



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 2456 of 1994

JOHN NJAU NJUGUNA.....PLAINTIFF

VERSUS

RAMESH L. LADHAR SHAH.DEFENDANS

RULING

Notice of Motion dated 22/3/2009 is brought under **Section 3A, Section 99 of Civil Procedure Act, and Order XX Rule 14, OVL rule 1.**

The orders sought are that the decree passed herein be amended and/or rectified in order to reflect and comply with the terms of the judgment of court delivered on 20/9/1999 and that it is in the interest of justice that the said decree be rectified as the applicant is likely to suffer immense loss if decree is executed in its present form.

Section 99 of the **Civil Procedure Act** provides:-

“Clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from any accumulated slip or omission, may at anytime be corrected by the court either of its own motion or on the application of any of the parties.”

Order XX rule 14 is also relevant and it states:-

“Where a suit is for dissolution of a partnership, or for the taking of partnership accounts, the court before passing a final decree may pass a preliminary decree, declaring the proportionate share of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken and other acts to be done, as it thinks fit.”

In this case originating summons was filed on 8/7/1994 under **Order 36 rule 4** for:-

- (1) declaration that the partnership determined on 14/9/91 by operation of law
- (2) the respondent do render true accounts of the said partnership to the applicants
- (3) any monies found to have been due to the deceased from 14/9/91 to date be paid with interest at bank rates
- (4) the net assets of the partnership be ascertained and distributed
- (5) motor vehicles No.KYT 346 and KNA 582 or their value be released forthwith to the applicants
- (6) that the respondent do pay damages for detention of the said motor vehicles.

From that time proceedings have been taken through interlocutory applications and various orders have been issued from time to time. Hearing proceeded and judgment was delivered. Preliminary decree was issued on 15/6/2001 and final decree on 24/1/2002.

Perusing Notice of Motion dated the 22/3/2009 the defendant seeks one order that the decree passed herein be amended and or rectified in order to reflect and comply with the terms of the judgment of the court as delivered on 20/9/1999.

Let it be known that the judge who wrote the preliminary judgment **Hon. Hayanga J.** has since retired from the bench.

The applicant raises several complaints as stated in supporting affidavit.

The orders made are:-

- (1) “That the partnership convened on between the defendant Ramesh Liladhar Sham and Rember Kimka be regarded as having been determined as from 14/9/1991 on account of late Kimka’s death.
- (2) That accounts of the partnership be taken by an independent accountant to be agreed or appointed by court and when such accountant is appointed.
- (3) DW3 M. M. Kansara and PW3 Francis Mingi Murithi be directed to explain to such independent accountant any questions arising from accounts delivered by them if so required by him.
- (4) That the said partnership on being dissolved and wound up the entire assets of the same partnership be sold and the proceeds therefrom be divided equally but such equal division be subject to the amount due to the deceased as a debt from the defendant”.

This was the preliminary decree. The court made an order that the defendant will pay a total sum of Kshs.442,579.40 which sum was to be paid to the partnership account. Further order regarding motor vehicle registration No. KYT 346 and KNA 582 were registered in the name of deceased and are hereby held to belong to him exclusively of partnership business. They should be retained to this estate and if sold by the defendant then the proceeds be paid to the estate. The price of KNA 582 be the value given in exhibit 10 as market value but KYT 346 be valued by AA of Kenya then the court ordered that Mombasa property MI/SEC.XIV/19 monthly rental of Kshs.35,000/= per month in 1994 be immediately be payable to the assets of the company and be divided equally. Order for costs were made. That the costs of these proceedings be paid to plaintiff and the professional fees be paid from partnership account.

I have perused the authorities cited:

In the case of **Gava verses General Printers Ltd.** It was held that **Section 99** deals with errors and accidental slips in judgment and it is appropriate to remedy a consent judgment faithfully recorded by court. Hold 3 that part of decree was impossible of performance, nugatory and incapable of execution.

In the case of **Munyale versus Mulerful, Court of Appeal**, court observed that the error in description of the title is so fundamental that it might have resulted in deferent property being attached with dire consequences for the respondents. In that matter there was misdiscription of the subject matter of suit.

In the case of **V. Karsandas Ramuga versus Mansukhlal Jivuraji & Others 1965 E.A 700**. It was held (ii) the words “*at anytime*”. In section 99 **Civil Procedure Act** allows the prayer of amendment to be exercised after the issue of formal order, (iv) a slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the mater then been brought to his attention.

In the case of **Henry Willian Hellon versus Hugh Hanis HL 1892** it was held “an error occurring from an accidental omission the decree should on a proper application be corrected.

Supreme Court Practice 1995 Volume 1 line 1 paragraph 20/11 states clerical mistakes in judgments or orders accruing from any accidental slip or omission may at any time be corrected by the court from motion or summons without appeal: at paragraph 20/11/1 “where an error of that kind has been committed it is always within the competency of the court To correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce.”

In addition the parties did file written submissions. The defendant/applicant submits that the decree contains fundamental discrepancies and does not conform with judgment.

Under **Order 20 rule 14 Civil Procedure Rules** it is provided that a preliminary judgment may be given “before passing of final decree.”

The final decree was given on 7/12/2001 while what appears preliminary decree was given on 20/9/99. Therefore this conforms with Order 20 rule 14.

After the preliminary decree was given **Judge Mbaluto** (also now retired) delivered the ruling out of which final decree was given. No appeal or review has been sought although the grounds advanced would warrant such an appeal or review.

There are important issues of Kshs.4,442,972/= it is argued that the decree did not take this into account. The defendant was ordered to pay the money by **Justice Hayanga** having found that it was partnership money.

The issue of kshs.9,519,987/= is also explained. At page 31 of the applicant’s application Kshs.9,519,987/= was judgment debt. “*although **Judge Hayanga** ruled Kinyoi and Chevi be paid form the partnership account but there is no account existing and I award they be paid by the plaintiff and defendant on equal basis at original costs with no interest.*” This was the arbitration award by O. N. Koimbuti. It is clear that according to the record the applicant attempted review and appeal but the venues were closed against him by dismissal of the applications.

The plaintiff/respondent submits that the defendant is guilty of delay. The applicant never challenged the accounts taken and only the ruling **Justice Mbaluto** he tried to protest unsuccessfully.

I have perused authorities cited and the proceedings before preliminary decree and final decree by **Hon. Justice Mbaluto** and I am satisfied that there are no clerical, or arithmetical mistakes in the judgments , decree or orders or errors accruing therein from any accidental slip or omission that need to be corrected by the court.

Application is dismissed with costs to the respondent.

Orders accordingly.

Dated, Signed and delivered at Nairobi this 2nd day of November, 2009.

JOYCE N. KHAMINWA

JUDGE