



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL APPEAL 235 OF 1997**

**THE OFFICIAL RECEIVER AND LIQUIDATOR ..... APPELLANT**

**AND**

**FREIGHT FORWARDERS KENYA LIMITED .....RESPONDENT**

**(Appeal from the Ruling of the High Court of Kenya**

**Nairobi (Shah, J) dated 23rd June, 1994**

**in**

**H.C. WINDING UP CAUSE NO. 6 OF 1981)**

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**JUDGMENT OF GICHERU, JA**

At the hearing of this appeal on 8th March, 2000, counsel for the appellant, Mr. Gatonye, submitted that in a nut-shell, the appellant's appeal gravitates on the refusal by the superior court to review its order made on 28th April, 1994.

By a Chamber Summons dated 23rd July, 1993 and made under section 72 of the Bankruptcy Act, Chapter 53 of the Laws of Kenya, sections 242(5) and 310 of the Companies Act, Chapter 486 of the Laws of Kenya, rules 5(2) and 107(3) of the Companies (Winding Up) Rules, section 3A of the Civil Procedure Act, chapter 21 of the Laws of Kenya and all other enabling provisions of the law, the respondent herein sought the following orders from the superior court..

1. THAT this Honourable Court be pleased to grant an order directing the Official Receiver and Liquidator (who is an officer of the court):

(i) to declare a dividend and to publish a notice thereof in the Kenya Gazette in accordance with Rule 107(3) of the Companies (Winding-up) Rules within 14 days from the date of the making of the orders herein; and

(ii) to pay to the applicant within 14 days from the date of the marking of the order pursuant to (1) aforesaid of the applicant's whole claim of K,Shs. 621,739.50 plus accrued interest thereon at the rate of

28 per cent per annum or (if higher) the per annum rate of interest charged by Standard Chartered Bank of Kenya Limited (being the applicant's principal bankers) to the applicant herein with effect from (and including) 24 November, 1987 until payment in full together with all accrued interest.

2. THAT the costs of this application be provided for.”

When the chamber summons came up for hearing the superior court on 28<sup>th</sup> April, 1994, counsel then appearing for the appellant herein applied for adjournment with a view to serving the Consolidated Bank of Kenya Limited which had taken over the management of Jimba Credit Corporation Limited where in the appellant had deposited the sum of Kshs 2,247,217/05 due to the creditors of Kenya Freight Consolidators Limited (in liquidation). The adjournment sought was refused by the superior court which proceeded grant the respondent's chamber summons and ordered that the respondent be paid the sum of Kshs 621,789/50 together with interest at court rates of 12% per annum by the appellant within 45 days from the date of that order. An application for a review of the said order by the appellant dated 17th June, 1994 and made under section 3A of the Civil Procedure Act, chapter 21 of the Laws of Kenya and under Orders XLIV and L rule 1 of the Civil Procedure Rules and all other enabling provisions of the law was on 23<sup>rd</sup> June, 1994 refused by the superior court for the reason that a review only lies when from the discovery of new and important matters or evidence which after the exercise of due diligence, was not within the knowledge of the appellant or could not be produced by the appellant at the time when the order was made or on account of some mistake or for any other sufficient reason which latter alternative had been held to be ejusdem generis to the first two alternatives either of which applied to the appellant's application for review. This refusal has, according to counsel for the appellant, placed the appellant in an awkward position as he is required to pay to the respondent money that is not in his hands with the resultant exposure to possible contempt of court proceedings against him.

On the authority Wangechi Kimita and Another v Mutahi Wakibiru, (1980-88) 1 KAR 977 the words “or any other sufficient reason” in Order XLIV rule 1(1) of the Civil Procedure Rules need not be analogous with the other two alternatives this order in view of section 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which confers an unfettered right to apply for a review. Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice “be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record.” Had the superior court taken the cue from the Wangechi case, supra, it would probably have concluded that without the Consolidated Bank of Kenya Limited being brought into the proceedings before it as the appellant had expressed his intention to do when he sought adjournment of the hearing of the respondent's chamber summons on 28<sup>th</sup> April, 1994, an injustice may have been occasioned as the issue of the deposited sum of Kshs 2,247,217/05 with Jimba Credit Corporation Limited as is set out earlier in this judgment would not have been adjudicated upon. Accordingly, I would allow the appellant's appeal, set aside the orders of the superior court dated 28<sup>th</sup> April and 23<sup>rd</sup> June, 1994 respectively and order that the respondent's chamber summons dated 23<sup>rd</sup> July, 1993 be set down for a fresh hearing in the superior court. I would also award the costs of this appeal to the appellant. As Akiwumi and O'Kubasu, JJA agree, it is so ordered.

