REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT 70 OF 2006

SHEVA HOTELS LTD ……..…..….PLAINTIFF

VS

AMINA HASSAN YAA ……..DEFENDANT

R U L I N G

By an application by way of Notice of Motion, pursuant to the provisions of Order XLIV of the Civil Procedure Rules, dated 1st March 2007, the applicant seeks orders:

1) That this Honourable Court do review the orders issued by the Honourable Justice Ouko on 23RD November, 2006 and the defendant be allowed unconditional leave to defend.

2) That the defendant's defence dated 15th January 2007 already filed herein be deemed to be properly on record.

3) That the costs of this application be provided for.

The application is grounded, *inter-alia*, on the grounds that:

a) The learned Judge having found that interlocutory judgment had been irregularly obtained by the plaintiff/respondent by virtue of Order IX Rule 1 of the Civil Procedure Rules, it is clear that the applicant was at liberty to file a defence anytime before final judgment without leave or conditions.

b) The plaintiff's wrongful act in irregularly obtaining interlocutory judgment cannot be visited upon the defendant.

c) The said ruling would unfairly penalize the applicant when the fault it is obvious lies with the respondent.

d) It is in interest of justice that the said ruling be reviewed.

e) The applicant has other sufficient reason and desire to obtain a review.

The application is predicated upon the annexed affidavit of Amina Hassan Yaa sworn on he 1st day of March 2007.

For the applicant it was argued that, on the 23rd November 2006, Justice Ouko delivered a ruling setting aside interlocutory judgment which had been entered on 24th March 2006. Equally the learned judge refused to grant unconditional leave to defend yet no conditions were given.

Last but not least, the fact that the learned Judge did find that judgment had been entered irregularly means that by virtue of Order IX Rule 1 of the Civil Procedure Rules, the applicant was entitled to file defence before final judgment.

It is significant that the applicant attached the said ruling marked as **exhibit "AHYI**" instead of an **order.**

For the respondent it was argued, that the application was made in contravention of the express orders of the court. Leave had been sought in the previous application for leave to defend which leave was rejected.

Moreover, the applicant has failed to extract and attach the order to be reviewed. That in itself is fatal.

Last but not least, the application has been brought after undue delay. In that the decision was made on 23rd November 2006 yet the application was made on 1st March 2007 – a delay of four (4) months. No explanation or reasonable explanation has been given for the delay.

I have carefully analyzed and fully considered all the legal issues raised in this application.

In my view, this application is a non-starter. It is a cliché that in an application for review, it is incumbent upon the applicant not only to extract the **decree or order** to be reviewed, but also to annex the decree or order to the application. See **PROTEN AND FRUIT PROCESSORS LTD – VS – CREDIT BANK LTD & 2 OTHERS: MILIMANI COMMERCIAL COURT CIVIL CASE NO. 1927 OF 1999.**

By reason of the fact that the applicant has done neither of these, the application is fatally defective and is for rejection.

Accordingly I dismiss the application with costs to the respondent.

DATED AND DELIVERED AT MALINDI THIS 18TH DAY OF JULY, 2007

N.R.O. OMBIJA

JUDGE

Mr.Opija for Khaminwa} for defendant.

Mr.Mayaka holding brief Mr.Ole Kina Advocate} for applicant.