



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 185 of 2008

AIMI MA KILUNGU

2. MALILI RANCHING LTDAPPELLANT

VERSUS

DOMINIC M. NDAMBUKIRESPONDENT

(Being an Appeal from the original Ruling in CMCC No. 388/2007 of the Chief Magistrate's Court at Machakos by Hon.H.O. Omondi on 15.10.2008)

RULING

1. On 12.2.2009 I overruled an objection raised by the advocate for the Respondent and made certain adverse orders against the advocate personally. On 18.3.2009, the Respondent sought orders that the Ruling aforesaid be reviewed because there was an error on the face of the said Ruling. From the affidavit of B.M. Mungata, sworn on 18.3.2008 (there must be an error!) a number of “**errors**” in the Ruling are noted.
2. However, before the Application could be heard, the advocate for the Appellants filed a preliminary objection which reads as follows:-
 - “i. the Application is defective in form and substance.***
 - ii) The court’s jurisdiction to entertain the Application has not been invoked.***
 - iii) The order requiring payment of costs Ksh. 10,000/= has not been complied with.***
 - iv) The application is incontestably bad in Law and incompetent in that no formal order had been drawn up and annexed to show what it is that aggrieves the Applicant. In this regard, the Respondent shall rely on HCCC No. 32 of 1974 Bernard Githii on behalf of Mutathini Farmers Company vs Kihoto Farmers Company vs Kihoto Farmers Company Limited and HCCC No. 29 of 1995 Uhuru High Development Limited vs Central Bank of Kenya & others.***
3. In his submissions Mr. Ngolya relied on the decisions in Benard Githii vs Kihoto Farmers, HCCC 32/1974 and Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 others–HCCC 29/1995 to reinforce the point that it is unclear what is sought to be reviewed.
4. In response, Mr. Mungata is of the view that the errors sought to be reviewed can properly be rectified under section 99 of the Civil Procedure Act and there is no need for the order or decree to be

attached.

5. This matter has a very interesting history; from the subordinate court, parties and the court have gone round what each party calls “**error**” after “**error**” and the substance of the dispute has never been determined. The appeal before me arises from a Ruling delivered on 15.10.2008 by The Chief Magistrate, Machakos ordering the present Appellants to show cause why they should not furnish certain securities pending the hearing of the suit before the lower court. That matter has not been settled either and parties are again citing “**errors**” in the initial Ruling on a prior Preliminary Objection. The question before me now is whether the Application for review dated 18.3.2009 is properly before court. It is said to be brought under Order XLI Rule 1,2, of the Civil Procedure Rules, Section 80, 3A of the Civil Procedure Act. It obviously quotes the wrong Rule but no matter; once section 80 of the Act is quoted, it is clear that what is sought is a review and under Order L Rule 12 “**no application shall be refused merely by reason of a failure to comply with this Rule.**”

6. Secondly, whether or not the order requiring Mr. Mungata to pay Kshs. 10,000/= as costs was complied with is by itself no reason to deny his clients audience as regards their Application for review. Enforcement of that order is a separate matter altogether.

7. Thirdly, and more crucially, I have read the decisions in Githii in Uhuru High Development Ltd. In Githi, Nyarangi, J.(as he then was) quoted with approval the decision in Gulamhusein Jivanji & another vs Ebrahim Jivanji & another, Law Reports of Kenya, 1929- 1930 Vol. 12 page 41 where the Chief Justice stated as follows:-

“ But, in my opinion however, aggrieved a person maybe at the various expressions contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or formal order based upon the judgment as whole that person cannot ... appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable.”

The learned judge then went on to state;

“The Applicant should have applied for a decree to be drawn up and issued. At this stage there is nothing upon which the court’s judgment can be received.”

8. In the instant case, my Ruling was based on a Preliminary Objection raised. I overruled it and it is clear what I am supposed to review. Mbaluto, J, stated in Githii that;

“It is the duty of a party who wishes to appeal against, or apply for a review of, a decree or order to move the court to draw up and issue a formal decree or order.”

9. What then am I reviewing when no formal order has been placed before me? In his lengthy affidavit, Mr. Mungatta has appointed out what he calls “**error**” but the end decision is unchallenged in substance and like in Jivanji, it is not enough to say that a line is untenable or a provision of law has been misquoted.

10. In the end therefore, there is nothing to review and the objection is valid. It is upheld with the result that the Application dated 18.3.2009 is struck off with costs to the Appellants.

11. Orders accordingly.

Dated and delivered at Machakos this **9th** day of **October 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Makau h/b for Mr. Ngolya for Applicant

No appearance for Respondent

Isaac Lenaola

Judge