



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 501 OF 1997

SAMMY C.L. AKIFUMA PLAINTIFF

-VERSUS-

SHELL DEVELOPMENT (K) LIMITED DEFENDANT

RULING

A. AWARD OF THE COURT GIVEN IN EARLIER JUDGEMENT

The plaintiff had an employment-related grievance which led to the filing of a suit in 1997, and this Court concluded the litigation with a judgment delivered on 17th February 2006. I propose to set out the Court's decree as stated in the judgment, as a new dispute has now arisen precisely on the terms of the decree. In the judgment the decree thus reads:

- "1. The defendant shall pay to the plaintiff Farewell Gift in terms of prayer 10(iii) of the plaint.
- "2. The defendant shall pay to the plaintiff a twenty-five year award in the sum of Kshs. 25,000/=.
- "3. The defendant shall write-off the outstanding balance on the car loan which as at 31st December 1996 stood at Kshs. 146,250/00; and the tax arising out of the written-off loan shall be paid by the defendant.
- "4. The defendant shall pay to the plaintiff retrenchment benefits, in the terms of prayer 10(vii) of the plaint.
- "5. The plaintiff's prayer for housing assistance in the terms of clause 10(viii) of the plaint is refused.
- "6. The defendant shall bear the plaintiff's costs to the extent of 65%; and the same shall bear interest at Court rate with effect from the date of filing suit."

B. PARTIES RETURN TO COURT CLAIMING TO HAVE DISAGREED ON THE DECREE

I did not expect this civil matter already concluded to follow me to the Criminal Division where I am currently engaged; but the record shows that the parties, through their counsel, had on 5th July 2006 appeared before the Court's Executive Officer who had the matter listed before me. This is how learned counsel **Ms. Lavuna** (for the plaintiff and judgment-creditor) and learned counsel **Ms. Kirimi** (for the defendant and judgment-debtor) appeared before me on 18th July 2006; and on that occasion there was no formal application before the Court, and **Ms. Lavuna** represented that all that brought them again to

Court, was that there was a disagreement between the two advocates regarding the tenor and effect of the decree.

It is necessary to recount what took place in Court on 18th July, 2006 as it is an explanatory background to the application which has now come before me and which is the subject of this ruling.

Learned counsel each came to Court with a draft decree extracted from the judgment of 17th February, 2006 and each represented her own draft to be the authentic rendition of the terms of the Court's judgment and decree.

Ms. Lavuna stated, and this is on record, that there was only one point of disagreement between her and **Ms. Kirimi** as regards the decree, namely, the Court's decision on the issue of *car loan*, which appears as point No. 3 in the decree as read in Court. **Ms. Lavuna's** representation was in these specific words: "The only issue of concern to me is the car loan. [The defendant] claims the issue of car loan had already been sorted out. [But the] plaintiff was made to pay the car loan." And to that, learned counsel **Ms. Kirimi** had a riposte: "We are bound by the judgment as it was written. [If the plaintiff doesn't like it, then it is] possible to apply for [a] review." And **Ms. Lavuna's** rejoinder was: "What has been awarded is being denied; it is being pleaded that the car loan be waived; and if it is waived, then it was the plaintiff's right to retain the money. There is a letter from the defendant saying that deductions [against the plaintiff] had been made."

On that occasion I made a ruling as follows:

"The plaintiff's draft gives the following particular: '(c) Refund of written-off balance on car loan: Kshs.146,250/00.' This, however, is not reflected in the defendant's draft decree at all. It means that there is a difference between the parties as to the intended meaning of the following order, in the Judgment of 17th February 2006 ?

'3. The defendant shall write-off the outstanding balance on the car loan which as at 31st December, 1996 stood at Kshs.146,250/00 and the tax arising out of the written-off loan shall be paid by the defendant.'

