REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 106 of 2003

NJERI ONYANGO……..……..……PLAINTIFF

VERSUS

PATRICK MUSIMBA …….....……DEFENDANT

R U L I N G

This is an application by the Plaintiff, seeking the review or setting aside of orders which were made on 27th May 2005. The applicant also asks the court to give directions on the interest that should be payable from the date of the decree, as well as the issue of execution of the said decree, in the event that the judgement-debtor defaulted.

The application was expressed as having been brought pursuant to the provisions of Order 50 rule 1; Order 44 of the Civil Procedure Rules, as well as Sections 3A and 80 of the Civil Procedure Act.

The reasons cited for the application were that the orders which were made on 27th May 2005, exceeded the prayers set out in the application dated 27th April 2004. In effect, the Plaintiff is convinced that there was an error apparent on the face of the record, as the orders which she seeks to have reviewed did result in the variation of the judgement and decree which had been previously issued, on 22nd October 2003.

Mrs Mwangi, advocate for the applicant pointed out that the matter which was before the Hon. Mutungi J. for, determination, was an application for stay of execution.

Having perused the record, I verified that the application dated 26th April 2004 sought the following three prayers;

"1 That this honourable court do grant stay of execution.

2. That this honourable court be pleased to grant an order for the payment of the decretal sum by instalments of Kshs. 50,000/= per month until satisfaction of the decree in full.

3. That the costs of this application be in the cause."

The reasons cited by the defendant to support that application were to the effect that he was ready and willing to satisfy the decree in instalments. However, he noted that he was unable to pay the said sum in a lump sum, as the decretal sum was a huge amount of money. He therefore asked the court to allow him pay the decretal amount by instalments.

Having given a hearing to the defendant's application, the Hon. Mutungi J. gave the following orders:-

"1. Grants a stay of execution.

2. Grants an order for the payment of the decretal sum by instalments of Kshs. 50,000/= per month until

satisfaction of the decree in full.

The payment to be without interest and of the sum due as on 20.4.04.

3. Costs of the suit herein to be in the cause, but without interest thereon."

It is the applicant's contention that the foregoing orders were a clear manifestation of an error apparent on the face of the record, as they extend to matters which were not canvassed before the court. In effect, the orders granted varied the judgement and the decree, which the defendant had said he was happy to settle. All he had asked for, was the opportunity to pay by instalments.

However, the Hon. Mutungi J. went ahead to not only grant the two prayers sought, i.e. for stay of execution, and for leave to pay by instalments, he also varied the judgement of the Hon. Ibrahim J. By the said judgement, the court had awarded interest on the decretal sum, at court rates from the date of filing suit until payment in full.

In the case of **NATIONAL BANK OF KENYA LIMITED V. NDUNGU NJAU, CIVIL APPEAL NO. 211 OF 1996,** the Court **of** Appeal held as follows:-

> **"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 for review that another judge could have taken a different view of the matter. 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 a ground for review."**

I have carefully perused the record of the proceedings before the Hon. Mutungi J. Nowhere did the defendant ask the court to vary the judgement or the decree. None of the parties addressed the court on the question as to the interest which had earlier been awarded in the judgement of the Hon. Ibrahim J. In the circumstances, I hold the considered view that there was an error apparent on the face of the record, as there was nobody who asked the Judge to determine whether or not the judgement should be varied, by the variation of the orders awarding interest on the principal amount.

In **HERMAN P. STEYN V CHARLES THYS, CIVIL APPEAL NO. 86 OF 1996,** the Court of Appeal quoted, with approval the following words from **Odd Jobs v. Mubia [1970] EA 476**

> **"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.**
> **On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."**

The Court of Appeal therefore felt that there had been no miscarriage of justice and that, on the contrary, it would be unjust to allow the appellant to succeed on the issue.

In this case, the parties did not ask the court, either directly or by conduct, to determine whether or not there ought to have been a variation to the judgement or decree. And, by purporting to vary the judgement, so as to deprive the applicant of interest, the court had thereby occasioned a miscarriage of justice, as it took away from the applicant a favourable decision, without being asked to do so, and also without giving to the applicant an opportunity to make submissions in that respect. I am therefore satisfied that the applicant has demonstrated sufficient reason to justify the review of the orders made on 27th May 2005.

Accordingly, I do now review the said orders by reinstating the orders which require the defendant to pay interest at court rates from 28th February 2003, when the suit was filed, until payment in full. I also reinstate the orders which had been granted by the Hon.

Ibrahim J., to the effect that the costs of the suit be paid by the defendant, to the Plaintiff.

And finally, I do review the orders of 27th May 2005, by adding thereto a default clause. Accordingly, if the defendant should default in the payment of any one instalment, of the shs. 50,000/=, which are payable monthly, the applicant shall be at liberty to execute the decree. This default clause is an extremely integral part of the decision, as without it, the applicant may find it difficult to commence execution proceedings even after the defendant defaults in the payment of the somewhat low monthly instalments. I say that the monthly instalments are low because the decretal amount was almost Kshs. 4,000,000/=; therefore if no further interest was added thereto, the decretal sum would be paid in about seven years. Therefore, it is only in the best interests of justice that there be a default clause.

Dated and Delivered at

Nairobi this 30th day of November 2005.

FRED A. OCHIENG

JUDGE