



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1112 OF 2000

**INTERVILLAS LIMITED PLAINTIFF
VERSUS**

POSTA INVESTMENT CO-OPERATIVE

SOCIETY LIMITED 1ST DEFENDANT

S.T. MUGACHA T/A GALAXY AUCTIONEERS 2ND DEFENDANT

RULING

This is an application for the review of an order made in this matter on 26.10.2000. The application is brought under O. XLIV Rule 1 and O. L Rule 1 of the Civil Procedure Rules. It is supported by an affidavit sworn on 30.3.2001 by Stanley Mugacha, (the applicant) and is grounded on the following:-

- (a) That the amount in question was paid to the 2 nd Defendant in the cause of his executing instructions to levy distress against the Plaintiff which instructions were given by the 1 st defendant.***
- (b) That the 1 st Defendant had, at the time of giving the said instructions given an express undertaking to indemnify the 2 nd Defendant against any actions that may arise of the instructions aforesaid.***
- (c) That the current suit is one of the actions covered by the indemnity aforesaid.***
- (d) That the 2 nd Defendant was at all times acting as an agent of the 1st Defendant.***
- (e) That the orders sought to be reviewed were issued while the 1 st and 2nd Defendants were being represented by the same advocate and the conflict of interest arising as a consequence of such representation was not brought to the attention of this court as the same advocate was appearing for both defendants. This position was not at the time known to the 2 nd Defendant as he entrusted the matter to the advocate for the 1 st Defendant and the issue of the indemnity given by the 1 st Defendant was not therefore raised at the time that the order was issued.***
- (f) That the Plaintiff and the 1 st Defendant are still Tenant and Landlord to each other and no prejudice will arise if the money is credited to the Plaintiff's rent account.***

It will be observed that in making this application, the applicant has not alleged that there was anything wrong or improper in the procedure followed in making the order sought to be reviewed or in the order itself. All he has done is to seek to introduce into the matter an alleged issue regarding indemnity, which appears to have absolutely nothing to do with the plaintiff, it being a matter purely between the applicant

and the 1st defendant.

Rule 1 of O. XLIV of the Civil Procedure Rules shows that an application for review under that rule can only be brought:-

(a) if there is discovery of new or important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order was made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) for other sufficient reason.

The affidavit sworn by the applicant reveals that the ground on which this application is based is some alleged conflict of interest in the representation of the applicant and the 1st defendant relating to an indemnity given by the 1st defendants to the applicant. In my view, such a ground is not germane to the matters envisaged by O. XLIV Rule 1 under which an application for review can be made and accordingly does not satisfy the requirements of the rule.

The application is in my view absolutely devoid of merit and is solely calculated to delay the enforcement of the order made on 26.10.2000. Moreover, the fact that it was lodged some 5 months after the making of the order sought to be reviewed suggests that the application has not been made in good faith.

For all those reasons, the application is dismissed with costs.

Dated at Nairobi this 24th day of October, 2001.

T. MBALUTO

JUDGE