REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 17 OF 2006

FARMERS CHOICE LTD ....APPLICANT

VERSUS

PETER NJAU MUIGAI..................................RESPONDENT

RULING

1. The application dated 25th August, 2016 is brought under Order 45 rule 1, Order 42 rule 6, Order 22 rule 22 of the Civil procedure Rules 2010 and sections 3A of the civil Procedure Act, Cap 21 Laws of Kenya. The application seeks the following orders:

> **"1. Spent.**
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> **2. This honourable Court be pleased to grant an Order of stay of the order issued on 2nd August 2016 requiring the Respondent to deposit the decretal sum pending the hearing and determination of this application on merits.**
>
> **3. This honourable Court be pleased to review the order issued on 2nd August 2016 and set aside the part requiring the Respondent to deposit the decretal sum.**
>
> **4. In the alternative, the court be pleased to review the order issued on 2nd August 2016 and direct Blue Shield Insurance Company Limited (now under statutory management) to deposit the decretal sum in this matter pending the hearing and determination of the Appeal herein and in default execution to issue against Blue Shield Insurance company Limited.**
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> **5. Costs of this application be provided for."**

2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit sworn by the Applicant, Peter Njau Muigai. The Applicants case is that the Respondent who was the Plaintiff in Nairobi CMCC 160 of 2003 claimed *inter alia* damages of Ksh.254,776.15 arising from an accident between motor vehicles KAP 186K in and KAP 819C in the year 2002. That the Applicants insurer Blue Shield Insurance Co. Ltd (now under statutory management) instructed it's advocates to defend the claim. That the Applicant came to learn of this appeal when the orders for the deposit of the decretal sum were made. It is contended that the insurance company is the primary and legitimate person to deposit the decretal sum but that the insurance company is currently under a moratorium which was extended on the 29th July, 2016. That the extension of the moratorium is a new matter which was not in the knowledge of the Applicant when the orders the subject of this application

where made.

3. The application is opposed. It is stated in the replying affidavit that the Applicant’s advocates were served with the hearing notice but failed to turn up when the appeal proceeded in their absence. That the application to set aside the judgment was allowed on condition that the decretal sum be deposited. It is averred that the application at hand is meant to frustrate the Decree Holder from enjoying the fruits of the judgment.

4. The appeal was canvassed by way of written submission which I have considered.

5. Under Order 45 rule 1 (1) of the Civil Procedure Act provides:

> **“1. (1) Any person considering himself aggrieved—**
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> > **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **(b) by a decree or order from which no appeal is hereby allowed,and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

6. The Applicant’s argument is that the extension of the Moratorium is a new matter. However, this court in the ruling the subject matter of this review application held that the omissions of the Applicant’s Advocate or insurer could not be visited on the Respondent. The extension of the moratorium therefore does not change that position. As stated by the Court of Appeal in the case of **Mwihoko Housing Co. Ltd v Equity Building Society [2007]2KLR**:

> **“It is trite law, and we reiterate, that 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.**
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> **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 of review that another Judge could have taken a different view of the matter. Nor can it be a ground of 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. See Nairobi City council v Thabiti Enterprises Ltd [1995-98] 2 EA 251 (CAK)**
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> **In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”**

7. With the foregoing, I find no merit in the application. Consequently, the application is dismissed with costs.

Dated, signed and delivered at Nairobi this 19th day of Jan.,2017

B.THURANIRA JADEN

JUDGE