Dated and delivered at Nairobi this 7<sup>th</sup> day of April, 2000.

JE GICHERU

JUDGE OF APPEAL

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GICHERU, AKIWUMI & O'KUBASU, J.J.A.)**

**Civil Appeal 235 of 1997**

**BETWEEN**

**THE OFFICIAL RECEIVER AND LIQUIDATOR.....APPELLANT**

**AND**

**FREIGHT FORWARDERS KENYA LIMITED.....RESPONDENT**

**(Appeal from the Ruling of the High Court of Kenya at Nairobi (Justice Shah) dated 23rd day of June, 1994**

**in**

**WINDING UP CAUSE NO. 6 OF 1981)**

**\*\*\*\*\***

**JUDGMENT OF AKIWUMI, J.A.**

The Respondent was one of the creditors of Kenya Freight Consolidators Ltd, a company which was in liquidation. The Appellant, the Official Receiver and an officer of the Court, was the Liquidator. By a Chamber Summons dated 23rd July, 1993, the Respondent applied to the High Court to direct the Appellant to pay to the Respondent within fourteen days, all that it was owed by the company in liquidation namely, Kshs.621,739.50 plus interest. This application finally came for hearing on 28th April, 1994, before Shah, J., as he then was, who, having refused the Appellant's application for adjournment, so that the Consolidated Bank of Kenya which apparently, held some money due to the creditors of the company in liquidation, could be served to come to court, made the following order for the payment sought by the Respondent:

"Adjournment refused - I peruse the offence (sic) Order therefore sum of Kshs.621,739.50 plus interest never (sic) at court rates be paid out to the applicant by the Official Receiver within the next 45 days. This sum will carry interest at 12% p.a from 14.5.89 until date of payment. This order may be extracted and served at Consolidated Bank Head office by the Official Receiver. Costs for the applicant."

On 17th June, 1994, the Appellant by notice of motion, applied under Order 44 of the Civil Procedure Rules for the learned Judge to review his order made on 28th April, 1994. This was on the grounds that the Official Receiver would be unable to comply with the order as, the Consolidated Bank which he had thought, had taken over the assets of Jimba Credit Corporation which included the sum of Kshs.2,604,865.00 being what had been realised from the company in liquidation, had denied that it had inherited any such sum. And also that because of this, the Official Receiver would be unable to comply with the order of 28th April, 1994. The learned Judge in his following brief thirteen line Ruling of 23rd June, 1994, made short work of the Appellant's application for review:

"Review only lies when from discovery of new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced by the applicant at the time when the decree was passed or the order made or on account of some mistake or error apparent on face of the record or for any sufficient reason. The words for "an (sic) sufficient reason" have been held back (1) to be ejusdem generis to first two or (2) extending the scope of first two grounds. None of these two alternatives apply here. The counsel who appeared before me on 28th April, 1994, ought to have taken up points now taken. These points were all known to council (sic). As the application really amounts to an

appeal as opposed to an application for review I cannot allow it."

The appeal before this Court now is against this Ruling. It was clear to the learned Judge and to me, that the basis for the review application was not on account of the first two grounds laid down in Order 44 r.1(1) namely:

"from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge ... 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",

but rather on the third ground set out in Order 44 r.1(1) namely:

"for any other sufficient reason",

which could only have been for the reason advanced by the Appellant that he could not comply with the order made by the learned Judge. The learned Judge, however, had then held that for this reason to be applicable, it had either to be ejusdem generis with the first two grounds set out in Order 44 r. 1(1), or an extension of their scope. He then went on and only in respect of the first ground, to say the Appellant must have known of his inability to pay the Respondent at the time the Respondent's application came for hearing, and it was not then a new matter which was not within his knowledge after the exercise of due diligence. But can it be said that at the time, the Official Receiver should have been aware of the fact that the learned Judge would make an order which could not be complied with? I would say, no!

With respect, the learned Judge erred in his conclusion that "for an (sic) sufficient reason" had to be ejusdem generis with the first two grounds set out in Order 44 r. 1(1) or analogous to them. This Court in the well known case of Wangechi Kimita v Wakibiru (1982-88) 1KAR 978, which was determined in 1985, and which was binding on the learned Judge, espoused the contrary view of the law. Nyarangi JA. in his judgment in this case, had this to say on the issue:

"I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly s 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v Charan Singh [1959] EA 793."

In his concurring judgment, Hancox JA. as he then was, made the following observation:

"I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order 44 r. 1(1), enabling a party to apply for review, namely 'or for any other sufficient reason' is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to be analogous."

Kneller JA's brief concurring judgment was as follows:

"Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached."

