

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 16 of 2008

(Arising from SRMCC No. 460 of 2007 of the Senior Resident Magistrate's Court at Mombasa)

KHALIF MOHAMED KHAMISAPPELLANT

VERSUS

ZARUM INVESTMENTS LTD.RESPONDENT

R U L I N G

This court dismissed the appellant's notice of motion dated 15th February 2008 on 21st day of April 2008. In that motion, the appellant had sought for an Order of stay pending appeal. The appellant thereafter filed another motion dated 25th April 2008 the subject matter of this ruling in which he seeks for interalia an order of review of the dismissal order. When the aforesaid motion came up for interpartes hearing, the respondent raised a preliminary objection against it. Mr. Khatib, learned advocate for the Respondent urged this court to strike out the motion on the ground that the formal order was not extracted and annexed to the application. Mr. Onjoro, learned advocate for the appellant was of the view that the law does not state that a party must extract and file a formal order.

It is not in dispute that the formal order dismissing the notice of motion dated 15th February 2008 has not been extracted and attached to the current motion. What is in dispute is whether or not the failure to do so is fatal to the motion for review. This issue was dealt with by the court of Appeal for Eastern Africa in the case of G.M. Jivanji =vs= M. Jivanji & Another [1929 – 30] 12 K.L.R. 44 in which it held interalia:

“A person applying for a review under that order must be “aggrieved by a decree or order”. The words ‘decree’ and ‘order’ are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be 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 or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII (now Order XLIV) 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 party to a suit. In these proceedings no resultant decree on the 29th August 1930, had yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of decree or order to move the court to draw up and issue the formal order.”

It is clear from the above decision that it is fatal to such an application if the formal order or decree sought to be reviewed is not extracted and filed. The aforesaid decision was adopted by the late Justice J.O. Nyarangi (as he then was) in the case of Bernard Githii on behalf of Mutathini Farmers Co. =vs= Kihoto Farmers Co. Ltd Nairobi H.C.C.C. No. 32 of 1974 (Unreported) in which the learned judge expressed himself as follows:

“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 reviewed. Mr. Khanna’s preliminary objection is valid.”

With respect, I agree with the view. Having come to that conclusion I am convinced that the Preliminary Objection raised by Mr. Khatib has merit. The same is upheld with the resultant order that the motion dated 25.4.08 is ordered struck out with costs to the Respondent.

Dated and delivered at Mombasa this 23rd day of May 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Alaba h/b Khatib for Appellant.

N/A for the appellant.