"While the defendant takes the position that the above order bears clear meaning on its face, the plaintiff reads implications into the order, and proposes the interpretation that the defendant has a duty to refund. If there is such a duty to refund, it becomes a matter of evidence, as to how such duty has arisen.

"Learned counsel for the plaintiff, Ms. Lavuna has submitted that all the elements standing in favour of 'duty to refund' were always there – even if the Court has not spoken expressly about it in the judgment.

"So, as I see it, there is something incidental to prove – and proof by depositions would be sufficient. Therefore, I will now make orders as follows ?

1. The defendant's draft decree be adopted as the decree of the Court.

2. The plaintiff do, within fourteen days of the issuance of the decree, file an application for the variation of the decree, attaching depositions in support of his case.

3. Such application once filed shall be heard and disposed of on priority before a Judge of the Civil Division, as may be directed by the Duty Judge."

When learned counsel appeared before the Duty Judge on 18th September, 2006 they were directed to appear before me again – and they did on 2nd October, 2006. This was a mention, at which **Ms. Lavuna** introduced a Notice of Motion dated 31st July, 2006 which she had filed on 1st August, 2006. Learned

counsel indicated again that her client was not satisfied in relation to the interpretation of the Court's judgment of 17th February, 2006 and with regard to the question of car loan.

C. JUDGEMENT-CREDITOR'S APPLICATION OF 31ST JULY, 2006: IS IT FOR INTERPRETATION OF JUDGMENT, OR SOMETHING ELSE?

The plaintiff's Notice of Motion is expressed to be by virtue of ss. 34, 99, 100 and 3A of the Civil Procedure Act (Cap. 21), Order XLIV, rule 2, Order XX rule 7(4) and Order L rule 1 of the Civil Procedure Rules. And what are the prayers? For orders that ?

(a) the Court "be pleased to amend the arithmetical mistake or error in the decree herein arising from an omission of an award provided for in the Judgment in this suit."

(b) the Court "do find that it is just and equitable that a refund of the written-off car loan deducted from the defendant's Provident Fund contribution be returned as a result of the implications arising from the judgment delivered in this suit."

(c) "interest on the decretal sum be calculated from the date of filing this suit as prayed for in the plaintiff's claim."

(d) "the cost of the application be paid by the defendant."

What are the general grounds upon which this application is founded? They are:

1. that, s. 100 of the Civil Procedure Act provides that this Court has powers to amend any defect or error in any proceedings in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings;

2. that, s. 34 of the Civil procedure Act provides that all questions arising between the parties to the suit in which a decree has been passed and relating to its discharge or satisfaction shall be determined by the Court executing it and not by a separate suit;

3. that, a disagreement on the draft decrees prepared separately by the parties to the suit has arisen and the same needs to be settled by the Court;

4. that, there exists an omission of an award given in the judgement in this suit, or an arithmetical mistake or error apparent on the face of the decree and the same warrants a review;

5. that, the Court ought to amend the omission, arithmetical mistake or error in the decree brought about by the wilful and deliberate misinterpretation of the judgment in this suit by the defendant, so that the Court's judgement is not rendered nugatory by granting prayers in vain;

6. that, the award of a car loan write-off and interest cannot be effected or executed with the decree in issue, yet these items were adjudged to be due to the applicant and were deliberately assigned and are now bestowed as of right by judicial determination and deliberate and final judgment;

7. that, the justice of the case demands that the real question of the sums due to the plaintiff as a result of the judgement in this suit be determined, in order for the decree-holder to obtain the fruits of his judgment.

The Evidentiary Basis of the Judgment-Creditor's Application

The judgment-creditor, **Sammy C.L. Akifuma**, swore an affidavit on 31st July, 2006 "to support the application to amend the mistake in the decree in this suit arising from an omission of an award provided for in the judgment." He deposes that he believes to be true the information given to him by his

advocates, that they had tried to extract the decree in the suit, “but the defendant’s advocates refused to approve out version of the decree and instead framed theirs on their own terms.”

