**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - MA - 200 – 2009**

**COMBINED SERVICES LTD :::::::::::::::::::::::::::::: APPLICANT/ PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL :::::::::::::::::::::::::::::: RESPONDENT / DEFENDANTS**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.**

**R U L I N G:**

This is an application brought before this court to review its decree in Civil Suit No. 939 of 2002 Combined Services V Attorney General in a judgment delivered on the 14th of February 2009.

It is the case for the Applicant, that there are mistakes and or errors on the face of the record that are prejudicial to the Applicant if not reviewed.

The Applicant further states that it has discovered new and important evidence that was not within its knowledge and was not produced when the decree was passed.

The Respondent Attorney-General denies that there is anything to review and in any case the Applicant has already filed an appeal in the Court of Appeal which can adjudicate over the issues raised.

Ms. Lillian Khalanyi appeared for the Applicant while Ms. Susan Odongo appeared fort the Respondent Attorney General.

Counsel for the Applicant relied on the affidavit of Mr. Richard Irumba the Managing Director of the Plaintiff company. It is the case for the Applicant that there was a mistake and or an error on the record when I awarded the Applicant interest of 4% p.a. on his dollar awards and yet it was not the average prevailing commercial borrowing rate for United States dollars at the time of the dispute. The Applicant contends that the correct average interest rate between the period August 2000 and February 2008 when judgment was delivered was 7.5% p.a.

Mr. Irumba deponed that he had discovered this new and important information after the judgment and that his former counsel Mr. Moses Kimuli of M/S Kalenge, Bwanika, Kimuli & Co. Advocates had failed to do so because it was not available at the time. It is the case for the Applicant that the award of 4% p.a. was too low and oppressive on it which had been out of pocket since 2000.
Secondly it was a mistake and or error for the court to award the Respondent interest on the sums in Uganda shillings for the unpaid advance payment guarantee bond at the rate of 24% p.a. which the contract provided that no interest was payable.

Thirdly it was a mistake and or error to award the Respondent the sum of Ug.Shs.41,306,426/= without apportioning it out in the agreed contractual proportions of 30% for Uganda shillings and 70% for United States dollars.

Fourthly it is also the case for the Applicant that it was a mistake or error to award the Respondent/Defendant half the costs of the counterclaim when the dispute would not have arisen if the Applicant had been paid is outstanding certificates as and when they fell due.

Counsel for the Respondent relied on the affidavit of Mr. Elisha Bafirawala of the Attorney General's Chambers in reply. It is the case for the Respondent that there is no need for a review of the decree as prayed for by the Applicants. Counsel for the Respondent submitted that the there was no clerical or arithmetical mistake or error on the face of the record to warrant any review.

Secondly counsel for the Respondent submitted that the information/findings to be reviewed was readily available but that the Applicant did not exercise due diligence in establishing the same.

Thirdly counsel for the Respondent on the issue of costs, submitted that costs were in the discretion of the court and that in her view court had properly and judiciously exercised in award 4% p.a. on the Unites States dollar award.

Furthermore the court had also properly and judiciously exercised its discretion on the award of costs.

Lastly it is the Respondent's case that there is a pending appeal in Court of Appeal against the decision of this court and that the matters for this review should be left to the appellate court.
I have reviewed the motion before me and the affidavits for and against it. I have also addressed myself to the submissions of both counsel.

Order 46 of the Civil Procedure Rules provides for review. Order 46 Rule 1 provides

> *"1. Any person considering himself or herself aggrieved-*
>
> *a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred…*
>
> *and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or an 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 passed or made against him or her, may apply for review of the judgment to the court which passed the decree or made the order…"*

counsel for the Applicant also referred me to two cases. The first was **Muyode V Industrial and Commercial Development and Another** [2006] 1 EA 243 (CA-K) at p. 246.
In that case their Lordships on appeal considered factors to be taken into when determining an application for review.
The court held

> *"…that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record.*
> *Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error on the face of the record would be made out. An error which has to be established by along drawn out process of reasoning or on points where there may be conceivably be two opinions, can hardly be said to be an error on the face of the record…"*

I certainly agree with that holding.

There Lordships further went on to hold at P. 247

> *"…mere error or wrong view is certainly no ground for a review although it may be for an appeal…"*

I also agree with this holding as well.

Finally their Lordships also made the finding at P. 246

> *"…most importantly the Applicant must make the application for review without unreasonable delay…"*

In the Muyodi case the application for review was made after a period of eight months (8 months) and the Appellant was guilty of laches.

I also agree that this is an important factor to consider when determining an application for review.

Counsel for the Applicant also referred me to the Ugandan decision in

**Kanyebwera V Tumwebaze [2005] 2 EA P. 86 (SC-U)**

The Justices of the Supreme Court at P. 92 in that case agreed with the view

> *"…that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The "error" may be one of fact, but is not limited to matters of fact and includes error of law…"*

This court is bound by the authority of **Kanyabwera** (supra). To my mind both authorities (both Ugandan and Kenyan) cited to me actually complement each other. It is clear to my mind that several factors have to be taken into consideration in determining an application for review.

To satisfy these factors the Applicant has to meet certain tests or answer certain questions depending on how he has moved his motion before court. I shall attempt to break them down systematically based on this particular motion.

