



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1197 of 2005

STEPHEN MUNGA MANGI.....PLAINTIFFS

VERSUS

1. THE GOVERNMENT OF THE UNITED STATES OF AMERICA

2. U.S AGENCY FOR INTERNATIONAL DEVELOPMENT (U.S.A.I.D).....DEFENDANTS

RULING

The application has been brought under Order XLIV rule 1(1), 2(2) 2, 4(1) and (2) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. The citing of the provisions of law under which the relief is sought and the presentation of the facts on the basis of which the relief, in the application is presented invites the court to consider both the technical and the merit aspect of the application. The technical aspect simply deals with questions as to whether the applicant has complied with the pre-requisites for presenting such an application. Where as the merit aspect deals with questions as to whether on the facts demonstrated, the applicant has a genuine complaint justifying the courts intervention in the manner sought in the first instance, and in the second instance questions as to whether the complaint has merit and that the grant of the relief sought is justified.

The pre-requisites that the applicant is supposed to comply with before presenting the application to court are found in Order 44 and Section 80 of the Civil procedure Act. The pre-requisite in Order 44 is simply a requirement that the applicant do present such an application without undue delay. Applying that requirement to the application herein, it is clear that the judgment sought to be reviewed was delivered on 4th day of February 2008. The first application for review is dated 10th March 2008 and filed on 11th March 2008 hardly 30 days latter. Hot on its heels came the amended application amended on 17th April 2008 and filed the same date. It is the same one which is subject of this ruling. Considering the time span involved, this court is satisfied that the applicant moved with speed to lodge complaint without unreasonable delay. This pre-requisite has been complied with.

As for the Section 80 pre-requisite it is prudent to set out the provision itself and then follow it up with case law on the construction of that Section. It reads “*any person who considering himself aggrieved:*

(a) *by a decree or order from which the appeal is allowed by this Act, but from which no appeal has been preferred or*

(b) *by a decree or order from which no appeal is allowed by this Act may apply for a review of*

judgment to the court which passed the decree, or made the order and the court may make such order there on as it thinks fit”.

As noted earlier on this Section has been construed. In the case of **PROTEIN LTD VERSUS CREDIT BANK LTD AND 2 OTHERS (2004) 2 KLR 409**. On application for review Emukule J. held inter alia that the Plaintiffs application was procedurally fatal as he had failed to discharge his onus to extract the decree to be reviewed and to annex a copy of it to the application.

This Court had occasion to deal with a preliminary objection to an application for review, in a ruling delivered on 14th February, 2008 in the case of **BROOKE BOND (k) LIMITED VERSUS JOHN MWANGI NG'ANGA NAIROBI HCCA 227 OF 2005**. Discussion on case law is found at page 4-6 of the said ruling. At page 4 this Court quoted with approval Njagi J. in the learned judges decision in **AGRICULTURAL SYNDICATE LTD VERSUS PAVEMENT BANK LTD MILIMANI COMMERCIAL COURT HCCC NUMBER 5861 OF 2001** in which the learned judge had high lighted several decisions on the prerequisites for an application for review. These formed the discussion at page 4-6 of the said ruling mentioned earlier on. These are:-

(1) The case of **GULAMS HUSSEIN M. JIVANJI VERSUS EBRAHIM JIWANJI AND ANOTHER (1928-30) 12 E.A.CA. pages 44-45**. This decision set out the ingredients for review as:

- (a) *The person applying for a review under that order must be aggrieved by the decree or order.*
- (b) *If it is a decree which is grieving then the person applying for review must be applying to review the judgment and*
- (c) *The ratio decidendi expressed in a judgment cannot be a source of grievance to a party to a suit unless the resultant decree is a source of grievance.*
- (d) *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 the formal decree or order.*

2. The case of **BERNARD GITHII VERSUS KIHOTO FARMERS LTD NAIROBI HCCC NO. 32 OF 1971 (UR)** where the holding was that *“unless a decree is drawn and attached to the application seeking review, it is not as clear as it ought to be what aggrieves the applicant. The decree or order must exist before an application is made for review of a judgment.*

3. *The case of UHURU HIGHWAY DEVELOPMENT LTD VERSUS CENTROL BANK OF KENYA AND 2 OTHERS NAIROBI HCCC NO. 29 OF 1995, in which an application for review the learned Judge described the failure to comply with section 80 of the Civil Procedure Act with respect to the extraction of the relevant order as the most fatal aspect of the application on which basis the application failed (by Mbaluto J.)*