The deponent avers that “the main issue of contention is (that) of the car-loan write-off and calculation of interest on the decretal sum herein.” He avers: “**Justice Ojwang** in his judgement allowed my prayer for a car-loan write-off, and the defendant rightly interpreted this to mean that I would not be called on to pay the loan.”

The deponent, with regard to deductions already made by the defendant from his Provident Fund dues, thus deposes:

“THAT I wish to bring it to the Court’s notice that by way of a letter dated 5th March, 1997 the defendant, after the filing of this suit, decided to satisfy my claim for Provident Fund dues, but *deducted and retained my car-loan amount* from the sum due.”

In support of this crucial averment, the deponent annexed a copy of the forwarding letter from the defendants’ advocates, M/s. Hamilton Harrison & Mathews Advocates, dated 5th March, 1997. The letter thus reads in part:

“**S.C.L. Akifuma**

“We tender to your [i.e., plaintiff’s advocates] client cheques from the Kenya Shell Provident Fund and the Kenya Shell Pension Fund.

“We set out how the figures are arrived at.

“Provident Fund:

“Deductions:

Car Loan Kshs.146,250/00.”

This letter acknowledging the deduction of Kshs.146,250/00 in respect of car loan, and from **Mr. Akifuma’s** Provident Fund dues, he deposed, had clearly featured in the evidence on record and had been tendered as plaintiff’s exhibit No. 7. The deponent averred that he had also claimed car-loan write-off in submissions made during earlier hearings in this case, before **Hayanga, J.** He avers that this claim for car-loan write-off bore no unilateral character as (para 14) “the defendant had promised a car-loan write-off in its letter dated 30th December, 1996 [plaintiff’s exhibit No. 4].”

The deponent avers that since the judgment decreed the writing-off of the car loan, the defendant cannot arbitrarily deduct the amount from his Prudent-Fund savings, and the amount should be refunded as part of the decretal sum and be reflected in the decree.

The deponent avers that the Court, in the judgement, had allowed his claim and prayer for retrenchment benefits in terms of prayer 10(vii) of the plaint – and ordered interest on costs to be paid with effect from the date of filing suit; and so he asks the Court to find that the interest due should be calculated on the amount of Kshs.1,966,120/= as well as the costs of the suit as from 28th February 1997 – since he has waited for nine years to be paid his retirement dues.

The Judgment-Debtor’s Papers filed In Opposition to the Application

The judgment-debtor responded by filing *both* grounds of opposition and a replying affidavit, by **James Njeke**, the General Manager of the defendant company, dated 23rd August, 2006.

The deponent avers that ?

- the plaintiff had filed his plaint on **28th February 1997**;
- the plaintiff had claimed 25 years' long-service award;
- the plaintiff had claimed an "outstanding car loan write-off;"
- the plaintiff had not "specifically pleaded" either of those two items;
- in **March, 1997** the plaintiff received from the Kenya Shell Provident Fund and from the Kenya Shell Pension Fund respectively, payments in total sum of Kshs.3,067,425/-;
- Kenya Shell Provident Fund and Kenya Shell Pension Fund are not parties to the plaintiff's suit, but were responsible for the payment of the *Provident* and *Pension* funds over which the defendant had no control;
- the plaintiff's claim "did not include those items for which payment had already been made."
- "the plaintiff now seeks a refund of a sum of Kshs.146,240/= which is said to be a refund of the car loan write-off which payment he contends should be implied from the judgment of the Court";
- "the plaintiff's prayer was for a car loan write-off and not for a repayment of sums paid."
- the plaintiff had only sought "a write-off of an undisclosed sum of money on the car loan";
- the Court gave judgement for the plaintiff "for the sum of Kshs.2,033,620/= and costs of the suit. Payment has already been made to the plaintiff for the amounts awarded by the Court bringing the total sums received by the plaintiff to about Kshs.5,101,045/=;
- "the trustees of the Kenya Shell Provident Fund are not parties to this suit, yet they are the proper parties to deal with any issue relating to moneys paid or withheld under the Fund."

