidavit sworn by the 1<sup>st</sup> Defendant. It elaborates those grounds.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by him and filed on 24<sup>th</sup> May, 2007. The grounds of opposition emerging therefrom are:-

1. That since entry of judgement, the Defendants have not made any effort to settle the decretal sum.
2. That there are no grounds pleaded upon which the judgement can be reviewed.
3. That the application is yet another attempt by the Defendants to avoid payment of the decretal sum.
4. That the application is without *bona fides* and is an abuse of the court process.

In response to the replying affidavit the 1<sup>st</sup> Defendant swore a further affidavit which was filed on 31<sup>st</sup> May, 2007. He reiterates the Defendants’ alleged financial difficulties.

I have considered the submissions made by the learned counsels appearing. No cases were cited. It appears that when the Plaintiff filed suit he was already registered as proprietor of the suit property. It also appears that he had possession of the same.

The basis of the present application is essentially that the Defendants are unable to pay the decretal sum because of financial difficulties. That can never be a ground for reviewing a judgement, and a consent judgement at that! Under rule 1 of Order 44 of the Rules, the Defendants must show that they have discovered a new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge, or could not be produced by them at the time when the decree was passed. Alternatively, they may demonstrate some mistake or error apparent on the face of the record, or any other sufficient reason for review.

No discovery of new and important matter or evidence has been pleaded or established. Nor is there a plea of some mistake or error apparent on the face of the record, and there is none. The Defendants seek a review of the consent judgement; they have not sought an order to set it aside. From the supporting and further affidavits, it appears they want the decree varied in such manner as will enable them to sell off or

mortgage the suit property in order to pay the decretal sum. But the suit property, as already seen, is in the name of the Plaintiff. Under the consent judgement the Defendants could have provided an alternative property acceptable to the Plaintiff. This would have enabled the Plaintiff to retransfer the property to the Defendants and give them possession of the same. They did not provide such alternative property acceptable to the Plaintiff.

The Defendants, in the alternative, were entitled under the decree, to refund to the Plaintiff the purchase price of KShs. 3.5 million in exchange for the suit property. They did not make the refund. The Plaintiff, as he was entitled to do, then proceeded to execute the decree for the KShs. 3.5 million plus costs and interest. He has been frustrated in this endeavour since the year 2002.

The Defendants cannot now be heard to complain that the decretal sum has increased to a huge amount due to interest. Nor should they complain that the suit property is still in the name of the Plaintiff and that he is making money thereon by way of rents. They could have settled the matter a long time ago by refunding the purchase price under order No. 2 of the decree. Now they must wait for the Plaintiff to recover his KShs. 3.5 million plus costs and interest by execution under order No. 3 before the property can revert to them under order No. 4 of the decree.

Upon consideration of all matters placed before the court, I find no sufficient reason to review the consent judgement entered on 4<sup>th</sup> October, 2000. I must therefore refuse the notice of motion dated 19<sup>th</sup> April, 2007. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2008.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 20<sup>TH</sup> DAY OF JUNE 2008**