4. *The case of DR PERE MALANDE OLINDO AND ANOTHER VERSUS DIAMOND TRUST BANK OF KENYA LTD NAIROBI HCCC NUMBER 1230 OF 1999, where Onyango Otieno J. (now JA) ruled that section 80 and Order XLIV rule 1 clearly spells out that the person applying for review is a person aggrieved by a decree or an order and that in itself means that he must as of necessity avail such an Order so as to enable the Court know the existence of the order with which such a person is aggrieved.*

5. *TRUST BANK LTD VERSUS GEOFFREY M. ASANYO NAIROBI HCCC NO. 118 OF 1998 (UR) where (Mbaluto J) ruled that it was now trite law that in an application of review of a decree or order the decree or order sought to be reviewed should not only be extracted but should also be annexed to the application. Since no such decree has been extracted no annexed to this application, there is in law nothing to review.*

After a review of the wealth of authorities set out above, this court went on to make observations at page 9 of the said ruling line 12 from the bottom thus “.....it is clear that the attack on the competence of

the application is based on the fact that the order sought to be reviewed was not extracted and annexed to the application. The appellant does not dispute non extraction of the order. The case law discussed in the cited case of AGRICULTURAL SYNDICATE LTD VERSUS PARAMOUNT BANK LTD (SUPRA) all go to indicate that failure to so annex the orders or decree sought to be reviewed, to the relevant application, makes the application invalid and is liable to being struck out”.

On the basis of the reasoning in the said own case the application for review was refused.

Turning to the application subject of this ruling, there is no doubt that the applicant herein merely annexed a copy of the judgment to the application. There is no decree or order extracted and annexed. Indeed it is to be appreciated that him applicant appears in person and he might not be expected to have known and had access to the legal authorities quoted above, but it is a cardinal principle of law that the law of the land has to be applied uniformly irrespective of its knowledge by the beneficiary or victims. The plaintiff in this case stands on the same footing like any other litigant before this court. The two provisions cited do not exempt litigants who are unrepresented. The applicant is therefore bound by the said principles, to the effect that, a party seeking review of a judgment or ruling should take – present the review application together with the formal decree or order grieving him. Failure to do so is fatal(See also the decision of Mwera J. in **DAIMA BANK LTD VERSUS ELANTRA PROPERTIES LTD, HARBINDER SING SETHI AND PAMELA SETHI MILIMANI COMMERCIAL COURT CC NO. 264 OF 1999 decided on 25.9.2002**).

The fatality of the effect of non compliance as outlined before has two effects. The first effect is one of finality where the matter is fore closed, never to be revisited, save for appeal against the order finally determining the matter. The second effect is where the court strikes out the incompetent application with a reprieve to the defaulting party being given time to comply especially where the court is of the opinion that there were issues to be interrogated in the faulted application. This was the position in the own cited ruling of BROOKE BOND K LTD VERSUS JOHN MWNAGI NG’ANGA (SUPRA).

At page 9 of the said ruling line 5 from the bottom, this court observed: *“This court has judicial notice of the fact that striking out a pleading on grounds of invalidity does not shut out the affected party from the seat of justice. There is room in appropriate circumstances for the court to reopen the door for such a litigant to regularize his/her position and then approach the seat of justice again when properly dressed. This is done purely on the courts discretion and inherent powers, for the sake of ends of justice to be met to both parties”.*

In this cited ruling, this court, went on to cite issues that were to be interrogated in the faulted application with leave to applicat and then went ahead to strike out the said application to extract the grieving decree and or order and then have the same annexed to a fresh application for review.

The same reasoning will apply to the applicant’s application. The applicant was seeking to review a judgment. He has set out explicitly grounds on the basis of which he desires this court to revisit the reasoning behind the said judgment and then reconsider and revise the same. It is only proper that he be heard on the same on its own merits. The error committed in as much as it is fundamental in faulting the application presented, it does not go to the root of the entire case more so when the proceedings are undefended and so no inconvenience or injustice is being suffered by the opposite party.

The net result of the foregoing assessment is that the applicants I am ended application amended on 17th April 2008 and filed the same date has been faulted for failure to extract the decree and annex it to the application. The extraction of the decree should have preceded the filing of the application. The application is therefore premature. The same is struck out with leave to the applicant to present a proper one after he has extracted the decree and annex the same to the intended application.

(2) Costs in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2008

R.N.NAMBUYE

JUDGE