For the rest of the averments, the deponent does not depone on *fact*, but expresses his belief in the veracity of legal stands taken by the defendant's counsel and conveyed to him – a mode of making depositions which is generally unhelpful, as the lay deponent, in effect, assigns to himself the forensic role of counsel. Averments of such a kind, I would hold, do not merit quite so much weight as do genuine depositions founded on fact, as perceived by one of the five senses. There is absolutely no basis for a deponent to convey to the Court what is no more than the argumentations and opinions of counsel.

In the category of such inappropriate averments by the deponent are the following:

- a party is bound by its pleadings and the evidence adduced;
- the Court did address itself on the claim of interest on the plaintiff's claims and declined to grant it;
- there is no material placed before the Court to warrant a review of the judgement herein;
- there is no error, clerical, arithmetic or otherwise on the face of the judgement, "and the decree as drawn by the defendant and settled by the Court reflects the judgment of the Court";
- "the settlement of the decree was not by consent and was done by the Judge after considering both drafts";
- "the plaintiff's application is an attempt to reopen the case and re-litigate issues that have already been determined and in respect of which judgment has already been rendered."

The point about improper depositions, when, as in the instant case, they rest significantly on the preferred

positions of the advocate, is still better demonstrated by the second reply document filed for the judgement-debtor (notwithstanding Order L, Rule 16 (1) which allows for depositions or grounds of opposition), that is, the grounds of opposition. This restates as points of contest to the judgment-creditor's application (and therefore points of law essentially, for forensic articulation by counsel) the very same elements included in the deponent's averments.

D. SUBMISSIONS OF COUNSEL

(1) Preliminary Points

The Notice of Motion of 31st July, 2006 was heard before me on 1st December, 2006, on which occasion learned counsel **Ms. Lavuna** represented the judgement-creditor while learned counsel **Ms. Kirimi** represented the judgement-debtor.

Ms. Lavuna restated the averment in the affidavit of the judgement-creditor, that he had no dissatisfaction with the judgement as such, save that certain elements in the decree were the subject of disagreement between the parties, and so a settlement by the Court was necessary. Learned counsel recalled, quite correctly, with respect, that the basis for the adoption of one of the two competing draft decrees, on 18th July, 2006 was to enable the judgment creditor to comply with the order made on that day, that "the plaintiff do, within fourteen days of the issuance of the decree, file an application for the variation of the decree" – and so the adoption of the defendant's edition of the draft was not dictated by merits but by the object of setting a foundation for the Notice of Motion herein.

Straightaway therefore, I will reject the contention in the defendant's seventh ground of opposition, that "the decree herein has already been settled by the Judge who delivered judgement [and] the issue of settling the decree does not arise." Consequently, I would find merits in the submission by learned counsel **Ms. Lavuna**, that: "We come only for the purpose of settling the decree, by virtue of Order XX, rule 7(4) of the Civil Procedure Rules. The said rule thus provides:

"(4) On any disagreement with the draft decree any party may file the draft decree marked as for settlement and the Registrar shall thereupon list the same in chambers before the Judge who heard the case or, if he is not available, before any other Judge, and shall give notice thereof to the parties."

Ms. Lavuna remarked: "On 18th July, 2006 we appeared [before the Court] for a settlement, as we then had two different drafts. There must be a decree in place; so we adopted the defendant's decree so I could raise the problem we have with that [draft] decree. [There is] no signed and sealed decree on the record, because we are still trying to settle the matter; and the Court should decide on two issues, [namely] the car-loan write-off and the [calculation of] interest."

(2) Does the Judgment Carry a Decision on Car-loan Write-off?

