REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1208 OF 1997

JANE WANJIRU GITAU……PLAINTIFF/RESPONDENT

-VERSUS-

THE KENYA POWER & LIGHTING

COMPANY LIMITED…….DEFENDANT/APPLICANT

RULING

I gave judgement in the main suit on ***27th February, 2004*** and decreed, on the basis of the plaintiff's claim as established by evidence, that –

(i) the sum of Kshs.200,000/= be paid by the defendant as the current market price of two Ayrshire cows;

(ii) the sum of Kshs.1,080,000/= be paid by the defendant for loss of income by the plaintiff for milk sales, for 24 months following the death of the two cows;

(iii) the sum of Kshs.72,000/= be paid by the defendant for loss of income from manure for 24 months following the death of the two cows;

(iv) items (ii) and (iii) above to bear interest at 12% per annum with effect from the date of filing suit;

(v) the sum of Kshs.37,000/= as professional fees – bearing interest at the rate of 12% per annum with effect from the date of filing suit;

(vi) costs of the suit – carrying interest at Court rate as from the date of judgement.

The defendant did not, apparently, appeal against the judgement, but opted to return before this Court by application, in the Notice of Motion dated ***15th February, 2005*** and filed on ***16th February, 2005.*** The application was brought under Orders L rule 1, XXIV rule 6(1) and XLIV rules 1 and 2 of the Civil Procedure Rules.

What are the specific prayers? That the order of the Court awarding interest on the sum of Kshs.1,080,000/= and Kshs.72,000/= respectively from the date of filing suit until payment in full be reviewed and substituted with an order for interest on the said sums from the date of judgement. That the order of the Court awarding interest on costs be reviewed and set aside. That the sum awarded as the cost of replacing the heifers assessed at Kshs.200,000/= be reviewed and substituted with the sum of

Kshs.80,000/=. That the principal decretal sum herein be marked as partly adjusted by lawful agreement, by a sum of Kshs.100,000/= and further be marked as duly satisfied. And, that the defendant's costs in this application be borne by the plaintiff.

On what grounds is the defendant's application premised? Firstly, that the plaintiff has threatened execution of the decree herein, even though the principal decretal sum has been paid over to her. Secondly, that: "There is an *error apparent on the face of the record*, in that interest on general damages has been awarded from date of filing suit when it should have been awarded from date of judgement." Thirdly, that the defendant who has paid the principal decretal sum was unable to immediately pay the costs ordered – as the plaintiff failed to tax her costs even when she was requested to do so. It is contended that the delay in filing the bill of costs is an abuse of Court process on the part of the plaintiff, as interest continues to accrue on an indeterminate sum. On this basis it is urged that the Court should review the order awarding interest on costs. It is also stated that the plaintiff had "lawfully agreed to partly adjust the decretal amount payable by reducing the said amount by a sum of Kshs.100,000/=."

To the defendant's application is attached the depositions of ***Flora Opiyo***, a manager in the legal department of the defendant – dated 9th February, 2005. The affidavit sets out not by deponing on facts, but by argument:

> (i) the plaint did not contain any liquidated claims in respect of which an award in special damages could be made (para.3);
>
> (ii) interests on damages accrues from the date of judgement, as that is when they become ascertainable (para.4);
>
> (iii) there is sufficient reason for the Court to review its judgement so as to conform with the tenets of the law regarding interest on general damages (para.10);
>
> (iv) the order for interest on costs ought to be reviewed in the interest of justice (para.12);
>
> (v) there is an error apparent on the face of the record, in the order awarding a sum of Kshs.200,000/= as the replacement value of the cows (para.13);
>
> (vi) there is sufficient reason for the Court to review its orders in respect of the interest to be computed on the general damages, on costs, and the replacement value of the cows (para.14).

