



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 219 of 1999**

**MEA LTD.....PLAINTIFF**

**VERSUS**

**GITITU COFFEE GROWERS CO-OPERATIVE.....DEFENDANT**

**RULING**

The Applicant in this Notice of Motion dated 12<sup>th</sup> day of July, 2005, is **Stephen Kimani Karuu t/a Kiriyyu Merchants**.

He has sought for orders that he be joined in this suit as an interested party for purposes of this application. Secondly that the court do review the orders made on the 10<sup>th</sup> June, 2003, to provide for his Auctioneer's charges and that the court do determine as to who between the Plaintiff and the Defendant shall pay the Auctioneer's charges.

The grounds upon which this application is based are stipulated in the body of the application and more specifically expounded in the supporting affidavit of Stephen Kimani Karuu.

Briefly, the genesis of this long standing dispute of the payment of the Auctioneer's charges started on or about 22<sup>nd</sup> February, 2003, when the applicant received instructions from Kangethe & Co. Advocates who were acting on behalf of the Plaintiff the decree holder in Nakuru HCCC No.219 of 1999 to execute a decree against the defendant. The applicant proceeded on 27<sup>th</sup> February to proclaim the attachable assets of the defendant **M/S Gatitu Coffee Growers Co-operative** in their premises at Githunguri as per the exhibited copy of the proclamation.

After the expiry of the requisite Notice the Auctioneer went to carry away the defendant's goods but found the premises locked and he therefore proceeded to seek a court order for breaking into the premises. On the strength of the breaking in order he attached one motor vehicle registration No. KAH 207C on 28<sup>th</sup> March, 2003.

However, on 11<sup>th</sup> April, 2003, the applicant was served with an order stopping the execution of the decree and on 9<sup>th</sup> April, 2003, he was served with another order directing the attached motor vehicle be released to the defendant.

The said orders were obtained by consent of both parties to the suit and the issue as to who should pay the Auctioneers' charges was never addressed. The Auctioneer was not paid his charges and thus this application.

On the part of the defendants this application was opposed as both lacking in merit and for being an abuse of the process.

Firstly, Counsel for the respondent argued that this application is res-judicata as it is similar to another application by the same applicant which Misc. Appl. No.564 of 2003 before the High Court of Kenya at Nairobi which application was dismissed. The applicant proceeded to apply for an order of review and even the application for review was dismissed.

Counsel for the respondent argued that the issues raised in the application were substantially an issue in the presents application which involved the same parties and it matters not that the previous suit was by way of Miscellaneous proceedings. According to Section 89, of the Civil Procedure Act:-

**“The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”**

Apart from the issue being res-judicata, Counsel for the respondent argued that a consent order cannot be recorded. In this regard, several Court of Appeal decisions were put forward in the case of Uhuru Highway Development Ltd -Vs- Central Bank and Others, Civil Appeal No.36 of 1996, especially the application of a direction taken from what was described as the Locus Classicus case in this aspect of res-judicata in Yat Thung Investment Co. Ltd -Vs- Bao Hang Bank Ltd 1975 ALJ 81 especially the handling by Law J.A.:-

**To sum up my views of this aspect of the case, an applicant whose application to set aside an exparte judgment has been rejected has a right of appeal. Alternatively he may apply for a review of the decision, under Section 80 of the Civil Procedure Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res-judicata as happened here...”**

Counsel for the respondent further argued that the consent order cannot be set aside or reviewed and the principles guiding the same were settled in several Court of Appeal decisions. (See the case of Flora Wasike -Vs- Destimo Wamboko [1988] I KAP 625 **Hancox, J.A.** (as he then was) says in his Judgment at page 626:-

**It is now settled law that a consent Judgment**

or order has contractual effect and can only

**be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”**

Lastly it was submitted that the application must be rejected for failure to append an extracted order being sought to be reviewed.

I have carefully considered this application with an anxious mind.

Firstly, this application is similar to the one filed by the same applicant in Misc. Application No.564 of 2003 except in this application the applicant has sought for two additional prayers to be enjoined as a party and secondly he sought for an order of the reiew of the orders by the 10<sup>th</sup> June, 2003 to provide for auctioneers’ charges. It is not clear why the applicant failed to include the issue in the Misc. Application No.564 of 2003. It is clear that all the matters were within his knowledge when he filed the first application but Mr. Ndolo argued that the earlier application was not argued on merit but was dismissed on a technicality. I agree with the decision of Uhuru Highway Development Ltd. -Vs- Law Society of Kenya (Supra) that a party can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed.

In the instant case the applicant did not offer any cogent explanation as to why all the matters were not disposed and canvassed in the earlier application. This issue can be elaborated further by considering the provisions of Order 44 of the Civil Procedure Rules:-

**“Any party considering himself aggrieved by a decree or order...and who from discovering 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 the decree or order was made or on account of some mistakes or error on the face of the record or if any sufficient reason may apply for a review.”**

Mr.Ndolo argued that the prayers sought by his client falls within the above provisions due to the fact that the decree holder and Judgment debtor did not prorovide for the Auctioneer’s charges when the consent order releasing the motor vehicle was recorded.

That may very well be so, but the challenge is whether the applicant properly came to this court.

It is trite law that an application for review must be accompanied by the order that the party seeks to review. In other words the applicant ought to have extracted the order and appended it to his application for review and failure to do so the application is defective. (See the case of *Gulamhussein Jivraj & Another -Vs- Ebrahim Jivraj & Another*[1930]E.A. CA.41).

The other issue that was raised is whether a consent order can be reviewed. The applicant has sought for the review of the order made on 10<sup>th</sup> June, 2003 so as to provide for the auctioneer’s charges. The grounds upon which the application is based deal with the consent order of 8<sup>th</sup> April, 2003 where the applicant was directed to release the attached moveables and which did not address the issues of the auctioneer’s charges.

A perusal of the records show that the order of 10<sup>th</sup> April, 2003, was not a consent order. The only consent order was the one of 8<sup>th</sup> April, 2003. Is it out of a typograhycal error? According to the argument by Counsel, the applicant clearly indicated that the order he sought to review was made on 10<sup>th</sup> June, 2003, which was the consent order. This further submission faces the problems of having to satisfy the laid down principles of seeking to set aside consent orders.

In view of the above the applicant’s application fails for being defective and is therefore dismissed.

For reasons that the applicant is seeking for payment of his auctioneer’s charges that have remained outstanding. I will order each party to meet their own costs of this application.

It is so ordered.

Judgment read and Signed on 28<sup>th</sup> April, 2006.

MARTHA KOOME

**JUDGE**