



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**Civil Case 206 of 2003 (OS)**

JIVAN MEHTA.....PLAINTIFF

VERSUS

J.M. KIBUCHI & 3 OTHERS.....DEFENDANT

**R U L I N G**

On 21/7/03, the Defendant/Applicant moved this court to review its orders made on 22/5/03. The Notice of Motion, under Order 44 rule 1 of the Civil Procedure Rules, also seeks costs for this application.

The application is supported by an Affidavit, of even date, by John M. Kibuchi, and is on the grounds that:

- 1. There is sufficient reason to review the order,*
- 2. The court gives directions on the issue of costs payable for the application by the Defendant.*
- 3. The Plaintiff has unduly misled and did not disclose all the true facts to the court to obtain the orders granted*
- . 4. On 24/6/03, the Plaintiff filed a miscellaneous application implying dissatisfaction with the Account rendered and the same is due for taxation on 29/7/03, contrary to the orders granted herein.*

In opposition, the Plaintiff/Respondent, on 11/8/03, averred that:

1. The Notice of Motion for Review is incurably defective; sets out no grounds or any ground known to law, and the grounds set out are no grounds and the application is misconceived, frivolous and should be truck out with costs;
2. the affidavit in support or the complaint raised therein, cannot supplement non-existent grounds in the motion.
3. the learned Judge who gave his ruling on 13/5/03 had said, about the applicant's affidavit **"it is the most evasive and unhelpful affidavit I have so far come across"** The deponent is an Advocate and an officer of the court, who refused to release monies clearly due and payable by him to client Jivan Mehta and who alone had special knowledge under Section 112 of the Evidence Act (Cap.80, Laws of Kenya) of the date of receipt by his firm of the

proceeds realized on sale of L.R. 12715/215 jointly owned by him and his brother Arun Mehta.

4. the date of receipt of the proceeds of sale was never a material matter as opposed to the actual receipt of the money. Whether it was sometime in November 2001 or thereabout, as Jivan Mehta assumed since his own advocate who knew exactly when the amount was received would not despite being repeatedly asked to divulge the same, compelling the client to sue the firm.

I have perused the pleadings herein, and considered the submissions by counsel for both sides and have reached the following findings and conclusions.

I begin with the application for review that is sought in the prayers herein.

Looking at the Ruling of this court, dated 22/5/03 by Nyamu J, and the order under which the application is brought, I am not sure that there is sufficient reason for the review sought. My reading of the Ruling, and the order complained of, is that if Nyamu J. misapplied or misunderstood the law, that is a matter for appeal, not review. I will not sit here and constitute myself as an appellate court over a matter of law, delivered by a judge of parallel jurisdiction as myself.

Secondly, the facts in the matter are rather unfortunate in that the applicant, Mr. Kibuchi, an advocate and officer of this court, allowed himself to be driven to the current situation where his own client, the Plaintiff in this suit, had ultimately to sue him to do that which he was and is, by law, obligated to do, but failed to do.

Order 3 of Nyamu J's Ruling of 22/5/03 has no ambiguities in my reading of the same. It is not enough for the Defendant/applicant to submit that he rendered the account as ordered by that ruling. When was that account rendered, and when and how was the account agreed? Was that within the 10 days stipulated in this court's order? That is the issue, and raising the issue of **"the account not being challenged"** is not the same as having the account agreed upon. It seems that the Defendant- Mr. Kibuchi - is approaching the matter from an evasive position.

My reading of the events on record, and the court order, is that the account was not agreed upon, and that necessitated going for taxation, as ordered by this court, in the same ruling.

Accordingly, I dismiss, with costs, the application herein dated 21/7/03.

I further order that the orders of this court, dated 22/5/03, and extracted on 14/7/03, be complied with to the letter.

DATED and delivered in Nairobi, this 8th Day of July, 2005.

**O.K. MUTUNGI**

**JUDGE**