So, the overwhelming bulk of ***Flora Opiyo's*** affidavit is not truly in the nature of material in respect of which she places before the Court *factual perceptions*, to weigh in the Court's assessment of the claims. The deponent has, for the most part, entrusted to herself the submission task of counsel – something which though common in affidavits seen in these Courts, must be deprecated as it does not represent the honest position of the deponent, quite apart from amounting to a usurpation of counsel's role. It is not often appreciated just how weighty the accurate record of factual information invariably is, in judicial decision-making; and in its place deponents sometimes stray into controversial matter for forensic treatment by counsel.

It is clear to me that the only factual depositions in ***Flora Opiyo's*** affidavit are the following:

> (i) by a letter of 10th May, 2004 the plaintiff's advocates agreed to a reduction by Kshs.100,000/= of the decretal sum (para.6);
>
> (ii) defendant's advocates had, by letter of 18th May, 2004 attempted to negotiate interest with the plaintiff's advocates (para.7);
>
> (iii) the plaintiff's advocates later "purported to renege on the agreement to reduce the decretal sum by Kshs.100,000/=" (para.8);

(iv) plaintiff delayed in extracting the decree and to have costs assessed (para.9);

(v) defendant forwarded payment in the sum of Kshs.1,289,000/= being the principal decretal sum less Kshs.100,000/= (para.9);

(vi) for a full year "the plaintiff did not take any steps to have its costs assessed despite numerous requests by the defendant's advocates."

Kennedy Chweya Onsembe the plaintiff's advocate swore and filed a replying affidavit on 24th February, 2005.

The deponent avers that he had received instructions to reject the defendant's proposal for a compromise of the decretal sum by Kshs.100,000/= (para.11); that it is the negotiations initiated by the applicant which caused delay in the filing of the judgement-creditor's bill of costs (dated 25th November, 2004) (para.14); that an earlier date of taxation than 15th March, 2005 could not be achieved on account of the Court vacation (para.15); that the suit has not been compromised, and the rights and obligations of parties remained exactly as was defined in the judgement of 27th February, 2004 (para.19); that there was correspondence showing the respondent's rejection of the proposal to lessen the decretal sum by Kshs.100,000/=.

On 12th July, 2005 ***Kennedy Chweya Onsembe*** swore a further affidavit in which he avers (para.4): "before and at the inception of the said negotiations for settlement out of Court after judgement [the parties acted on] a 'without prejudice' basis and all parties negotiating were aware of the same having been communicated both orally and in writing to the applicant's advocates…" (para.4).

Learned counsel ***Mr. Kiragu*** and ***Mr. Onsembe*** first appeared before me on 27th September, 2005 for the purpose of canvassing the judgement-debtor's application.

Mr. Kiragu contended that the plaint had contained only an invitation to the Court to determine what was payable, and consequently the award of interest from the date of filing suit "was an error". Counsel urged as the law in relation to interest, thus: where the interest sum is quantified by the Court, then interest accrues from the date of judgement. In support of this argument ***Mr. Kiragu*** cited two cases: ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** [1970] E.A. 469, and ***Prem Lata v. Peter Musa Mbiyu*** [1965] E.A. 592.

In the ***Mukisa*** case *(op. cit.,* at p.475), ***Spry, V.P.*** had thus remarked:

> "***The principle appears clearly, I think, in the judgement of this Court in Prem Lata v. Mbiyu [1965] E.A. 592. That was a case concerning damages for personal injuries. The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgement. In the present case, West End did not prove that any specific sum was due as damages; the Court had to make the best assessment it could on inadequate material. In these circumstances, I think that interest should only have been awarded on the general damages as from the date of judgement."***

In the ***Prem Lata*** case [1965] E.A. 592 (at p.593) ***Law, J.A***. had remarked:

> ***"In both these cases the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest. But suits for damages for personal injuries are in a different category. It cannot be said that, at the date of filing suit, the plaintiff is***

entitled to any particular amount. This depends on the decision of a number of factors, including liability, contributory negligence, and the assessment of the damages which may include, as in this case, a considerable element in respect of future disability. In these circumstances, we do not consider that the Chief Justice wrongly exercised his discretion in refusing to award interest from the date of filing suit in respect of the general damages, as the infant plaintiff cannot be said to have been deprived of the money represented by these damages from any particular date before judgement."

