



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 204 of 1994**

**NATIONAL BANK OF KENYA ..... PLAINTIFF**

**VERSUS**

**JOSEPH ODINGO AGOLA ..... DEFENDANT**

**RULING**

**Joseph Odingo Agola** instituted this Notice of Motion dated 13<sup>th</sup> November 2005, which is expressed to be brought under **Order 44 Rule 1 and 6** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The applicant seeks for orders of stay of execution, the order of committal to civil jail of the applicant be vacated and more fundamentally, the review of the *exparte* judgment dated 18<sup>th</sup> November 1999.

This application is premised on the grounds that the applicant was at all material times not aware of the hearing date of the suit which was fixed by his advocate one **Ndeke Gatumu** without his knowledge.

The claim by the plaintiff was not supported by bank statements or other documents and there was no *prima facie* case against the applicant beyond **Kshs.431,331/-** for which he had written cheques.

The court wrongfully entered judgment with costs and interest at **Kshs.4,048,489/10** and moreover the plaintiff never drew a decree relating to the judgment of 18<sup>th</sup> November 1994 and thus the application for execution and the consequential committal to civil jail was illegal.

These grounds were further expounded by the matters deposed to in the supporting affidavit of the applicant. The reasons given for the review can be summarized as follows: -

- Ø **The applicant was never notified of the hearing date by his Advocate, M/s Ndeke Gatumu.**
- Ø **The learned trial Judge refused to grant an adjournment despite the fact that the applicant was not aware of the hearing date.**
- Ø **There was no agreement between the applicant and respondent and the charge of interest at 40% per annum was irregular and against the provisions of the Banking Act.**
- Ø **There was no basis for a claim of Kshs.4,048,489/10 as the applicant had only overdrawn Kshs.431,331/- which he claims to have paid in full and,**
- Ø **Finally, there was no proper decree drawn as per the provisions of the law.**

It is for the above reasons that the applicant sought for the above orders.

On the part of the respondent, this application was opposed. Counsel for the respondent submitted that the present application is vexatious and brought in bad faith after six (6) years since judgment was entered after such an inordinate delay. The applicant is merely accrobating and reprobating for reasons that he was, on a previous occasion brought to court on a Notice to Show Cause when his advocate then on record **M/s Olaly Cheche** pledged to pay Kshs.500,000/- on or before 20<sup>th</sup> May 2003 which sum was never paid.

After numerous attempts to commit the applicant to civil jail, a consent order was recorded on 21<sup>st</sup> March 2005 whereby the applicant committed himself to pay **Kshs.100,000/-** within 30 days from the date of release and thereafter to pay **Kshs.30,000/-** per month until full payment.

On the issue of the decree, Counsel for the respondent submitted further that the decree was drawn according to the provisions of **Order 21** of the **Civil Procedure Rules**.

As regards the interest rate charged by the plaintiff, the principal sum was in respect of an overdraft facility and the interest rate fluctuated and therefore there is no error on the face of the record to warrant a review.

The provisions of **Order 44** of the **Civil Procedure Rules** regarding the application for orders of review are clear that a party desiring to apply for review must show

*“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 was made, or on account of some mistake or error apparent on the face of the record ...”*

I have considered the rival arguments and all the material presented before me.

The reasons advanced by the applicant are that he was not aware of the hearing dates of the suit. That is a matter that the applicant should take up with his advocates on record who owed him a duty of care.

As regards the interest rates that were charged, the applicant did not provide any agreement to show that the agreed interest rate was different from what the bank had charged him. The applicant did not provide any information such as a Legal Notice to show the prevailing interest rate as at the time he took the overdraft was 13% and not 40%.

In any event the applicant has been brought to court on a Notice to Show Cause and a consent order was recorded in the year 2003, the applicant ought to have brought his grievances then, bringing this application after six (6) years, I find the applicant guilty of lashes.

(See case of **Popin (Kenya) Ltd & 3 others –vs- Habib Bank Ag Zurich C.A No. 80 of 1988**)

Apart from the issue of interest rate which the applicant claims to be new, all the other grounds advanced for review are suitable for the Court of Appeal, there is no error on the face of the record; the trial judge arrived at the decision after evaluating the evidence that was before the court. If the trial court misapprehended the facts and the law, the appropriate procedure should have been an appeal.

In the case of **Eastern and Southern Africa Development Bank –Vs- African Green Fields Ltd & others E.A.L.R [2002] 2 E.A 371** it was held

*“An order cannot be reviewed because it is shown the judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the laws or that he exercised his discretion wrongly in the case ...*

*The proper way to correct a judge alleged misapprehension of the procedure or the substantive law or*

*his alleged wrongful exercise of discretion is to appeal the decision unless the error is apparent on the face of the record therefore does not require elaborate argument to expose.”*

Similarly in this case, I see no error that is apparent on the face of the record that does not require elaborate arguments. Accordingly, I am not satisfied that the application has merit and I hereby dismiss it with costs to the respondent.

It is so ordered.

**Ruling read and signed on 3<sup>rd</sup> day of November 2006.**

**MARTHA KOOME**

JUDGE