



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 34 of 2005

FAMAU MWENYE ALI & 19 OTHERS.....PLAINTIFFS

VERSUS

MARIAM BINTI SAIDDEFENDANTS

R U L I N G

By a Notice of Motion dated 9th July 2009, the applicant seeks for review orders that:

- (1)The name of the defendant in the judgment delivered on 26th June 2008, be deleted and substituted by the names of the defendants in the draft decree submitted for approval.
- (2)The costs of this application be borne by the defendants as under the judgment, they have been ordered to pay the plaintiff's costs.

The application is premised on grounds that there is an error apparent on the face of the record, correction whereof, is in the interest of justice and is unlikely to prejudice the case.

The application is supported by an affidavit sworn by the plaintiff's advocate Mr. Jiwaji in which he states that judgment was delivered on 26th June 2008, and he had submitted the draft decree to the defendant's advocate for approval but there was no acknowledgment of receipt.

Mr. Jiwaji eventually requested for the file to be placed before the Deputy Registrar for approval of the draft decree in terms of Order XX Rule 7(3) of the Civil Procedure Rules. He was subsequently informed that the name of the Defendant in the judgment was different from the names of the defendants in the draft decree and so she was unable to exercise her powers under Order XX Rule 7(3) Civil Procedure Rules.

It is pointed out that when the plaintiffs commenced the action, the name of the draft was Mariam Binti Said.

The original defendant had died, whilst the defendants (i.e Mutahar Ahmed Dahman and Alamin Ahmed Dahman were allowed to continue the proceedings as legal representatives and administrators of the estate of Mariam Binti Said – having obtained letters of administration – they were thus substituted on the deceased's original draft.

It is on this basis that correction of the error is sought.

The application is opposed, and the respondent in a replying affidavit depones that the same is misconceived and otherwise bad in law and an abuse of the court process, so it ought to be dismissed. It is pointed out that the application does not seek to review the orders granted in respect of this application should be dismissed.

The application is made under Order ILIV rules 1 of the Civil Procedure Rules and section 3A and 80 of the same.

In arguing the application, Mr. Jiwaji in his brief submissions urged them to allow the application saying it was an error apparent on the face of the record.

In opposing the application, Mr. Kiarie points out that where one seeks to review an order or judgment, it ought to be extracted and attached to the application – which hasn't been done in this instance, consequently there is no judgment to be reviewed, and the application should be dismissed.

Basically this is an application for review – under Order XLIV rule 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,*
- (b) *and who from the discovery of new and important matter or evidenceor 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.”*

It is not disputed that there is an error, but respondent contests the procedural approach – a copy of the judgment or order was not extracted and annexed **Jivanji v Jivanji (1929-30) 12 KLR 44** clearly set out the principle on review – requiring that a copy of the order or judgment complained of must be annexed to the application for review. The holding in Jivanji case was followed by Mbaluto J in the **Uhuru Highway Development Ltd v Central Bank of Kenya and 2 others Case** where the learned Judge stated:

“The failure by the applicant to extract a formal decree was fatal to the application and it should on that count fail”

I need not go into the substance or merit of the application, the application is defective for failing to annex a copy of the judgment complained of and it is struck off for want of procedure. Costs of the application shall be awarded to the respondent.

Delivered and dated this 22nd of February 2010 at Malindi.

H. A. OMONDI

JUDGE