



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 355 of 2002

SIFUNA & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

1. AKHTAR SHAHID BUTT

2. MODERN COAST BUILDERS &

CONTRACTORS LTD.....DEFENDANTS

RULING

In the Notice of Motion dated 26th February 2009 and filed on 2nd March 2009, the plaintiff/applicant, applies for review of the order issued on 7th December 2004, *inter alia*, dismissing the plaintiff/applicant's application for summary judgment. The second prayer sought is consequential to prayer one. So determination of prayer one will dispose of prayer two by which the plaintiff/applicant seeks judgment as prayed together with costs and interest.

When the application came up before me on 5th May 2009 for hearing, counsel for the defendants raised a preliminary objection on the ground that the order sought to be reviewed had neither been extracted nor exhibited. In counsel's view the application was therefore incompetent. Counsel for the plaintiff/applicant whilst admitting that case Law seemed to support the contention of counsel for the defendants, there is nothing in Section 80 of the Civil Procedure Act or Order XLIV to suggest that an extracted order ought to be extracted and exhibited to validate an application for review.

I have given anxious consideration to the application and the submissions of counsel appearing. Having done so, I take the following view of the matter. Under Section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules, it would appear that review is available to a person aggrieved by a decree or order from which either no appeal is allowed by the rules or an appeal therefrom is allowed but has not been preferred. So, it is the decree or order that the applicant complains about and it is the decree or order that both Section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules mention. There are several decisions of the High Court which decree that before an application for review under the said provisions is made, the applicant must extract the decree or order sought to be reviewed. (See Obonyo – v – Were & 5 Others [2004] 1 KLR 489, Naresh Rathod – v – Mohamed Dad Mohamed: [C.A. No. 215 of 2003] (UR), Uhuru Highway Development Limited – v – Central Bank of Kenya and Others: [HCCC No. 29 of 1995] (UR) and Bernard Githinji – v- Kihoto Farmers Co-operative Limited: [HCCC No. 32 of 1974] (UR).

Those decisions are of persuasive value to me. They have however been made by different judges of the High Court at different times. The decisions were arrived at on sound reasoning. One of the reasons for the decisions is that judgments and rulings contain facts, reasons for the decisions and principles of Law applicable which the party applying for review may not wish to challenge hence the requirement to extract the order or decree sought to be reviewed.

I am persuaded therefore that an actual order or decree sought to be reviewed is a prerequisite to seeking a review of the order or decree. I therefore find and hold that this application is incompetent for failure to extract and exhibit the order sought to be reviewed. The application is accordingly struck out with costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kulecho holding brief for Sifuna and Mushelle holding brief for Khatib.

F. AZANGALALA

JUDGE

26TH MAY 2009