REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 268 oof 2002

VIJAY MORJARIA ……...……...……..PLAINTIFF

VERSUS

M/S MAJANI MINGI ESTATES LTD…….1ST DEFENDANT

HARRY HORN JR…….2ND DEFENDANT

RULING

By a plaint dated 25th November 2002, the plaintiff stated in paragraph 4 thereof as follows:-

"***In or about 14th October, the plaintiff advanced the first defendant a friendly loan in the sum of Kshs.4,800,000/- which sum of money was to be repaid on 16th October 2002 in the sum of Kshs.285,000/- with a provision that in default of any one instalment the entire amount was to become due and payable on demand"***

The above portion of the pleading is not quite clear. I presume that the plaintiff advanced the aforesaid sum to the first defendant on 14th October 2002 and the said sum of money was to be repaid by monthly instalments of Kshs.285,000/- with effect from 16th October 2002. The plaintiff further stated that the second defendant gave a personal guarantee of Kshs.4,800,000/- in the event that the first defendant defaulted in payment of the advanced sum. He further stated that the first defendant had defaulted in repayment of the sum of Kshs.4,800,000/- and therefore the entire sum was due and payable at once. He prayed for judgment against the defendants jointly and severally for Kshs.4,800,000/- plus costs and interest at court rates from October 2002 until payment in full.

Summons to enter appearance were served upon the defendants and on 11th December 2002 M/S Ndeke Gatumu and Company Advocates entered appearance for both defendants. On 8th January 2003 the plaintiff's advocates, Kimatta and Company filed a request for judgment under **Order IXA rules 5** and **11** of the **Civil Procedure Rules**. The request for judgment was as against the two defendants allegedly for their failure to file defence. The request was for the sum of Kshs.4,800,000/- together with costs and interest.

On 14th January 2003 M/S Ndeke Gatumu and Company filed a statement of defence for and on behalf of the two defendants. In the said statement of defence, the defendants averred that the plaintiff's suit was incompetent, misconceived and bad in law. The first defendant further denied knowledge of any friendly loan in the sum of Kshs.4,800,000/-. The second defendant denied that he gave a personal guarantee of

Kshs.4,800,000/- in favour of the plaintiff as was alleged in the plaint.

Prior to the filing of the said statement of defence the defendants' advocate requested for particulars of the plaintiff's claim and by a letter dated 18th December 2002 requested the plaintiff's advocate to confirm that he will not apply for judgment in default of defence until fifteen days after service of the particulars requested for. The said letter was not responded to and for that reason the defendants' advocate chose to file the statement of defence .

Upon service of the statement of defence by the defendants' advocate, the plaintiff's advocate wrote a letter dated 21st January 2003 informing the defendants' advocate that judgment in default of defence had already been entered and warned that if the claim as contained in the plaint was not settled within ten days from 21st January 2003, execution would be applied for.

On 31st March 2004 the defendants filed an application by way of chamber summons seeking stay of execution and setting aside of the judgment that was allegedly entered on 8th January 2003. They further urged the court to order that the decree herein and the execution proceedings that had been commenced were irregular. It is important to observe that upon receipt of the request for judgment and payment of the same on 8th January 2003, the Deputy Registrar entered judgment on a date which is not quite clear, it appeared as though it was entered on 8th of January 2003 but the same was altered to read 13th January 2003. There are several averments by the plaintiff in various affidavits to the effect that judgment in default of defence was entered on 8th January 2003.

Between April 2004 and July 2005, the advocates for the parties herein appeared before several courts regarding the application dated 31st March 2004 and indicated that they were negotiating a settlement and continually requested that the application be stood over generally. However, on 27th July 2005, the advocates appeared before this court and recorded a consent that:- ***"By consent the application dated 31st March 2004 be allowed in terms of prayer 2 only. The plaintiff be at liberty to issue a fresh notice to show cause to the defendants. Costs to the plaintiff".*** Prayer number 2 referred to hereinabove was as follows:-

"***That this honourable court be pleased to order that the decree herein and the execution proceedings are irregular and/or unlawful."***

Thereafter, execution proceedings were undertaken by the plaintiff as against the second defendant and counsel for both parties appeared before this court's Deputy Registrar on several occasions for various reasons. Several consent orders regarding payment of the decretal sum were recorded before the Deputy Registrar. On 18th October 2005 the advocates for the parties prepared and signed a document which was headed "ORDER". It read as follows:-

"***By consent of both parties, judgment is entered in favour of the plaintiff against the defendant jointly and severally for:-***

(a) Kshs.3 million

(b) Costs

(c) The said amount to be liquidated by monthly instalments of Kshs.500,000/- per month with effect from 18th October 2005 and thereafter on every 18th day of each succeeding month until payment in full.