A matter which falls for instance under the first ground of Order 44 r. 1 (1), may also well fall under the third ground of Order 44 r. 1 (1) without their necessarily being ejusdem generis or analogous to each other. The learned Judge erred in refusing to consider the Appellant's ground for review namely: his inability to comply with the learned Judge's order because in his view, to qualify as any other sufficient reason, this inability had to be ejusdem generis or analogous with the first two grounds of Order 44 r. 1 (1). And even if this inability could be said to be ejusdem generis with the first ground and which it is not, the learned Judge as I have already adverted to, was wrong when he implied that because the Official Receiver was aware of the fact that Consolidated Bank denied having inherited any money from Jimba Credit Corporation on behalf of the company in liquidation, that meant that he should also have been

aware of the kind of order that he would make.

As is clear from the following wording of Section 80 of the Civil Procedure Code which is the genesis of Order 44, that section gives a wide right to apply for a review where an appeal has not been preferred or where an appeal is not allowed:

"Any person who considers himself aggrieved -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Order 44 r. 1(1) repeats the same general criteria regarding the right to apply for review but lays down in addition, the three grounds in Order 44 r. 1(1) already referred to, upon which an application for review may be based. To emphasise the point and to put matters beyond doubt, that a person aggrieved by a decree or order, even if he has the right to appeal, but has not done so, may, nonetheless, subject to certain conditions which do not apply in this case, apply for a review of the decree or order, sub rule 2 of Order 44 significantly provides that:

"Any party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review."

It is because of the foregoing and the fact as appears from the record of appeal, that the Appellant had not by 17th June, 1994, when he filed his notice of motion for review, filed any notice of appeal or appealed against the Ruling of the learned Judge given on 28th April, 1994, that the learned Judge's other reason for disallowing the Appellant's application for review, namely that:

"As the application really amounts to an appeal as opposed to an application for review, I cannot allow it.",

is insupportable.

In the result, the Appellant's appeal succeeds on the grounds that the learned Judge misapprehended and misapplied in the circumstances before him, the principle of review as set out under Order 44 of the Civil Procedure Rules. I would allow the appeal, set aside the Ruling of 23rd June, 1994, of the learned Judge refusing to review his earlier Ruling of 28th April, 1994, which is also set aside and order that the Appellant's Chamber Summons of 23rd July, 1993, be heard afresh by the superior court. The Appellant will have the costs of this appeal as well as his costs in the review application before the High Court.

Dated and delivered at Nairobi this 7th day of April, 2000.

A. M. AKIWUMI

JUDGE OF APPEAL

**COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O'KUBASU, J.A (IN CHAMBERS))**

**Civil Appeal 235 of 1997**

**BETWEEN**

**THE OFFICIAL RECEIVER AND LIQUIDATOR ..... APPELLANT**

**AND**

**FREIGHT FORWARDERS KENYA LIMITED ..... RESPONDENT**

**(Appeal from the Ruling of the High Court of Kenya at Nairobi (The Hon. Mr. Justice A.R Shah)  
dated 23rd day of June, 1994**

**in**

**WINDING UP CAUSE NO. 6 OF 1981)**

**\*\*\*\*\***

**JUDGMENT OF O'KUBASU J.A**

This appeal arises out of a Ruling by the High Court (A.B. Shah, J as he then was) delivered on 23rd June, 1994 in Winding up Cause No. 6 of 1981. There are four grounds of appeal:-

- "1. The learned judge misapprehended and misapplied the principles of review set out in Order 44 of the Civil Procedure Rules to the facts before him.
2. The learned judge erred in failing to consider the merits of the application for review.
3. The learned judge erred in failing to appreciate that the appellant's inability to pay the claim arose independent of any wrongdoing on his part and for that reason, he should not be penalised.
4. In any event the learned judge erred in failing to appreciate that payment as ordered by him in his ruling of 28th April, 1994 would constitute preferential treatment to the respondent".

In order to appreciate the gist of this appeal, it may be necessary to go back to the order made on 28th April, 1994. The record shows that on that day the application before the superior court was the Chamber Summons application dated 23rd July, 1993. That application sought the following orders:-

"1. THAT this Honourable Court be pleased to grant an order directing the Official Receiver and Liquidator (who is an officer of the court):

- (i) to declare a dividend and to publish a notice thereof in the Kenya Gazette in accordance with Rule 107(3) of the Companies (Winding-Up) Rules within 14 days from the date of the making of the orders herein and
  - (ii) to pay to the Applicant within 14 days from the date of the making of the order pursuant to (i) aforesaid of the Applicant's whole claim of Kshs.621,739.50 plus accrued interest thereon at the rate of 28 per cent per annum or (if higher) the per annum rate of interest charged by Standard Chartered Bank of Kenya Limited (being the Applicant's principal bankers) to the Applicant herein with effect from (and including) 24th November, 1987 until payment in full together with all accrued interest.
2. THAT the costs of this Application be provided for".