The first basic test or motion is whether the applicant is aggrieved. To my mind to be aggrieved the party must have or will suffer a legal grievance. In this case the Applicant depones that if the decree made by this court is not reviewed it shall suffer irreparable loss and damage.

The second test according to motion is whether no appeal has been preferred from the decree or order not withstanding that appeals from such decrees and orders are allowed. I shall address this at the end of my ruling.

The third test is whether there is some mistake or error apparent on the face of the record. The Applicant in this case raises several mistakes or errors on the face of the record. The first is that this court made an error by awarding the Applicant interest at 4% p.a. on its dollars awards instead of 7.5% p.a.

Now, if this is a mistake or error as alleged, is it one that *"stares one in the face"* or is *"so manifest and clear that no court would permit"* it? I find not. There is nothing in the record that even refers to a rate of 7.5% p.a. Counsel for the Applicant submitted that the 7.5% p.a. would have been arrived at if court had applied prevailing exchange rate at the time of the dispute converted it into Uganda shillings and then apply the commercial shilling rate. I must admit I did not fully follow her argument but even that notwithstanding is this not *"a drawn out process of reasoning"* relying on extraneous matters to show the incorrectness? I find that it certainly is and in any event the Applicant/Plaintiff in their plaint had prayed for interest at 30% p.a. and yet failed to justify it in the case. It seems to me that even here the Applicant/Plaintiff had two opinions of what the correct rate is. In any event the Applicant's Managing Director deponed differently that 7.5% p.a. was some form of average taken over the period of the dispute.

Applicant tried to qualify this by the interest rate of 7.5% p.a. was a discovery of new and important matter in the final determination of the suit. The rules on this point are clear, such a discovery of new and important matters or evidence must be of such a nature that it was not in the possession or knowledge of the Applicant <u>after the exercise of due diligence</u> and could not be produced by the time when the decree was passed or the order made. In this regard, I agree with counsel for the Respondent that it is not a credible proposition that this information about the interest rate after the exercise of due diligence would not have been available at <u>the time the decree was passed</u>. I think para 14 of the Applicant's Managing Director's affidavit throws some light on the matter as he considers interest at 4% p.a. as to low since the money has been outstanding for a long time.

It is my view that the Applicant is simply putting forth a new alternative argument which is not sustainable by way of review.

The second mistake or error that the Applicant points to is the court awarding the Respondent interest at 24% p.a. on the unpaid insurance guarantee bond and yet the contract clearly stipulated that interest was not payable on the advance payment.

Unfortunately neither the Applicant nor its counsel refers court to the exact provision in the contract that states that interest shall not be awarded with respect to the advance payment.
Indeed this never even arose at the trial. Unfortunately the contract on record Exhibit P.1 (which in my view is incomplete anyway) is silent on the matter. Consequently I see no mistake or error here either.

The third mistake or error is that court awarded the Respondent the sum of Shs.41,306,428/= (the value of the guarantee) without a portioning it into 30% in Uganda Shillings and 70% in US dollars. Actually I am at a loss regarding this ground as the Applicant seems to be raising a complaint on behalf of the Respondent. The Respondent on the other hand says nothing about it in reply. This issue of apportionment is raised by the Permanent Secretary of the Ministry of Water, Lands and Environment in Exhibit P.8. That notwithstanding, the Respondent/Counterclaimant in the counter-claim prayed for the sum of Shs,41,306,428/= in the amended defence without apportionment and court granted it. I simply cannot see how this can be a point for review for the Applicant and so I dismiss it. The fourth mistake or error was to award the Respondent/Defendant half the costs of their counter-claim. Like the previous ground, the Applicant here is raising a review on behalf of the Respondent. The Respondent in reply does not complain and states that costs are in the discretion of the court (see para 2 of affidavit of Elisha Bafirawala). This too is not a point of review for the Applicant and so I dismiss also.

Now I shall address the reply by counsel for the Respondent that the application before is incompetent because there is a Notice of Appeal against the decision of this court dated 25th February, 2008 filed in the civil registry of the Court of Appeal.

Counsel for the Applicant in reply submitted that the Notice of Appeal was withdrawn on the 11th December, 2008. Court however was not shown this withdrawal of the Notice of Appeal.

The rules on this point are quite clear. A review can only be considered regarding

> *"a) …a decree or order from which an appeal is allowed, but from which no appeal has been preferred…"*

The Dictionary of English Law Volume 2 by Clifford Walsh by Sweet and Maxwell 1959 at page 1387 defines the word prefer to mean *"…to apply, to move for; to prefer for costs meant to apply for costs…"*

Perhaps in light of submissions by counsel for the Applicant (which I take she being an officer of court) that the Notice of Appeal was withdrawn this is a moot argument and not of much value to this case, so I leave it at that.

Finally I cannot take leave of this application without observing that it was filed one year and two months after my judgment on the 14th February, 2008. In the **Muyodi Case** (supra), it was held that an application for review must be made without unreasonable delay and in that case an application for review made after a period of eight months was found to be guilty of laches. I agree and say the same of this application.

All in all I find that the Applicant has failed to make out a case for review and I dismiss this case with costs.

**……**

**Geoffrey Kiryabwire**

**JUDGE**

**Date: 02/09/09**

02/09/09

09:30am

Ruling read and signed in Court in the presence of:

- A. Kahuma for Applicant
- S. Odong for Respondent
- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire

**JUDGE**

**Date: 02/09/09**