(d) In default of any of the instalments, the entire amount to become due and payable and the plaintiff to be at liberty to execute and recover the entire amount.

DATED at Nakuru this 18th day of October 2005.

(Signed)

KIMATTA & COMPANY

ADVOCATES FOR THE PLAINTIFF

(Signed)

NDEKE GATUMU & COMPANY

ADVOCATES FOR THE DEFENDANTS"

The said "***order"*** was filed in court on 18th October 2005 and Kshs.300/- was paid on the same day as court fees for the same. However, no entry was made in the court file by either the Deputy Registrar or a Judge to the effect that the said consent order had been adopted as a judgment of the court. Following execution of the said "***order"***, M/S Kimatta and Company wrote to M/S Ndeke Gatumu and Company on 21st October 2005 and enclosed copies of a draft decree and requested the defendant's advocate to approve the same with or without amendments and thereafter return the same to him for filing in court. It is not clear whether Mr. Gatumu approved the said draft decree but on 3rd November 2005 a decree signed by the Deputy Registrar of this court was issued in terms of the consent filed on 18th October 2005. On the same day the plaintiff's advocates applied for execution of the decree and the requested mode of execution was by way of issue of a notice to show cause why the second defendant could not be committed to civil jail. Notice to show cause was issued as prayed and the same was served upon the second defendant on 15th November 2005. The advocates for the parties together with the second defendant appeared before a Deputy Registrar on 18th and 25th November 2005 when it was agreed and recorded by consent that the second defendant would pay a sum of Kshs.500,000/- on or before 12th December 2005 in default of which a warrant of arrest was to issue against him. On 16th December 2005 Mr. Kimatta and Mr. Gatumu appeared before a Deputy Registrar and Mr. Kimatta indicated to the court that the cheque of Kshs.500,000/- which had been given to his client by the second defendant following the consent order of 25th November 2005 had been dishonoured upon presentation for payment. A further consent was recorded to the effect that the second defendant was to pay a sum of Kshs.1,000,000/- on or before 31st January 2006. It was further agreed that the costs of the suit were to be agreed upon and the same be paid on or before 31st January 2006. On 6th February 2006 the advocates for the parties recorded yet another consent where it was agreed that the repayment schedule that had been agreed upon earlier be extended to 17th February 2006 by which time the judgment debtor was supposed to have paid all the outstanding amounts in default of which a warrant of arrest was to issue against him. Come the 17th of February 2006 no payment had been effected and a warrant of arrest was issued as against the second defendant. Upon his arrest, Mr. Kimatta and Mr. Gatumu appeared before a Deputy Registrar and recorded the following consent:-

"***By consent the judgment debtor to be released on his personal bond of Kshs.500,000/-. Further the judgment debtor to pay Kshs.200,000/- on or before 10th March 2006. The balance of the decretal sum to be liquidated within 30 days from the said date i.e. 10th March 2006. In default execution to proceed. Matter to be mentioned on 12th April 2006 to confirm payment. J/D to attend court".***

On 12th April 2006 a further consent was recorded before the Deputy Registrar. The same was as follows:-

"***By further consent the outstanding sum is agreed at Kshs.2,300,000/-. The same to be paid by the J.D as follows:-***

(i) Kshs.300,000/- to be paid on or before 27th April 2006.

(ii) Kshs.800,000/- to be paid on or before 5th May 2006.

(iii) Kshs.600,000/- to be paid on or before 27th May 2006.

(iv) Kshs.600,000/- to be paid on or before 25th June 2006.

(v) J/D to deposit postdated cheques with the plaintiff.

Mention on 12th May 2006 to confirm progress of payment. J/D's bond be extended to that date."

After several mentions, counsel appeared before a Deputy Registrar of 13th of June 2006 and Mr. Kimatta informed the court that all the cheques that had been issued by the defendants in purported settlement of the decree had been dishonoured upon presentation for payment. The court observed that the defendants had defaulted on all the consents that had been recorded and allowed execution to proceed. The defendants had by that time made some payments, leaving a balance of Kshs.2,064,595/-. The warrant of arrest in execution was issued on 14th June 2006. The amount that appears in the warrant of arrest and which was due for payment had increased to Kshs.2,154,067/-.

It is against the aforesaid background that on 19th June 2006 M/S Kibunja & Associates Advocates filed a notice of change of advocates for the defendants/judgment debtors in place of Ndeke Gatumu & Company Advocates. Together with the notice of change of advocates, Kibunja & Associates also filed, under certificate of urgency, an application by way of chamber summons which was brought under **Order III rule 9A, Order XX rule 7(1), Order XXI rule 22(1), Order 49 Rule 3A** of the **Civil Procedure Rules, Section 84(1)** and **(2)** of the **Constitution of Kenya** and **Rule 10(a)** and **(b)** of the **Constitution of Kenya (Fundamental Rights and Freedom of the Individual) Practice** and **Procedure Rules.** The application sought several orders and the substantive ones were as follows:-

1. Pending the hearing and determination of the application, leave be granted to the applicants to change their advocates and engage the services of Kibunja & Associates Advocates in place of Ndeke Gatumu and Company Advocates.

2. Pending the hearing and determination of the application, the court be pleased to make orders for stay of execution of the orders made on 13th June 2006 by H. M. Nyagah, Deputy Registrar, and the subsequent warrant of arrest issued on 14th June 2006 against the second judgment debtor and the same be recalled, cancelled or quashed.

3. That judgment entered on 8th January 2003 against the applicants in default of defence be set aside and all consequential orders and decrees be evacuated.

4. That the warrants of arrest issued herein be declared unlawful and be recalled, cancelled and/or quashed and the respondent be restrained from further applying for/and obtaining warrants of arrest against the second judgment debtor as the warrants are unconstitutional and placing the second judgment debtor in detention for a civil debt amounted to cruelty and degrading treatment and was in gross violation of his fundamental rights to his freedom of movement.

The said application was supported by the second defendant's affidavit. The history of the matter was set out therein extensively. He deposed that the initial judgment entered allegedly in default of defence was invalid because it was entered before the statutory period for filing of defence had expired given that the law omits computation of time for the period 21st of December in any year and the 6th of January in the year next following, both days inclusive. He lamented that an invalid decree had been extracted and notice to show cause why he should not be committed to civil jail issued unless he paid the decretal amount. In paragraph 17 of his affidavit, he deposed that he was enjoined in the suit as a guarantor and he verily believed that the decree could only be enforced against him after the decree holder exhausted all remedies against the principal debtor. He remonstrated that the decree holder was abusing the court

process by applying for his committal to civil jail to enforce a decree that had been irregularly obtained and which was null and void. In his view, that was tantamount to breach of his fundamental right to liberty, security of the person and protection of the law guaranteed under the **Constitution of Kenya**. He therefore urged the court to grant the orders as sought in his chamber summons.

Mr. Kibunja for the applicant submitted that the memorandum of appearance, having been filed on 11th December 2002, the statement of defence was not due until 15th of January 2003. He cited Court of Appeal decision in ***SULEIMAN VS KARASHA [1989]KLR 201*** where it was held that the period of 21st December to 6th January in any year should not be included in the computation of time for amending, delivering or filing of any pleadings or doing of any other act. That it is in line with the provisions of **Order XLIX rule 3A** of the **Civil Procedure Rules**. Counsel further submitted that the irregular judgment that was entered in default of defence was only as against the first defendant. He added that the act of the Deputy Registrar of entering the said judgment before its due date was without jurisdiction and therefore the purported judgment that was entered was ***coram non judice*** and had to be set aside ***ex debito justitiae.*** In support of that submission, he cited several authorities. They included ***SOUTHERN CREDIT BANKING CORPORATION LTD VS JONAH STEPHEN NGANGA (2006) eKLR, CARMELLA WATHUGU KARIGACA VS MARY NYOKABI KARIGACA*** Civil Appeal No. 30 of 1995 and ***HE ZHUO VS QIU WEN YENG*** Civil Case No. 128 (OS) of 1994 at Mombasa (unreported). According to Mr. Kibunja, the running thread in all the above decisions was that as long as the initial judgment was entered without jurisdiction and was therefore irregular, all the consents that followed thereafter were of no legal consequence. In particular the consent judgment that was recorded on 18th October 2005 to the effect that the defendants were to pay a sum of Kshs.3,000,000/- plus costs and interest could not hold, counsel submitted.

Mr. Kibunja further submitted that the second defendant, having been sued as a guarantor, judgment against him could only be entered for the principal sum that he had allegedly guaranteed excluding interest and costs. He cited the case of ***ARI BANK CORPORATION LTD (IN LIQUIDATION) VS LAKE VICTORIA FISH LTD (IN RECEIVERSHIP) AND ANOTHER [2006] eKLR***.

Regarding the alleged unconstitutionality of the warrant of arrest that had been issued against the second defendant, Mr. Kibunja cited ***JOSEPH KAMAU KARURI VS KIMANI THUITA AND ANOTHER Misc. Application No, 1672 of 2004 at Nairobi*** (unreported). In that matter, a constitutional application was filed pursuant to the provisions of **Sections 65** and **84** of the Constitution in a matter where it was alleged that a warrant of arrest had been issued and executed against the applicant for alleged non payment of Kshs.287,698.90. The applicant claimed that he had paid the decretal amount in full and exhibited documents in acknowledgment of payment issued by the advocates for the judgment creditor. That notwithstanding, the decree holder had proceeded to obtain a warrant of committal to civil jail without disclosing that the decree had been settled. The court held that because of the alleged payment of the decretal sum the warrant of arrest gave rise to some constitutional issues and ordered stay of such warrant.

I may observe that the facts in the aforesaid case are totally different from the facts in the present matter simply because in the case herein it has not been shown that the decretal amount has been paid in full by the judgment debtors. I will revert to this issue later in this ruling.

Mr. Kimatta for the plaintiff opposed the defendant's application. He pointed out that the defendant's application was incompetent because it had breached the provisions of **Order III rule 9A** of the **Civil Procedure Rules** in that it had been filed by an advocate who was purporting to come on record after judgment had been passed but without having obtained an appropriate order of the court. The said provisions state as follows:-

"***9A When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."***

Mr. Kimatta emphasised that there was no order of the court allowing Mr. Kibunja to come on record. There was only a letter by Ndeke Gatumu and Company Advocates dated 16th June 2006 addressed to Kibunja and Associates Advocates and copied to the Deputy Registrar, High Court of Kenya at Nakuru. In the said letter, Mr. D. N. Gatumu of Ndeke Gatumu & Company Advocates stated that he had no objection to Mr. Kibunja and Associates taking over the conduct of this case on behalf of the defendants. The said letter was filed in court on the 19th of June 2006 when the notice of change of advocate as well as the defendant's application now under consideration were filed. According to Mr. Kimatta, that letter did not satisfy the mandatory provisions of **Order III rule 9A**. He therefore urged the court to hold that the application filed by Kibunja and Associates was incompetent and proceed to strike it out.

Regarding the default judgment, Mr. Kimatta submitted that the same was validly entered on 13th January 2003. However, the judgment was subsequently vacated by consent of the parties on 18th October 2005 when it was agreed that judgment be entered against the defendants jointly and severally for Kshs.3,000,000/- plus costs and interest. A decree was subsequently drawn in terms of the aforesaid consent. It was that decree that the plaintiff was seeking to execute. He took the court through the various consents that were entered into before the Deputy Registrar of this court regarding payment of the decretal amount and pointed out that the defendants had substantially breached those consents. Several cheques that were issued by the defendants in purported part payment of the decretal sum and which had been dishonoured upon presentation for payment were exhibited in the plaintiff's replying affidavit. He further submitted that the first application that was drawn by the defendants to challenge the first judgment was withdrawn and the defendants were therefore estopped from complaining about that initial judgment. He further submitted that there was no basis upon which the consent judgment could be set aside. He cited the case of ***WASIKE VS WAMBOKO [1988] KLR 429*** where the Court of Appeal held that a consent judgment or order had contractual effect and could only be set aside on grounds which could justify setting aside a contract or if certain conditions remained to be fulfilled which were not carried out. He further buttressed the above argument by citing ***DIAMOND TRUST BANK OF KENYA LTD VS PLY AND PANELS LTD & OTHERS [2004] 1EA 31*** where the Court of Appeal referred to ***WASIKE VS WAMBOKO*** (supra) and reiterated that consent judgment may only be set aside on the ground of fraud or collusion, mistake or misrepresentation . The court further held that an advocate had ostensible authority to reach a compromise on behalf of his client. In that same decision, Githinji JA, held that where the consent judgment impugned had been executed, as in the present case where the judgment debtors had made part payment of the decretal sum, the courts were less likely to set aside the consent judgment.

Regarding the warrants of arrest that had been issued against the second defendant, Mr. Kimatta submitted that there was nothing that offended the second defendant's constitutional rights and freedom as alleged. The second defendant had through his counsel executed several consents which had default clauses providing for his arrest and committal to civil jail in the event that he defaulted in payment of the decretal sum. Counsel further submitted that the **Civil Procedure Act** and the **Rules** made thereunder specifically provided for this mode of execution where a judgment debtor may be summoned before a court of law to show cause why he cannot be committed to civil jail for his failure to satisfy a lawful decree against him. He further told the court that the first defendant had no attachable assets since all its property had been mortgaged to various financial institutions. That averment by the plaintiff in his replying affidavit had not been denied. In the circumstances the plaintiff could only proceed as against the second defendant who was the first defendant's guarantor, he stated.

Lastly, Mr. Kimatta submitted that the defendants had not shown that there were any triable issues disclosed by their statement of defence and more so, considering that the parties had subsequent to the entry of the default judgment negotiated and recorded a binding consent judgment. He urged the court to dismiss the defendant's application in its entirety.

Having carefully considered all the submissions that were made by both counsel, the first issue that I wish to resolve is whether M/S Kibunja & Associates are properly on record or not, in terms of the provisions of **Order III rule 9A.**

It is not in dispute the said advocates were instructed to take over the conduct of the defendants' case

from M/S Ndeke Gatumu & Company after judgment had been entered against the defendants. The change of advocate could not therefore be effected without an order of the court upon an application, due notice having been given to M/S Ndeke Gatumu & Company. No such application was made and no order was issued by the court to grant leave to M/S Kibunja & Associates to come on record. The letter that was written by M/S Ndeke Gatumu & Company Advocates and forwarded to M/S Kibunja & Associates with a copy to the Deputy Registrar stating that they had no objection to M/S Kibunja & Associates taking over the conduct of the matter did not suffice. If the new advocates did not wish to file an application, they should have prepared a consent letter and have it signed by or on behalf of the two firms of advocates, file it then write to the Deputy Registrar to enter the consent. Thereafter a formal order would have been extracted. **Order XLVIII rule 2A** of the **Civil Procedure Rules** states that:-

"***Any order may, by consent of the parties evidenced in writing, be entered by the registrar, or in a subordinate court, by an executive officer so authorised in writing by the Chief Justice."***

M/S Kibunja &Associates did not comply with the mandatory provisions of ***Order III rule 9A***. Even though one of the prayers in the chamber summons filed by the defendants on 19th June 2006 was for grant of leave to the said advocates to come on record for the defendants in place of M/S Ndeke Gatumu & Company, such leave required to be first granted before a notice of change of advocates could be filed and the other prayers sought.

That notwithstanding, in the circumstances of this particular matter, I will not hold that the defendants' application is incompetent and proceed to strike it out. In ***MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE & ANOTHER [2001] 2 EA 460,*** it was held that it was not in the overall interest of justice to invoke procedural lapses to defeat applications unless such lapses went to the jurisdiction of the court or where substantial prejudice was going to be caused to the adverse party. This is not the case here. The plaintiff will not be prejudiced in any way if M/S Kibunja & Associates are allowed to represent the defendants, having failed to strictly comply with the provisions of **Order III rule 9A**.