When that application came up for hearing before the superior court, Mr. Kamau for the Official Receiver made an application for adjournment on grounds that he wished to serve one T.P. Haia of Consolidated Bank of Kenya. It is recorded that Mr. Hira who was holding brief for Mr. Anjarwalla for applicant complained that there had been no explanation as to what had been going on since August, 1993. It would appear that Mr. Hira was ready to proceed with the application. Then the superior court made the following order:-

"Adjournment refused - I peruse the offence. Order, therefore, sum of Shs.621,739/50 plus interest never at court rates be paid out to the applicant by the Official Receiver within the next 45 days. This sum will carry interest at 12% p.a. from 14.5.89 until date of payment. This order may be extracted and served at Consolidated Bank Head office by the Official Receiver. Costs for the applicant".

Arising out of the above order the appellant herein filed a Notice of Motion dated 17th June, 1994 seeking a review of the said order. According to the record the appellant sought an order for review on the basis of difficulties in complying with the court order. That application for review was dismissed and hence this appeal.

Mr. Gatonye for the appellant argued that the learned judge misapprehended and misapplied the law. He went on to state that the Official Receiver had put the money in Jimba Credit Finance which became insolvent. Hence, the Official Receiver could not pay out as ordered by the court. In Mr. Gatonye's view, review should have been granted.

Mr. Hira for the respondent argued that there was no discovery of new and important evidence. Mr. Hira submitted that it was immaterial whether the official Receiver had money or not.

In this appeal, it would appear that the appellant was dissatisfied with the order of superior court made on 28th April, 1994. In the first place the appellant was not granted opportunity to be heard since the application (made on its behalf by Mr. Kamau) for adjournment was refused. After refusing the application for adjournment, the superior court went ahead and made the order. It is now contended that the appellant could not comply with that order as it had no money to pay out. That is why an application for review was made. The application for review was made on the basis that there were difficulties in complying with the order of superior court.

The issue here now is whether the appellant was right in seeking a review rather than filing an appeal. The application for review was made pursuant to Order XLIV r.1 of the Civil Procedure Rules which provides:

"1.(1) Any person considering himself aggrieved-

(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."

Hence an applicant must show that there has been 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. The applicant may also show that there was some mistake or error apparent on the face of the record. And lastly, the applicant may apply for review if there is any other sufficient reason. In the instant case, the appellant's main ground for review was that the court order could not be complied with due to difficulties arising from the fact that the appellant had invested the

money in Jimba Credit Finance which had become insolvent. In other words the appellant was not in a position to comply with a court order for the simple reason that it had no money to pay out. The issue now is whether this could come under the clause "for any other sufficient reason".

In Wangechi Kimita & Another v. Mutahi Wakiburu (1982-88) 1 KAR 977 with regards to the words "for any other sufficient reason" Nyarangi JA said:-

"... I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S.80 of the Civil Procedure Act confers unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v. Charan Singh (1959) E.A. 793".

And in agreeing with Nyarangi J.A, Hancox J.A (as he then was) said at page 981

"I would add that I also agree with the reasoning of Nyarangi J.A that the third head under Ord 44 r. 1(1), enabling a party to apply for a review namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which do not themselves form a "genus or class of things with which the third general head could be said to be analogous".

From the foregoing, it would appear that this Court has already given its interpretation to what "or for any other sufficient reason" means.

The position in this appeal is that the order of superior court made on 28th April, 1994 could not be complied with since the Official Receiver had put the money in Jimba Credit Finance which had become insolvent. The Official Receiver was, therefore, at the risk of being in contempt of a court order. Hence, that is why an application for review was made. In my view the situation that the appellant found itself constituted "any other sufficient reason" to warrant a review of the previous order.

There was one other aspect of this appeal raised by Mr. Hira as regards Section 342 of the Companies Act which provides:-

"An account to be called the Companies Liquidation Account shall be kept by the official receiver with the National Bank of Kenya Ltd or such other bank as may be prescribed and all moneys received by the official receiver in respect of proceedings under this Act in connexion with the winding up of companies shall be paid to that account".

In the present appeal, the official receiver kept the money in Jimba Credit Finance. We were not told whether Jimba Credit Finance falls under "or such other bank as may be prescribed". Whether Jimba Credit Finance falls under that heading or not does not, in my view, change the fact that the appellant had shown "any other sufficient reason" to warrant a review.

I would, for the reasons set out herein above allow this appeal and set aside the ruling of superior court made on 23rd June, 1994 and review the order of 28th April, 1994 by setting it aside. I would award the appellant costs in this court and in the superior court.

Dated and delivered at Nairobi this 7th day of April, 2000.

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR