



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL**

AT NAIROBI

CIVIL APPEAL NUMBER 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

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

2.THAT the costs of itnhtiesr eAsptp.lication 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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR