



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 551 of 2000

COMBINED MINERAL LIMITED PLAINTIFF

VERSUS

TIOMIN RESOURCES INC. DEFENDANT

RULING

The Notice of Motion dated 29/6/05, under Order 44 rule 1; Order 50 rule 1 of the Civil Procedure Rules and Section 3A of Cap. 21, Laws of Kenya, seeks the following orders:

1. **That the judgment and decree of this Court, given on 15/4/05 be reviewed;**
2. **The judgment or award given to the Plaintiff for loss and damage plus interest thereon as stipulated in items (b) (c) and (d) of the said judgment be reversed or set aside with costs to the Defendant**
3. **Alternatively, there be stay of further proceedings in this case pending appeal.**
4. **Costs of this application be provided for.**

Supported by an Affidavit by Colin Forbes, the application is on the grounds, inter alia, that: -

- a) **there is a mistake or error apparent on the face of the record;**
- b) **the award of the said damages in the judgment is a nullity in law and the applicant has a right ex debito jiustitiae to have it reversed or set aside**
- c) **the claim for loss of payment under the contract or loss of rent was a special damage and since it was not specifically pleaded and proved, the court had no jurisdiction to award it;**
- d) **the said alleged losses under the contract and/or rent in lieu thereof or otherwise were quantifiable and the plaintiff's failure or omission to quantify them in the plaint was fatal, and rendered the said claim irrecoverable;**
- e) **the losses or damage could not be recovered as general damages as general damages cannot be awarded for breach of contract**
- f) **Alternatively, if the application for Review is unsuccessful, the Defendant will suffer loss and disadvantage and in the interest of justice the present proceedings ought to be stayed pending**

appeal.

Apart from the Supporting Affidavit herein above referred to, the applicant put in a Further Affidavit, dated 6/10/05, and filed in Court on 7/10/05, the purpose of which was to annex a copy of the judgment, omitted in the Supporting Affidavit, herein earlier referred to.

In opposition, the Respondent/Plaintiff, through their learned counsel, Mr. Thangei, and the grounds of opposition, submitted that the application is incompetent on several grounds, and should be dismissed with costs. First, the counsel submitted, the Decree and Judgment sought to be reviewed, must be annexed to the application.

As defined in Section 2 of the Civil Procedure Act, Cap. 21, Laws of Kenya, a “decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”

On the relationship between the decree and the judgment, the authority of GULAM HUSSEIN JIVANJI V. EBRAHIM JIVANJI & ANOR. (1930) 12 E.A. C.A. 41 is adequate. There, Sir Jacob Barth C.J. (Kenya) stated, at the relevant part at pp.44-45 that “..... Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application (sic for review) should be for a review of the judgment upon which it is based.” In the application before me the applicant annexed, initially, the decree only, but in its Further Affidavit, annexed the judgment. The validity of that annexed judgment, and by extension the Decree given the relationship between the two as explained herein above, was challenged by Counsel for the Respondent, on the ground that the annexed copy of the judgment is not signed by the judge, nor sealed by the court. To that extent what is annexed to the application is not a properly extracted judgment. That, went on the Respondent’s counsel, means that there was no payment of the requisite fees, as would be evidenced by a payment receipt.

From the above, the natural conclusion is that the unsigned judgment is invalid, and therefore its annexation is of no consequence and since both the decree and (valid) judgment must be annexed to the application, the application is incompetent.

I respectively agree with the views and submissions of the learned counsel for the respondent, that the application ought to fail.

I would have stopped there as I do not believe that any other reasons are necessary to dismiss this application for Review.

However, I think the stronger reason for dismissing this application lies on the answer as to whether a Review is the appropriate action in a case where the grounds clearly show that the court either misapprehended or overlooked the law and hence arrived at legally erroneous judgment and the awards. In support of this, a brief rundown of the grounds is imperative. The legal huddle in this otherwise important task is that having held that the judgment annexed to the application is invalid, by virtue of its not being signed, technically, I have no valid document – from which to cross-check on the grounds of the application. However, notwithstanding that, the grounds of appeal, even in the absence of, or without delving into the judgment, should suffice.

I skip ground (a) which requires my looking at the invalid, unsigned judgment, and I go to ground (b) which states that the judgment is a nullity in law. Needless to say such a matter is not for review, but appeal, as I would be sitting on appeal of my own decision.

The same goes for grounds of application numbers (c) through (e).

As was held in NATIONAL BANK OF KENYA LTD V. NDUNGU NJAU, Civil Appeal No. 211 of 1996, at p.8 “A review may be granted whenever the court considers that is necessary to correct an apparent error or omission on the part of the court Nor can it be a ground for 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 law cannot be ground for review. If he (the judge) had reached a wrong conclusion of law, it could be a good ground for appeal, but not review.”

In conclusion, I need only state that the alternative prayer number three (3) which is reflected in ground of application (f) can only be granted if the application is under the correct legal provisions and that is stay of execution pending appeal. Here, the application is not under Order 41 rule 4, of the Civil Procedure Rules, and hence the courts jurisdiction to grant such an order or orders is not properly invoked.

Finally, I have carefully gone through the submissions and authorities cited by learned counsel for the Defendant/applicant, Mr. Oyatsi, and I have successfully failed to locate any authority, binding on me or otherwise, that suggests that a judge/court can sit on Review of its own Judgment/Ruling where the issues raised are matters of law. Such cases can only be dealt with at an appellate level.

The immediately foregoing reasons for dismissal of this application are, as stated earlier, not necessary. In a layman’s language, they are an overkill. But I had to go through them to leave no doubt.

All in all therefore, and for the reasons given above, this application, by way of a Notice of Motion, dated 29/6/05, is hereby dismissed with costs to the Plaintiff/Respondent and against the Defendant/applicant.

DATED and delivered in Nairobi, this 5th Day of December, 2006.

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O.K. MUTUNGI

JUDGE.