



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 340 of 2000**

1. JANE NJOKI MUHIA
2. TOM MWACHITI MWERO
3. MSHIRI BAKARI
4. WYCLIFF MOKAYA
5. STADI MAALIM
6. DAVID MATUKA
7. ALI POJO
8. DAVID KIRIRO
9. PAUL KAHINDI.....PLAINTIFFS

**VERSUS**

1. ENOCK B. MARANGA
2. WOODVENTURE (K) LIMITED.....DEFENDANTS

**RULING**

This is an application for reviewing and or setting aside the court order made in this matter on 3<sup>rd</sup> November, 2008. The application is made under sections 3A and 80 of the Civil Procedure act and all enabling provisions of the Law and is brought by way of a Notice of Motion dated and filed on 28<sup>th</sup> May, 2009.

The main grounds upon which the application is based are that:-

- 1) **The 6<sup>th</sup> plaintiff never authorized the filing of this suit.**
- 2) **The 6<sup>th</sup> plaintiff only learnt of the said suit when his wife's property was attached in execution of the decree herein.**
- 3) **The 6<sup>th</sup> plaintiff ceased being a member of VODA SACCO in 1999 and had nothing to do with this suit.**
- 4) **It is only just and fair that the said judgment and all subsequent orders be reviewed and/or set aside.**

The application is supported by an affidavit of the 6<sup>th</sup> plaintiff which affidavit is an elaboration of the above grounds. The application is opposed and there is a replying affidavit sworn by Jacqueline Waihenya Maina, counsel for the 2<sup>nd</sup> defendant/respondent. It is deponed in the affidavit, *inter alia*, that the plaintiffs including the 6<sup>th</sup> plaintiff filed this suit against the defendants in the year 2000 and over the years, have appointed various advocates including M/S Ngombo & Company Advocates, Steve Kithi & Company advocates and now M/S Mogaka, Omwenga & Mabeya Advocates. The latter infact at one stage urged the expediting of the case. It is further deponed that the defendants then

instructed counsel to apply for dismissal of the suit which application was allowed by Serگون J, on 30<sup>th</sup> May, 2008. It is also deponed that the plaintiffs were then served with the defendant's Bill of Costs which costs were taxed on 21<sup>st</sup> November, 2008. It is then deponed that the applicant and the co-plaintiffs were duly served with a certificate of costs but failed, neglected or refused to pay the said costs. In the premises the 2<sup>nd</sup> defendant contends that this application has been lodged too late and solely to delay the 2<sup>nd</sup> defendant's enjoyment of the fruits of the judgment entered in its favour.

The 6<sup>th</sup> plaintiff filed a supplementary affidavit in response to the said Replying Affidavit in which he reiterated his averments in the supporting affidavit emphasizing that he never instructed M/S Steve Kithi & Company advocates or Ngombo & Company Advocates and that he was never served with the application for consolidation, Bill of Costs or Certificate of Costs.

When the application came up for hearing before me on 18<sup>th</sup> February 2010, counsel agreed to file written submissions which they highlighted on 19<sup>th</sup> April, 2010. Counsel for the 6<sup>th</sup> plaintiff's principle argument is that the 6<sup>th</sup> plaintiff did not authorize the filing of the suit and no written authority was exhibited by the 1<sup>st</sup> plaintiff who swore the verifying affidavit accompanying the plaint. The suit by the 6<sup>th</sup> plaintiff was therefore incompetent, so counsel opined. For that proposition reliance was placed upon the case of **Research International East Africa Ltd – v – Julius Arisi & 213 Others [CA No. 321 of 2003] (UR)**.

In her response to the submissions on behalf of the 6<sup>th</sup> plaintiff, counsel for the 2<sup>nd</sup> defendant submitted that the application is incompetent for failing to exhibit an extracted order sought to be reviewed. For that proposition reliance was placed upon my decision in **Fidelity Commercial Bank – v – Michael Ruraya Mwangi & Another Nairobi (Milimani) HCCC No. 232 of 2002**.

Counsel further submitted that the 6<sup>th</sup> plaintiff's complaints are matters to be considered on appeal and not in a review application. For that proposition reliance was placed upon the decision of Hon. Okwengu J, in **Sunflag Textile & Knitwear Mills Ltd – v – Geoffrey Wachira Mahinda & 2 others Nyeri HCCC No. 24 of 2000 (UR)**.

