



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 46 OF 2012**

**DAVID P. KIENGO .....PLAINTIFF**

**VERSUS**

**CMC MOTORS GROUP LIMITED.....DEFENDANT**

**RULING OF THE COURT**

1. The Notice of Motion application before the court is dated 11<sup>th</sup> February, 2016 and is filed by the Plaintiff. The application seeks as the main order that the judgment herein delivered on 18<sup>th</sup> September, 2015 be reviewed and/or varied, and that the costs for this application be provided for.
2. The applications is premised on the grounds set out therein and is supported by affidavit of the plaintiff **David Kiengo** Sworn on 11<sup>th</sup> February, 2016.
3. The plaintiffs' case is that there is an error apparent on the face of the judgment. The applicant's case is that;
  - a. *The Learned Judge at paragraph 28 of his judgment ordered and directed that "The defendant should therefore install the engine back to its original state at no costs to the plaintiff.*
  - b. *At paragraph 32, the Judge further ordered and directed further "However, for the ends of justice, I shall order that the defendant also installs the second hand gear box and the engine as it was previously, within the next 30 days. The plaintiff shall pay the amounts of Kshs. 115,542.90 as the repair charges for the installation of the second hand gear box within 30 days upon payment of which the vehicle will be delivered to him by the defendant".*
  - c. *The plaintiff paid the sum of kshs. 115,542.90 within the time ordered but the defendant has neglected and/or failed to deliver the motor vehicle as ordered.*
  - d. *The defendant has instead asked the plaintiff to go tow the vehicle as opposed to installing "the engine back to its original state" or "as it was previously" as ordered by the court.*
  - e. *The uncontroverted and undisputed fact in evidence is that the engine was previously in good running condition prior to the dismantling by the defendant. The vehicle was driven by the plaintiff into the defendant's garage.*
  - f. *The words "it's original state" or "as it was previously" are matters of facts which are directly*

discernable from the evidence on record. The parties should not be allowed to interpret those words beyond what was recorded in evidence.

*g. In the circumstances there is sufficient and just cause for this court to review its judgment to give its efficacy and meet the ends of justice.*

4. The defendant opposes the application vide the replying affidavit filed herein in which they revise the two issues that is that **Order 45(1)** of the **Civil Procedure Rules** for review is not satisfied and that matters raised in the application are matters of interpretations of the judgment and burden of appeal and that this court's hands are now tied.

5. I will not write a long ruling on this matter. The only issue I raise for consideration is whether **Order 45(1)** of the **Civil Procedure Rules** on review has been complied with in regard to a new and fresh evidence being found and whether or not there is an error on the face of the record.

6. For avoidance of doubt, I have read again the said judgment which I delivered herein on 18<sup>th</sup> September, 2015. At paragraph 28 of the Judgment, I stated that I had established that the plaintiff had not shown that the defendant caused the engine problems. This is paragraph 28:

*“I now turn to the issue of cost of repairs. It is common ground that subject to liability, the Plaintiff would be entitled to recover reasonable costs of repairing the damage to the car and engine. As I have already established, the Plaintiff has not shown that the Defendant caused the engine problems. However, it is clear that in carrying out the diagnosis to the engine, the same was removed and never returned to its original state after the Plaintiff rejected the quotation of Kshs. 749,466.60/=. The Defendant should therefore install the engine back to its original state at no costs to the Plaintiff. Further, the supplied gearbox should also be installed as initially agreed, and the plaintiff should pay the agreed sum of Kshs. 115,542.90/= that he had agreed to pay for the installation of the gear box”.*

That paragraph is clear to me. It does not warrant any further clarification, at least not from me. The defendant did not cause the engine problem. It was however, necessary, that in carrying out the diagnosis to the engine the same was removed and never returned to its original state after the plaintiff's rejected the quotation stated above.

7. This is why I directed the defendant to install the engine back to its original state. This “*original state*” only referred to its physical position in the motor vehicle. It did not refer to its mechanical condition, which was already faulty. At paragraph 32, the judgment stated;

*“In the upshot, I find that while the Plaintiff is entitled to the possession of the car he must pay the repair charges agreed upon with regard to the installation of the gearbox to the Defendant. However, for the ends of justice I shall order that the defendant also installs the second hand gear box and the engine as it was previously, within the next 30 days. The Plaintiff shall pay the amounts of Kshs. 115,542.90 as the repair charges of the installation of the second hand gearbox within 30 days upon payment of which the vehicle will be delivered to him by the Defendant”.*

8. The reference to vehicle being delivered to the plaintiff as stated in paragraph 32 did not imply that the vehicle had to be in good mechanical condition. These installations were necessary to make the vehicle physically complete, to remain relevant as a salvage.

9. On the issues I raised herein, it is my find that **Order 45(1)** of **Civil Procedure Rules** for review has not been satisfied, and, that the judgment delivered on 18<sup>th</sup> September, 2015 has no error on the face of the record. If the plaintiff is not satisfied with the judgment the plaintiff has the legitimate right to appeal against the same. Otherwise the judgment speaks for itself.

10. For the forgoing reasons of this ruling the plaintiff's Notice of Motion application dated and filed herein on 11<sup>th</sup> February, 2016 is dismissed with costs to the Defendant/Respondents.

Orders accordingly.

**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2016**

**LADY JUSTICE G. NZIOKA**

**JUDGE**

**Present**