Learned counsel drew the Court's attention to the content of the judgement, item No. 3 in the award. She urged that the same was unequivocal, on the face of the judgement itself: "*The defendant shall write-off the outstanding balance on the car loan which as at 31st December, 1996 stood at Kshs.146,250/00...*" Since already, that sum had been **deducted** by the defendant, the sum thus deducted should be refunded – learned counsel urged, quite persuasively, with respect. Payment from the Provident Fund had been made in *March 1997*, very soon after the suit was filed on *28th February 1997*, quite clearly, on the direction of the *defendant* herein; and so, the Provident Fund dues were not, as such, an item to be claimed again by the plaintiff. However, this Provident Fund payment – which, as I have determined, must have been made at the behest of the *defendant* – was made *less the car-loan* as it then stood. I must, in these circumstances, draw the conclusion that the defendant was controlling and directing the mode and amounts, in the payment of the plaintiff's Provident Fund dues. Since the car-loan question was in no way linked to the holding of Provident Fund assets by the trustees, a deduction of car loan from Provident Fund dues could only have been effected at the behest of the defendant; and so I now find and hold that

the plaintiff was under no legal obligation to sue the Provident Fund Trustees in respect of car-loan deduction.

Learned counsel urged that it was not at all the case, contrary to the judgment-debtor's claims, that the plaintiff's claim to car-loan write-off was an entirely new matter; this question was pleaded, and was fully ventilated before the learned Judge who heard the case in its entirety, **Hayanga J**, and plaintiff's exhibit No. 7 is testimony to that effect; and this question was determined with finality in the judgment rendered by this Court on 17th February, 2006.

If the car-loan refund did not feature in the decree as drawn, **Ms. Lavuna** urged, that would be an error and a claw-back on definite rights pronounced upon by this Court, in favour of the plaintiff- judgement-creditor. She recalled that ss.34, 99 and 100 of the Civil Procedure Act (Cap. 21) made enabling provisions for the rectification of such an error in a judgement.

Section 34(1) of the Civil Procedure Act (Cap. 21) thus provides:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit”.

Section 99 of the same Act thus provides:

“Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

Section 100 of the Act thus stipulates:

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

(3) What is the Correct Position on Interests?

Ms. Lavuna drew the Court's attention to item 6 of the Court's award, in the Judgment of 17th February, 2006; it thus reads:

“The defendant shall bear the Plaintiff's costs to the extent of 65%; and the same shall bear interest at Court rate with effect from the date of filing suit.”

Counsel urged that the reference to interests had only touched on “costs of the suit”, thus leaving open the issue of interests as they related to the *decretal sum*. This constituted, as counsel urged, an omission which worked injustice to the plaintiff, as he had had to wait for some nine years for the due payment to be made. Learned counsel asked that a direction be made regarding interest on the decretal amount.

(4) The Judgment-Debtor's Responses

Learned counsel **Ms. Kirimi** contested the propriety of the judgement-creditor's application, from the standpoint that; “What is being sought amounts to an application for review”; that this was not a proper motion for the settlement of a decree – because Order XX, rule 7(4) which is concerned with the settlement of a decree did not require an application. I would not, however, accept such a submission, with much respect; for both counsel had appeared before me on 18th July, 2006 when, due to certain unclear facts which on that account clouded my perception of the relevant questions, I in my exercise of judicial discretion, ordered that an application be made, with affidavit evidence, and indeed, this was duly done and both parties filed affidavits which are now, quite properly, before this Court.