I now wish to consider the propriety of the default judgment that was entered on 13th of January, 2003. The plaintiff requested for judgment on 8th January 2003 and it is not in dispute that the defence was not due as at that date in view of clear provisions of **Order XLIX rule 3A** of the **Civil Procedure Rules** which excludes the period between 21st of December and the 6th of January in every year in computation of time for amending, delivering or filing of any pleadings except in applications in respect of a temporarily injunction. A memorandum of appearance having been filed on 11th December 2002, the defence had to be filed within fifteen days from the aforesaid date but taking into consideration the provisions of **Order XLIX rule 3A** as aforesaid. The period was therefore to expire on 13th January 2003 and which means that the request for entry of judgment in default of defence could only be made as from the 14th January 2003. The Deputy Registrar should not have acted on a request that had been made irregularly. It appears to me that the default judgment had been entered on 8th January 2003 but when it was realised that the same had been entered prematurely the date was altered to 13th January 2003. I say so because the plaintiff stated in paragraph 5 of his replying affidavit as follows:-

"***That the cause of action herein is based on a liquidated claim for Kshs.4,800,000/- and judgment in default of defence was entered on 8th January 2003."***

In paragraph 11, the plaintiff reiterated that the request for judgment was paid for on 8th January 2003 and a similar averment is also found in paragraph 12 thereof. Mr. Kimatta conceded, and in my view rightly so, that the request for judgment was made prematurely. However, he submitted that the irregular judgment was subsequently vacated and/or abandoned and in its place parties negotiated and entered into a consent judgment for Kshs.3,000,000/- plus costs and interest. That followed the filing of an application by the defendants seeking to set aside the default judgment. I have already set out the full consent that was executed by the advocates for the parties herein. However, the consent that was filed on 18th October, 2005 did not expressly state that the judgment had been set aside.

In my view, the default judgment entered on 13th January, 2003 was irregular and this court must set it aside ***ex debito justitiae***. Having done so, what is the effect of the consent judgment dated 18th October 2005? According to Mr. Kibunja, that consent judgment and all other subsequent consents were void for the reason that the initial default judgment was irregular and in his words, was entered by this court's Deputy Registrar without jurisdiction. I do not agree with Mr. Kibunja that the Deputy Registrar acted without jurisdiction. There is a difference between an irregular act and one done without jurisdiction. **Order XLVIII rules 2** and **2A** empower a Registrar or a Deputy Registrar of this court to enter judgments in default of appearance or defence and also to enter such other orders as parties may consent to in writing. **Order XLVIII rule 2** provides as follows:-

"***2 Judgment may, on application in writing, be entered by the Registrar or, in a subordinate court, by an Executive Officer generally or specially there unto empowered by the Chief Justice by writing under his hand, in the following cases:-***

(a) Under Order IXA;

(b) In all other cases in which the parties consent to judgment being entered in agreed terms;

(c) Under Order XXIV, rule 3(costs, where suit withdrawn or discontinued)."

A close reading of that rule reveals that where parties or their respective advocates negotiate a consent and reduce it into writing and require the same to become judgment of the court, they have to apply to the Registrar or an executive officer to enter the same. They cannot just file a consent letter in the court file and pay for the same and assume that it has automatically become a judgment of the court if a Registrar or his Deputy or an executive officer (if it is a subordinate court matter) has not actually entered the same. In this regard what can be said of the consent order of 18th October 2005? My view is that strictly speaking, by its mere filing, it did not become a judgment of the court because it was not explicitly endorsed by the Deputy Registrar. The advocates for the parties did not comply with the provisions of **Order XLVIII rule 2** by applying to the Deputy Registrar to enter judgment in terms of their consent. The same can be said of a request for judgment made under **Order IXA rule 5** which is paid for but is not acted upon by the Deputy Registrar who enters the judgment in a court file. Parties or their advocates have no capacity to enter judgments on their own, without involving a Deputy Registrar or an executive officer in the case of a matter before a subordinate court.

However, the Deputy Registrar by implication endorsed the consent that was executed by the advocates for the parties on 18th October 2005 by signing a decree on 3rd November 2005. The said decree made specific reference to the aforesaid consent and in my view, the said decree was valid and cannot be challenged. The decree was drawn as follows:-

"DECREE

CLAIM FOR

a) Kshs.4,800,000/- being principal amount

b) Costs

c) Interest at court rates from October, 2002 till payment in full.

d) Any other relief that this honourable court may deem fit and just to grant.

