



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO.319 OF 2003

**ANTHONY ATHANAS NGOTHO**

**T/A NGOTHO ARCHITECTS:.....PLAINTIFF**

**VERSUS**

**NATIONAL INDUSTRIAL**

**CREDIT BANK LIMITED :..... DEFENDANT**

**RULING**

The Notice of Motion dated 23rd March 2004 was brought by the Defendant under Orders XLIV Rule 1 and L Rule 1 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all the enabling provisions of the Law. It is seeking one main order that this Court be pleased to review its order of 17th March 2004 by limiting the interlocutory injunction therein to only LR.No.1/109 Nairobi and substituting the sum of Kshs 8 million with the sum of Kshs 18,713,320.00. The ground for the application is that there is an error apparent on the face of the order in that:-

- i) This Court made its finding at page 11 of the Ruling that the charge in respect of LR.No.1160/42 – KAREN is lawful but finally granted the order of injunction affecting both LR. NO.1160/42 and LR. No.1/909.**
- ii) This Court made its finding at page 13 of the Ruling that the Plaintiff owes the Defendant over Ksh s18,713.320.00 but finally granted the order of injunction on condition that the Plaintiff pays to the Defendant the sum of Kshs 8 million within 45 days from the date of the Ruling. The Court gave no reason for the discrepancy between the two amounts and both the Law and facts' dictate that the Plaintiff should have been ordered to pay Kshs 18,713,320.00 and not 8 million .**

The application is supported by an Affidavit sworn by Counsel for the Applicant. The application was opposed and there are Grounds of Opposition filed by Counsel for the Plaintiff. The application came up for hearing on 1st July, 2004. The same Advocates who acted in the injunction application are the ones retained in this application.

Counsel for the Applicant in his oral submissions in Court was brief and to the point. In his view my Ruling of 17th March 2004 has a mistake or an error apparent on its face as stated in the Applicant's Notice of Motion and a review should be ordered.

Counsel for the Respondent in opposition submitted that he saw no mistake or error in the said Ruling and the Applicant's application is a smokescreen for an appeal. In his view Counsel for the Applicant is challenging certain parts of the Ruling out of context. The Plaintiff/Respondent has complied with the conditions for the grant of injunction including the payment of Kshs 8,000,000/= which payment has been accepted by the Applicant without complaint. In Counsel's view the Applicant is approbating and reprobating the said order.

Reliance was placed on the decision of the Court of Appeal in National Bank of Kenya Ltd –v- Ndungu Njeru: Nairobi CA. No.211 of 1996 (un reported) for the proposition, that a review application which is a disguised appeal should not be allowed. Further reliance was placed on another Court of Appeal decision in Nairobi City Council –v- Thabiti Enterprises Ltd: Nairobi CA. No. 264 of 1996 (un reported) for the proposition that a party should not be allowed to approbate and reprobate a Ruling at the same time. Counsel for the Respondent also relied on the decision in the case of the Eastern and Southern African Development Bank – v- African Green Fields Ltd & 2 Others: Nairobi HCCC NO.1189 of 2000 (un reported) for the proposition that the wrong exercise of discretion or misapprehension of the Law cannot be a ground for review. In his view the application for review is without merit and should be dismissed.

The above are the rival positions taken by the parties. I have also read the record including my own Ruling. The sum total of my ruling was that I was satisfied that a *prima facie* case with a probability of success had been shown and an award of damages would not adequately compensate the Applicant. However as clearly stated in the Ruling it was my view that the injunction would be granted on terms which terms I defined. With respect I cannot appreciate the Applicant's complaints. It should be understood that I was dealing with an interlocutory application. I was careful not to make any final orders or orders that would prejudice the subsequent trial. The Applicant may not be happy with the terms of the injunction. With respect this is not a ground for review. It should not be forgotten that in granting the injunction on terms I was exercising a discretion. I may have exercised the discretion in a way the Applicant did not like. Its remedy I am afraid is an appeal and not a review of my exercise of discretion.

In the result, the Notice of Motion dated 23rd March 2004 has no merit and is dismissed with costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2004.**

**F. AZANGALALA**

**AG. JUDGE**

**Read in the presence of:**