

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

CIVIL APPEAL NO. 82 OF 2008

- BETWEEN -

**1. NOOR MOHAMED
2. MOHAMED SIDIQ**

3. YAKUB MOHAMEDAPPELLANTS/APPLICANTS
- AND -
SALEH AWADH MOHAMED DAMMAN.....RESPONDENT

RULING

The appellants moved the Court by Notice of Motion dated 19th August, 2009, and brought under Orders XLIV (rule 1) and XLIX (rule 5) of the Civil Procedure Rules, and ss. 3A, 80 and 99 of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application carried two substantive prayers:

- (i) that the Court review the Order made by Mr. Justice Sergon on 22nd July, 2009 as there are errors apparent on the face of the record;
- (ii) that the Court review “the time given and amounts to be deposited in joint bank accounts and [extend] the time to 90 days, or [order] that the sum to be deposited, be paid in 6 monthly instalments”.

The application was based on the following grounds:

- (a) the said order of 22nd July, 2009 includes the name of one Akberali Hussein as an appellant, but that is not the name of any of the three appellants;
- (b) the amount to be deposited as one year’s increased rent-sum should be Kshs. 72,000/= for 1st and 3rd appellants, being, in the case of 1st and 3rd appellants, based on the rate of Kshs. 6,000/= per month; and for 2nd appellant, one year’s increase being Kshs. 60,000/=, based on the rate, Kshs. 5,000/= per month;
- (c) the total sum to be deposited comes to Kshs. 204,000/=, and not Kshs. 420,000/=;
- (d) the time allowed for depositing the said sums is too short for ordinary working-class individuals such as the appellants, and it should be extended by 90 days, or the amounts be paid in six monthly instalments.

Evidence to support the forgoing grounds is set out in the affidavit of 1st appellant sworn on 20th August, 2009.

The respondent’s replying affidavit was sworn not by the respondent, but by the respondent’s lawyer, Mohamed Omar Aineen. The burden of the replying affidavit was greater on submission-type statements than on detailed fact. For instance, the deponent thus states:

- (i) “....the application is misconceived, bad in law, and another attempt on the part of the appellants to delay the conclusion of this matter”;
- (ii) “....the appellants have no locus to purport to canvass the appeal on behalf of Akberali Hussein”;

(iii) “...the order for payment of the rent deposit within 30 days was reasonable, and the appellants have no justifiable reason for not complying.....”

That affidavit occasioned a response by 1st appellant, who deposed that paragraph 8 of the replying affidavit was incorrect, as the deponent was occupying one flat only, at a monthly rental of Kshs. 2,000/=. Learned counsel Mr. Kasmani, for the applicants, urged as the foundation of the application, the contention that there are errors apparent on the face of the record, in the orders of 22nd July, 2009; there are only three appellants in the appeal, and it was an error to include the name of Akbarali Hussein who had been a party in the Rent Tribunal proceedings but had died well before the proceedings herein were commenced; it was in error, counsel submitted, to include the said Akbarali Hussein in the apportionment of the rent-payment burden set out in the ruling.

Counsel submitted that the said rent-payment apportionment in the ruling also bore a calculation error: the amount to be deposited by the three appellants, as one year’s increased rent, comes to Kshs. 204,000/=, and not Kshs. 420,000/=. The figure of Kshs. 204,000/= was consistent with the appellant’s affidavit evidence on the number of rooms they are occupying, and the applicable rates of rent-payment. Counsel urged that the accruing rental figure of Kshs. 204,000/= was at variance with the assessment report filed by an assessment officer who, however, has given no evidence.

Learned counsel Mr. Mutubia, for the respondent, urged that the application was misconceived, as it was merely seeking to vary the orders of the Court, outside the framework of the appeal which had been lodged. Counsel submitted that the appellants have not only failed to pay their rents, in accordance with the ruling of the Rent Restriction Tribunal in Rent Restriction Assessment Case No. 29 of 2007, dated 18th November, 2007, but they had also failed to pay the old rent, and so the applicants had “come to Court with unclean hands and are undeserving of the equitable and/or discretionary orders sought”. It was urged that the appellants “ought to comply with orders of the Court and pursue the substantive appeal where they can seek the orders sought now”.

Counsel submitted that, insofar as the issues sought, by the appellants, to be reviewed also form part of the main appeal, the appellants are barred from canvassing their case at this stage, by the provisions of s.80(a) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order XLIV, rule 1(a) of the Civil Procedure Rules. To advance this argument, learned counsel invoked case law.

In *Iyadi v. Wamalwa* [2008]1 E.A. (HCK), Mr. Justice Ochieng thus remarked (pp. 142-143):

“The plaintiff has submitted that the orders for review and for setting aside of proceedings, which have been sought by the defendant, cannot be granted under the provisions of [Order] XLIV of the Civil Procedure Rules.

“The basis of that submission was that before the Court [is] moved for review, there has to be a decree or order.....”

The respondent’s counsel did not, however, direct focused attention to such principles of the foregoing case as should dictate the destiny of the instant application; and consequently, the application will stand or fall on its merits as assessed by the Court.

Learned counsel Mr. Kasmani filed replying submissions, in which he based his argument on the broad discretions entrusted to the Court by ss.1A and 3A of the Civil Procedure Act; and he urged that the High Court decisions relied on by the respondent had been delivered prior to the inclusion of s.2A of the Act in 2009.

Whereas the applicants have set out their grievance in a perceptible mode, the respondent has sought to defeat their claim on technicalities of procedure. It is not apparent to me why the evidence tendered by the respondent did not robustly address the core gravamen raised by the appellants. On the merits, I have to conclude that the applicants brought before the Court prayers not lacking bona fides: therefore, they did make a prima facie case which the respondent did not meet in substance.

Consequently, I will allow the appellants' application by Notice of Motion dated 19th August, 2009. Specifically, I will order as follows:

(a) the orders of 22nd July, 2009 shall relate only to three appellants, namely, Noor Mohamed, Mohamed Sidiq, and Yakub Mohamed;

(b) the rental monies required to be deposited in joint bank accounts by the appellants shall be so deposited within a period of 30 days as from the date hereof;

(c) the remaining issues, particularly those relating to the amounts of money payable, shall abide the hearing and determination of the appeal;

(d) the costs of the instant application shall be costs in the appeal.

DATED and DELIVERED at MOMBASA this 24th day of September, 2010.

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J. B. OJWANG
JUDGE