Judgment is entered by consent of both parties as follows:-

a) Kshs.3 million

b) Costs

c) The same to be liquidated by way of monthly installments of Kshs.500,000/- per month with effect from 18th October, 2005 and thereafter in every 18th days (sic) of each succeeding month till payment in full.

d) In default of any installment, the entire amount to be come due and payable and the plaintiff to be at liberty to execute and recover the entire amount.

DATED at NAKURU this 18th day of October 2005

ISSUED at NAKURU this 3rd day of November 2005

(signed)

DEPUTY REGISTRAR

HIGH COURT OF KENYA NAKURU"

There was considerable lapse of time between 13th January 2003 when the default judgment was entered and 18th October 2005 when parties entered into the aforesaid consent. It was not contended by the applicants that there was any fraud or collusion, mistake or misrepresentation in entering into the said consent judgment. Subsequent to the execution of the consent and issuance of the decree on 3rd November 2005, the defendants had made part payment and the balance of the decretal sum as at 14th June 2006 was Kshs.2,154,067/-. The defendants issued several cheques after they entered into the consent judgment but all their cheques were dishonoured. Those cheques were issued by the first defendant and signed by the second defendant. The decree that was issued following the consent order of 18th October 2005 was not as clear as required under **Order XX rule 6** of the **Civil Procedure Rules** in that it did not state whether the judgment had been entered against the first and the second defendants jointly and severally but that seems to have been the intention of the parties because in the consent letter of 18th October 2005 they stated as follows:-

"***By consent of both parties judgment is entered in favour of the plaintiff and the defendant jointly and severally for:-***

(a) Kshs.3,000,000/-

(b) Costs

(c) …

(d) …"

Mr. Kimatta Advocate then signed for the plaintiff and Mr. Ndeke Gatumu Advocate for the defendants.

I therefore hold that there was a valid judgment by consent that was entered by the Deputy Registrar of this court on 3rd November 2005 following the consent letter executed by the parties on 18th October 2005.

The advocates for the parties and the second defendant appeared before this court's Deputy Registrar on a number of occasions after the 18th October 2005 and on all those occasions the second defendant through his advocate made proposals for payment of the balance of the decretal sum. Severally he agreed that if he defaulted on the proposed mode of payment the court would issue a warrant for his arrest. That notwithstanding, he defaulted and continues to be in default todate. He cannot now argue that the

warrants of arrest that were issued against him as a result of his default are unconstitutional and/or violate his fundamental right to freedom of movement. The fundamental rights of an individual as enshrined in Chapter V of the Constitution are expressed to be subject to respect for the rights and freedoms of others and for the public interest and where a party is clearly disrespecting the rights of others he cannot seek refuge in this court by invoking the provisions of Section 84 of the Constitution. The defendants herein and in particular the second defendant, has explicitly bound himself to pay their debt to the plaintiff/decree holder which they agreed stood at Kshs.3,000,000/- as at 18th October 2005. They cannot deny that obligation.

Mr. Kibunja submitted that the second defendant, having been sued as a guarantor could only be pursued to pay the decretal sum after all the effort had been made to recover the same from the principal debtor. I agree with that principle of law. However, in this case, the plaintiff stated on oath that the first defendant did not have any attachable assets since all its assets had been mortgaged to various financial institutions. That statement under oath was not denied by the second defendant. In the circumstances, the plaintiff is perfectly entitled to proceed against the second defendant. If the plaintiff was executing against the second defendant for recovery of the initial claim of Kshs.4,800,000/- plus costs and interest as stated in the plaint, I would have held that the second defendant's liability as a guarantor is limited to a sum of Kshs.4,800,000/- as per the personal guarantee which he is alleged to have executed on 14th October 2002. However, that is not the case. The execution is for a much lesser sum than the guaranteed amount. The defendants should pay the decretal sum.

All in all, I find no merit in the defendants' application and I dismiss the same with costs to the plaintiff.

DATED, SIGNED and DELIVERED at Nakuru this 3rd day of November, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Kimatta for the plaintiff and Mr. Gitonga holding brief for Kibunja for the applicant.

D. MUSINGA

JUDGE