

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E124 OF 2022**

**BETWEEN**

**PERMOD MALHOTRA.**

.....**PLAINTIFF**

**AND**

**ALMASI**

**LIMITED.....1<sup>ST</sup>**

**DEFENDANT**

**FRANCIS MBURU.....2<sup>ND</sup>**

**DEFENDANT**

**MARK MBURU.....3<sup>RD</sup>**

**DEFENDANT**

**RULING**

**Introduction & Background**

1.The Plaintiff has filed the Notice of Motion dated 2<sup>nd</sup> September 2025 under **section 80** of the **Civil Procedure Act** and **Order 45 Rule 1 & 2** of the **Civil Procedure Rules** seeking to review the judgment delivered by the court on 20<sup>th</sup> March 2025 by changing the interest rate on the awarded sums from 3% per annum compounded monthly to 3%

per month compounded monthly as set out in the Deed of Acknowledgment of Debt. The application is supported by the grounds on its face and the Plaintiff's affidavit sworn on 2<sup>nd</sup> September 2025. It is opposed by the Defendants through the Grounds of Opposition dated 2<sup>nd</sup> December 2025. The application was canvassed by way of written submissions which are on record and I have considered the same together with the pleadings and I will be making relevant references to them in my analysis and determination below.

### **Analysis and Determination**

2. The primary issue for the court's determination is whether the court ought to review the judgment of 20<sup>th</sup> March 2025 by changing the interest rate on the awarded sums from 3% per annum compounded monthly to 3% per month compounded monthly as set out in the Deed of Acknowledgment of Debt. The parties agree that under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.
3. The Plaintiff's application is anchored on the ground of a mistake and/or error on the face of the record. The Court of Appeal in **National Bank**

**of Kenya Limited v Ndungu Njau [1996] KLR 469** explained what constitutes an error of law apparent on the face of the record and the scope of review:

*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. 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 for review that another Judge could have taken a different view of the matter. Nor can it be a ground for 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 ground for review.*

4. The Plaintiff states that the court made an error on the face of the record by misinterpreting clause 2 of the Deed as it stated that the Deed provided for 3% interest per annum in case of default, but the Deed actually provides for 3% interest per month compounded monthly until full payment. That the final orders were based on this incorrect reading, which has caused a miscarriage of justice by depriving the plaintiff of the sums properly due under the agreed interest rate. In response, the Defendants aver that the 2<sup>nd</sup> Defendant is deceased, so the application cannot proceed against him, that under **section 26** of the **Civil Procedure Act**, the court has discretion to award interest and

is not bound by the rate pleaded by the Plaintiff, that the application is essentially an appeal disguised as a review application, which is not permitted and that the court's order on interest was a discretionary one, and such orders cannot be challenged by way of review. As such, the Defendants contend that the court has already delivered its judgment and is now *functus officio* and further, that the judgment was delivered in March 2025, but the application was only filed in September 2025, an inordinate and unexplained delay.

5. Clause 2.3 of the Deed provided that *"For the avoidance of doubt, if the Lessee fails to pay any of the instalments of the Outstanding Debt as set out in Sub-clause 2.2 above on the due date, interest at a rate of 3% per month shall be payable and shall be compounded monthly until payment is received in full."* In the judgment, the court held that *"As per Clause 2.2 and 2.3 of the Deed, the 1st Defendant agreed to pay the outstanding debt... and in the event of failure to pay any installments, an interest rate of 3% per annum would accrue and it would be compounded monthly until payment is received in full."* (my emphasis). The court then ordered interest at 3% per annum compounded monthly. The judgment explicitly states that Clause 2.3 provides for "3% per annum," but the actual Deed says "3% per month". I do not think that this requires an elaborate argument as one merely looks at

the Deed and the judgment side by side and notices that the court misstated the Deed.

6. Whereas I can agree with the Defendants that under **section 26** of the ***Civil Procedure Act***, the court has discretion to award interest on the decretal sum from the date of suit or from the date of judgment, it should not be lost that interest that accrued before filing the suit is a matter of contract between the parties. In this case, the court applied the contractual interest rate from the due dates, that is, 26<sup>th</sup> July 2021 and 26<sup>th</sup> May 2022 until payment in full. The court was not exercising discretion under **section 26** but applying the contractual rate from the Deed, which it misread. The court's dispositive orders on interest were premised on this erroneous reading of the Deed, and that correcting this error does not require re-exercising discretion or re-analyzing the merits of the case.

### **Conclusion and Disposition**

7. In the foregoing, I allow the Plaintiff's application dated 2<sup>nd</sup> September 2025 as follows:

**1) The dispositive orders in the judgment dated 10<sup>th</sup> March 2025 are hereby set aside and substituted as follows:**

**Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally for:**

**(a) Kshs. 2,000,000.00/= together with interest at the rate of 3% per month compounded monthly from 26<sup>th</sup> July 2021 until payment in full;**

**(b) Kshs. 22,420,000.00/= together with interest at the rate of 3% per month compounded monthly from 26<sup>th</sup> May 2022 until payment in full.**

**2) All other terms of the judgment shall remain unchanged.**

**3) There shall be no order as to costs of this application.**

**DATED SIGNED AND DELIVERED virtually at NAIROBI this 8<sup>th</sup>**

**DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Muthiani for the Plaintiff/Applicant

2. Ms. Somba holding brief for Dr. Okubasu for the Defendant
3. Amos- Court Assistant

ORIGINAL