I have now considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The 2<sup>nd</sup> defendant's counsel has asked me to find that the application is incompetent as the order sought to be reviewed has not been annexed to the motion. In **Fidelity Commercial Bank – v – Michael Ruraya Mwangi & Another (supra)** I upheld a preliminary objection and struck out an application for review on the ground that the order sought to be reviewed, had neither been extracted nor annexed to the motion for review. In doing so I received guidance from the decision of the Court of Appeal for East Africa in **G. M. Jivanji – v – M. Jivanji & Another [1929-30] 2 KLR 44** in which the following passage appears:-

**“Each decree, necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should for a review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment as a whole, that person cannot under Order XLI appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a suit. In these proceedings no resultant decree on the 29<sup>th</sup> August 1930 had yet come into existence. It is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue the formal decree or order.”**

So, it would appear that an extracted decree or order is a prerequisite for an application for review under Order XLIV Rule 1 (1) of the Civil Procedure Rules. It is significant that in the **Fidelity Commercial Bank** case, an extracted

order sought to be reviewed could not be traced on the record and in **Jivanji – v – Jivanji**, case the resultant decree had not even come into existence. Those cases are therefore distinguishable from this case in which it is not disputed that a decree has in fact been extracted. Indeed the resultant order was a dismissal of the plaintiffs’ suit with costs. There is therefore no difficulty in determining what the 6<sup>th</sup> plaintiff is complaining about. It is also illustrative that Section 1A has now been introduced to the Civil Procedure Act and I must keep in mind the overriding objective of the Civil Procedure Act and Rules.

In the end I find and hold that the 6<sup>th</sup> plaintiff’s motion is not incompetent for failing to annex the extracted order sought to be reviewed since the same is on the record and is in any event simple order dismissing the plaintiffs’ suit with costs.

Turning now to the merits of the application, the 6<sup>th</sup> plaintiff has predicated his motion on there being sufficient reason to review the order of dismissal. His reason is that he never authorized the filing of the suit at all and learnt of the suit when his wife’s property was attached in execution for costs. Counsel for the other plaintiffs, M/S Steve Kithi & Company Advocates, were served with the motion for review but neither filed Grounds of Opposition nor a Replying Affidavit. The 6<sup>th</sup> plaintiff’s averment that he did not authorize the institution of the suit is therefore unchallenged. The plaintiff is in any event clear that it was not verified by an affidavit by the 6<sup>th</sup> plaintiff. The plaintiff therefore offended Rule 1 (2) of Order VII of the Civil Procedure Rules. That conclusion is not without authority. In **Research International East Africa Ltd – v – Julius Arisi & 213 Others (supra)** the court held as follows:-

**“In our view, the true construction of Rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing and files such authority in the case to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.....”**

On the authority of the **Research International East Africa Ltd case**, the verifying affidavit of the 1<sup>st</sup> plaintiff was filed without the authority of the 6<sup>th</sup> plaintiff. It follows that there was no compliance with Order VII Rule 1 (2) of the Civil Procedure Rules and the 6<sup>th</sup> plaintiff’s suit was liable to be struck out under Rule 1 (3) of Order VII of the Civil Procedure Rule.

The 6<sup>th</sup> plaintiff avers that he came to know of the suit when his wife’s property was attached on May 2009. This application was lodged in the same month. In my judgment, the 6<sup>th</sup> plaintiff is not guilty of delay at all.

Having come to the conclusion that the 6<sup>th</sup> plaintiff did not authorize the filing of this suit, I find and hold that there is sufficient reason to review the order of dismissal of the suit with respect to the 6<sup>th</sup> plaintiff. I substitute therefore an order striking out the suit purportedly instituted on his behalf. The 1<sup>st</sup> plaintiff precipitated what has led to this motion. I order that the 1<sup>st</sup> plaintiff pays all thrown away costs of the 6<sup>th</sup> plaintiff and the 2<sup>nd</sup> defendant.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF JUNE 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Ms Juma for the 2<sup>nd</sup> Defendant and Mr. Wandera holding brief for Mr. Mogaka for the 6<sup>th</sup> Plaintiff.

**F. AZANGALALA**

**JUDGE**

**3<sup>RD</sup> JUNE 2010**