Ms. Kirimi in her submissions did not, in my view, focus herself on the possible merits of the case being tendered by the judgment-creditor, for a settlement of the decree emerging from the judgment of 17th February, 2006. Learned counsel by her language and Court-room deportment, to me, appeared impatient as she declaimed: “*if parties agree on a decree, it is to be marked for settlement. That was already done, and the decree was settled. The draft made by the Defendant agreed in all material respects with the judgment. What is [now] being [sought] is an application to amend the judgement in respect of Kshs.146,250/=... That issue cannot be raised now.*” She repeated the contentions in the judgment-debtor’s affidavit and in the grounds of opposition: “*The Provident Fund wasn’t a party. If the plaintiff is dissatisfied with the judgement, then an appeal must be made.*” **Ms. Kirimi** urged that the Judgement-creditor’s application was, in effect, a mere sham: “*There is no slip or arithmetical error in the judgement [as contemplated in s.99 of the Civil Procedure Act (Cap.21)]; if there is, it has not been shown. There is no error or mistake apparent on the face of the record.*”

Learned counsel **Ms. Kirimi** contested the validity of the interests-grievance being raised by the Judgement-creditor. She remarked: “*The award of interest is discretionary, and there is no contractual document setting it out; if it was not awarded, then it was declined, and hence [there’s] nothing further to consider. What was given was interest on costs – 65% ? to be paid by the defendant.*”

E. FURTHER ANALYSIS, AND DETERMINATION OF THE QUESTION

(1)Preliminary Remarks

The judgement-creditor has moved the Court by Notice of Motion, as directed by this Court on 18th July, 2006, and his grievance is not against the judgement delivered on 17th February, 2006 as such, but in relation to the *defendant’s version of the decree* which is claimed to be in consonance with the terms of that judgement. The applicant contests that decree, and asks the Court to intervene by directing that a decree be extracted which tallies with the terms of the judgement; and, if that is done, it is the applicant’s case, then a certain car-loan which stood in amount at Kshs.146,250/= as at 31st December, 1996 and which the defendant deducted from his Provident Fund dues, would be refunded.

The applicant has a second prayer; the monies comprised in the decretal sum have been awaited for some nine years; and so the judgement of 17th February, 2006 should have decreed the back-dating of interests on that sum to the date of filing suit, on 28th February, 1997, just as was done in respect of the *costs* of the suit.

The first prayer, as already stated, is quite properly made in accordance with the earlier orders of this Court, and is entirely consistent with the pertinent provision of statute law. The second prayer is essentially dependent on *judicial discretion*, as I will indicate further on.

(2) Does the Judgement entitle the Judgement-Creditor to a Refund of Car-Loan?

I have anxiously considered the submissions of both learned counsel, on the question of consistency between the terms of the Judgement of 17th February, 2006 and the defendant’s version of the draft decree. The judgement is very clear on the question; it orders: “**The defendant shall write-off the outstanding balance on the car loan which as at 31st December, 1996 stood at Kshs.146,250/00...**”

The logical inference is that if the said sum of Kshs.146,250/00 had already been taken away from the applicant herein, then it *must be refunded*. That sum, it is quite clear from the proceedings and from all the relevant Court records, had indeed been *taken away* from the applicant. The judgement, therefore, is ordering that the said sum of Kshs.146,250/00 as at 31st December, 1996 be *refunded*, and this fact ought to appear in a valid decree extracted from the judgement.

Learned counsel **Ms. Kirimi** has raised the technical point that the one who took away the applicant’s Kshs.146,250/00 was not the defendant but the Provident Fund Trustees who were not joined as a party in the suit. My thinking on this question is quite clear already. The authority to deduct the car loan by the

said Trustees could not have been exercised, but at the behest of the *defendant*. On this account, elementary principles of justice dictate that I must lift the veil covering those Trustees, and perceive them as no less than the *alter ego* of the defendant. I now find and hold that it is the *defendant* who deducted the car loan from the Provident Fund dues of the applicant; and I now direct that the decree drawn from the judgement, is to obligate the *defendant to refund the said sum of Kshs.146,250/00*, which I will grant with interest, further on.

(3) Is it Just and Equitable that the Decretal Sum specified in the Judgement should bear Interest as from Date of Filing Suit?

The law on interests, and effective dates thereof is clearly stated in statute law. The Civil Procedure Act (Cap.21), thus provides (s.26 (1)):

“Where and in so far as a decree is for the payment of money, the Court may, in that decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.”

It is evident that the determination of effective dates for interests awarded is essentially left to the Court, which has a wide discretion to grant interests, and to determine the effective dates of payment. It hardly admits of any doubts, of course, that all discretion donated by law must be exercised *judicially*, which means, relevantly in relation to material fact, conscientiously, and with a sense of equity and fairness.

If such an equitable determination had *already* been exercised, then I would have been reluctant to address the applicant’s prayer in that regard. The reasoning is set out in my earlier ruling, in ***Jane Wanjiru Gitau v. The Kenya Power & Lighting Company Limited***, HCCC No.1208 of 1997:

“...on grounds of proper procedure, grants of interest made in the exercise of discretion donated by law cannot, I would hold, be contested before the same Court. This must be taken up on appeal; and the expectation must be that the appellant will then be able to satisfy the appellate Court that the mode of grant of the interests in question was in departure from the requirements of the law”.

In the instant case the Court consciously pre-dated the commencement of interest on *costs*, but there was no *mention* of such commencement date in respect of the *decretal sum*. Was it deliberate? The silence, learned counsel for the respondent herein urges, amounts to this: “if it was not awarded then it was declined, and hence [there is] nothing further to consider”.

I have taken note that in the judgement-creditor’s suit filed by M/s. Ogenche & Co. Advocates on 28th February, 1997 a specific claim was made for Retrenchment Benefits in the figure of Kshs.1,996,120/=. Subsequently, on 28th July, 2000 there was a change of advocates, and M/s. Musalia Mwenesi Advocates took over the judgement-creditor’s case. The matter first came up before ***Aganyanya, J*** on 20th November, 2001, then before ***Kuloba, J*** on 9th July, 2002 after which ***Hayanga, J*** conducted the whole trial, beginning from 21st July, 2003. I have scrutinized the whole file again, and I have concluded that the changes aforementioned may have permitted some lack of focus and clarity in the suit papers to pass through, and this, I believe, was cause for a slip in the judgement of 17th February, 2006 particularly on the question of interest rates on the Retrenchment Benefits payable to the judgement-creditor. This item was such a substantial amount, that it was inconceivable the Court would overlook interests upon it even as interests were being specifically awarded on *costs*; and now the judgement-creditor pleads that that, precisely, is the sum he had awaited, for nearly a decade; he calls for an equitable exercise of the Court’s discretion, in making a back-dated award of interest on the decretal sum. And on this, in my view, credible plea, I have not had any focused response whether through evidence or by way of legal argument, coming from the judgement-debtor’s side. This fact leaves this Court with the only option of a

favourable answer to the judgement- creditor's prayer.

(4) The Court's Order

(a) The orders herein are to be read together with, and to qualify in the particulars herein specified, this Court's judgement delivered on 17th February, 2006.

(b) One set of decrees shall be extracted from the said judgement of 17th February, 2006 together with the ruling herein, and duly issued by the Deputy Registrar as the Decree of the Court.

(c) The judgement-creditor's application by Notice of Motion dated 31st July, 2006 is allowed in terms of prayers (a), (b) and (c) thereof.

(d) Without prejudice to Orders (a), (b) and (c) hereof, it is specified herein that the refund of the written-off car loan which had been deducted from the judgement-creditor's Provident Fund benefits, being the sum of Kshs.146,250/00 as at 31st December, 1996, shall be made to the judgement-creditor by the judgement-debtor with interest at Court rates with effect from the date of filing suit.

(e) The costs of this application shall be borne by the defendant, which costs shall bear interest at Court rates as from the date hereof until payment in full.

DATED and DELIVERED at Nairobi this 19th day of January, 2007

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Judgement-Creditor/Applicant: Ms. Lavuna, instructed by M/s. S. Musalia Mwenesi Advocates

For the Judgement-Debtor/Respondent: Ms. Kirimi, instructed by M/s. Hamilton Harrison & Mathews Advocates