Mr. Kiragu urged that the foregoing authorities of the Court of Appeal supported his position – that the plaintiff had shown no entitlement to a particular amount and so interest should only have been awarded as from the date of judgement; in his words: "interest could only accrue from the date when interest was justly seen to be payable." Counsel also contended that "interest may only be awarded as from a time before judgement where the claim is for a liquidated sum." Counsel relied on such an argument to submit further that the Court's judgement of 27th February, 2004 carried an *error apparent on the face of the record*. While admitting that the gravamen could have been taken up on appeal, ***Mr. Kiragu*** urged that the appellate process could in correct legal procedure be forgone, in preference for an *application for review* of judgement.

Mr. Kiragu also contended that a lawful adjustment of the Court's decree had already taken place, during negotiations between the parties, and so the Court should mark the decree as partially adjusted. He contended that his client's letter of negotiation, of 26th April, 2004 had been answered by the judgement-creditor on 10th May, 2004 and that a compromise had, in that process, been arrived at. He urged that the existence of such a compromise be upheld, by virtue of the Court's discretionary powers under S.3A of the Civil Procedure Act (Cap.21). Such exercise of power, ***Mr. Kiragu*** urged, was in the interests of justice; and in this regard he invoked the Court of Appeal decision in ***Mrs. Rahab Wanjiru Evans v. Esso Kenya Limited***, Civil Appeal No. 13 of 1995, in which the said judicial discretion had been typified as a "residual jurisdiction which should only be exercised in special circumstances…in order to put right that which would otherwise be a clear injustice."

Learned counsel contested the Court's award of Kshs.200,000/= as replacement value for two cows, and *he thought* a figure of Kshs.80,000/= for two cows would have been more appropriate. This, without question, and with due respect, amounted to a re-canvassing of matters of *evidence* which had already featured in the trial and which, so far as this Court is concerned, would have been finally set to rest under the doctrine of ***res judicata.*** Any grievance of such a nature, I would hold, can only be addressed in an *appellate Court*, and it was a clear misapprehension of the law, with respect, that the matter be reverted to before the High Court.

Mr. Kiragu submitted that a lawful agreement had already been reached between the parties, on reduction of the decretal sum by Kshs.100,000/=, and that the Court should, by virtue of its powers under O. XXIV**,** rules 1 and 2 record the same. He urged that the said rule would allow variation to a judgment, on the basis of a *later agreement of the parties.* For authority counsel relied on general principles enunciated in ***Mulla on the Code of Civil Procedure,*** 15th ed by ***P.M. Bakshi*** (Vol. I; Bombay: N. M. Tripathi Private Limited, 1995) (at pp. 924-925). Learned counsel adopted examples in ***Mulla*** (p. 927), and submitted that the Court would be able to exercise its discretion freely "to amend decrees and orders"; "to correct its own mistakes"; "to correct an error due to laches or negligence of officers of the Court"; "to set aside an order obtained by fraud practised upon the Court, or where it is misled by a party or the Court itself commits a mistake which prejudices a party – who is not to blame …"; (p.928) "to issue an injunction…"; (p.930) "to interfere where its decree is being executed in a manner manifestly at variance with the purport and intent of the decree"; (p.932) *"to recall and cancel an invalid order or orders which cause injustices";* (p. 932) "to grant reliefs on the basis of subsequent events, or subsequent legislation, or to admit evidence coming into existence subsequent to the date of the first hearing".

The tenor and effect of such submissions is that there are *clear injustices* embodied in the Court's judgement of 27th February, 2004 which should now be rectified, using the broad latitude of discretion recognised under the law. Learned counsel urged that the purpose of the judgment was to provide

compensation, and not to "unjustly enrich the plaintiff".

To the judgment-debtor's submissions, learned counsel ***Mr. Onsembe,*** for the judgment-creditor, had the riposte that the application was in contravention of existing provisions of the law, notably s.80 of the Civil Procedure Act (Cap. 21) which thus stipulates:

> ***"Any person who considers himself aggrieved –***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."***

Mr. Onsembe submitted that the defendant had, on 12th March, 2004 *lodged an appeal* against the entire judgement, and consequently the instant application would offend against the provisions of s.80 of the Civil Procedure Act (Cap. 21). As the defendant had already filed a *notice of appeal,* learned counsel submitted that such a step, in law, *amounted to an appeal having been filed*; and that only where no appeal had been thus lodged, could the judgement-debtor come before the Court by way of an application under O.XLIV. ***Mr. Onsembe*** urged that the mere fact of filing an appeal as the applicant had done, had taken away the *jurisdiction* of this Court in respect of *review.* A person in the position of the judgement-debtor could only *seek review by this Court under narrowly-defined conditions* – learned counsel submitted. For such a person, given the terms of s.80 of the Civil Procedure Act (Cap. 21), could only seek review under Order XLIV**,** rule 1 where there is *"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"*.

Mr. Onsembe submitted that there was no *new material* which the judgement-debtor had discovered since the delivery of judgment and the issuance of the decree; and consequently the instant application failed to comply with the narrow exception allowing review under Order XLIV, rule 1. To proceed with such an application, it was urged, was tantamount to having the Court sit on appeal over its *own judgment.* It was urged that the judgement was the culmination of a trial process, during which all relevant *evidence* including expert evidence, had been called and duly tested. ***Mr. Onsembe*** submitted that all the issues brought in the instant application could be canvassed on *appeal.*

Learned counsel while admitting that there had been correspondence between his client and the judgment-debtor through counsel, restated the content of the depositions in this matter, that "all that correspondence was on a without-prejudice basis"; and he urged consequently that the content of negotiations in such circumstances should not be allowed to prejudice the judgment-creditor.

On the substantive grievance of the judgment-debtor, which founded counsel's claim that the Court's record was marked by patent error, namely the unacceptable operative dates of interest-payment, learned counsel ***Mr. Onsembe*** now cited the content of s.26(1) of the Civil Procedure Act (Cap.21). That section stipulates:

> **"Where and in so far as a decree is for the payment of money, the court may, in the 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."**

Learned Counsel also cited the provisions of s.27 of the Civil Procedure Act (Cap. 21), which gives the Court a *wide discretion in relation to awards of costs* of a suit. S. 27(1) of that Act provides:

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid…"***

Mr. Onsembe submitted that the judgment-creditor's claim had been a *material-damage claim* which had taken place in ***1994***, some ten years before the date of the judgment, and some *three years before the filing of suit in* ***1997.*** In these circumstances, learned counsel submitted, it was in every respect proper that the Court should exercise its discretion unfettered, in determining matters pertaining to costs and interests, in both rates and operative dates.

Mr. Onsembe submitted that on the Court's records and on the judgement text of 27th February, 2004 there was no *error* clerical or otherwise, nor was there a *mistake* to justify the judgment-debtor's application for review.

Learned counsel submitted that if the interests awarded by the Court were a source of legitimate grievance to the judgment-debtor, then the only proper recourse was an *appeal*: because this was an issue so strenuously *contested at the trial*, that the trial Court must be taken to have exhausted its scope for decision-making when it made its awards.

Mr. Onsembe submitted that the Court of Appeal decision in ***Nyamogo and Nyamogo Advocates v. Kogo*** [2001] E.A. 173 which was included in the judgment-debtor's bundle of authorities, was instead in support of the judgment-creditor's position. Their Lordships in the Court of Appeal had in that case thus held (p.174):

> ***"We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal***."

Mr. Onsembe submitted that if indeed there was an error in the determination of interest dates, in the judgment of 27th February, 2004 then this would be a matter for ***appeal*** but not ***review.*** Counsel urged that in any situation in which an error of law or *evidence* might be ascribed to a decision of the High Court, any legitimate quest for a remedy must only look to the *Court of Appeal*; because *any misdirection on law is exclusively a question for appeal.* Learned counsel urged that the grounds set out on the face of the judgment-debtor's application were not, in law, a basis for allowing a review; and consequently the application merits being dismissed.

In his rejoinder, learned counsel ***Mr. Kiragu*** urged that Order XLIV, rule 1 allows the Court to review a decision notwithstanding the existence of a right of appeal – and that all that was required to attract the application of such exception in the rule, was ***sufficient reason***. He maintained that sufficient reason did indeed exist, because the judgment of 27th February, 2004 had an *error apparent on the face of the record.*

Was the application an afterthought, as urged for the judgment-creditor? Counsel submitted that such an issue could not properly be taken: because *lodging a notice of appeal constitutes no more than information to the Court* and to the opposite party that there is just a ***desire to appeal***. In support of this

submission counsel cited the Court of Appeal decision in ***Yani Haryanto v. E.D.F. Man (Sugar) Limited***, Civil Appeal No. 122 of 1992 in which the following passage appears:

> "***The learned judge was of the view that the only purpose that rule 74(1) of the Court of Appeal Rules served was to enable a party to manifest its desire to appeal. We entirely agree with him.***
>
> ***"A notice of appeal, apart from manifesting a desire to appeal, appears to have a two-fold purpose. One of the two purposes is to enable applications to be made to the Court of Appeal under rule 5(2)(b) of the Court of Appeal Rules. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed under rule 81 (1) in the Court of Appeal."***

I understood ***Mr. Kiragu*** on the basis of his reliance on the ***Yani Harianto*** decision, to be urging that his client's notice of appeal, which counsel for the judgment-creditor had taken as a true, formal appeal, was after all only a *technicality* and there may well have been much greater intent to seek *review* than to lodge and prosecute an *appeal*. If that is the case, then it would be unsurprising if it turned out (as apparently is the case) that, after all, a record of appeal has to-date not been lodged: and one would then understand the context in which the judgment-debtor has both "sued" for *negotiations* and sought to invoke this same Court's *review* jurisdiction. Were there to be such a *forensic ruse*, it would however not in any way qualify the state of the law as regards matters ***res judicata*** in the High Court and matters that must be challenged only on *appeal*. (To such matters I will revert further on).

Learned counsel ***Mr. Kiragu*** contested the judgement-creditor's position, that by the application for review, the Court was being asked to consider once again matters which were already disposed of in the judgment. This, however, in the words of counsel, "is untrue, because Parliament has granted authority to review the Court's order." The difficulty with this submission is that Parliament has narrowly defined the conditions under which such a review may be carried out; and besides, the merits of a review application are dependent on the distinction between *misconception of law or misapplication of evidence*, on one side, and *patent error appearing on the face of the record*, on the other side. So, whether or not a question is suitable for ***review*** is not, as counsel for the judgment-debtor suggests, solely dependent on the factor, in gross, that *Parliament has granted review powers.*

My foregoing review of the evidence and submissions, already, I believe, suggests the direction in which this ruling must go, as an expression of my judicial assessment.

The judgment of 27th February, 2004, *ex facie*, was a final expression of judicial decision-making at this level. Section 80 of the Civil Procedure Act (Cap. 21), however, has created certain limited opportunities for a party to seek before this Court a *review* of the judgment. The most significant such opening for review is where there is an error or mistake *apparent on the face of the record*. Essentially, the competence of the instant application depends on the judgment-debtor being able to show that, indeed, there is an error or mistake apparent on the face of the judgment text. Learned Counsel ***Mr. Kiragu*** has strived to show that the mode of setting effective dates of interest, in the judgment, did manifest error apparent on the face of the record.

But learned counsel has also re-contested certain matters of merit which had been strenuously canvassed during the trial; the obvious one is the *value to be placed on the judgment-creditor's cows* which had in 1994, been electrocuted by the insecure electrical cables belonging to the judgment-debtor.

I will dispose of that point by referring to an earlier ruling which I had given, in ***George Gikubu Mbuthia v. Kenya Power & Lighting Company Limited***, HCCC No. 751 of 2001. In that case too, the defendant had sought a review of orders earlier made by the Court. I had relied on a Court of appeal decision, ***National Bank of Kenya Limited v. Ndungu Njau***, Civil Appeal No. 211 of 1996 in which their Lordships had thus stated the law:

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident***

and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground of review."

I proceeded in the ***George Gikubu Mbuthia*** case to hod that any contested questions during the trial, once pronounced upon by the Court, became further redressable by way of ***appeal*** but not review. I stated the law in that case as follows:

"Whether or not natural justice has played its role in judicial decision-making is, in my view, a controversial and litigious point which, when in issue, must be regarded as a fit subject for appeal to a higher Court. For one thing, natural justice itself is an abstract principle in its full sense, and the presence or absence of it in its totality is not, in most cases, a visible phenomenon on the records … Therefore I would hold that the said orders cannot be questioned following the method of review for errors on the face of the record. It should be made quite clear that errors on the face of the record, which on that account lend themselves to review, generally show an obvious and [a] crystal-clear starkness such as makes them readily perceptible".

That is still my understanding of the state of the law; and thus I would not agree that a matter already canvassed during the trial, such as the value of the judgment-creditor's electrocuted cows, can again become the subject of *review* before the same Court.

In the same strain I stated my understanding of the law in a recent ruling in ***A. J. Limited and Another v. Catering Levy Trustees and Three Others,*** HCCC No. 1488 of 2000:

"So this is a most typical example of a case properly heard on the merits, in the presence of counsel who made their submissions both ingeniously and industriously. From that fact alone this, as a matter of law, is not a case for review by the Judge who gave the ruling. It was not at all alleged by counsel for the plaintiffs, that there was some error [apparent] on the face of the record, or some oversight calling for rectification through review. What counsel for the plaintiffs was seeking was, in effect, a re-hearing on merits and then a setting aside of the decision of 22nd April, 2005."

On the effective date of the various interests granted, similarly, I have seen no evidence of an *error apparent on the face of the record.* For the law relating to the grant of interests, and to the setting of effective dates thereof, is clearly stated in *sections 26 and 27 of the Civil Procedure Act (Cap. 21)*; and the crucial element therein is that the Court has a *wide discretion to grant interest and to determine the effective dates of payment of such interests.* Obviously, all discretion donated by law to the Court is to be exercised *judicially*. I see good cause in the mode of awarding the interests which are now being questioned through an application for review. But 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.*

I am unable to address the ground pursued by the judgment-debtor, with regard to the binding nature of the out-of-Court negotiations which may have taken place between the parties; for there is conflicting evidence as to what was agreed and how; and there is not on record any *consent document* duly filed.

In the result, the judgment-debtor has not, in my assessment, succeeded in showing that a review in this matter could in law be entertained.

I therefore dismiss the judgment-debtor's application by Notice of Motion dated 15th February, 2005, with costs to the judgement-creditor.

Any further application such as may arise, whether in connection with this ruling, or in relation to the judgment of 27th February, 2004 shall be heard and disposed of in the Civil Division of the High Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 21st day of July, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Judgement-Debtor/Applicant: Mr. Kiragu, instructed by M/s Hamilton Harrison & Mathews, Advocates

For the Judgment-Creditor/Respondent: Mr. Onsembe, instructed by M/s. K. Onsembe & Co. Advocates