



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 875 of 2001

TRUST BANK LTD.....PLAINTIFF

VERSUS

AJAY SHAH.....1ST DEFENDANT

NITIN CHANDARIA.....2ND DEFENDANT

VINOD PATEL.....3RD DEFENDANT

JIGNESH DESAI.....4TH DEFENDANT

RULING

Application dated 04.09.2008 prayer 3.

The Application seeks to vary judgment delivered on 22.11.2007 be reviewed and set aside “*No costs to first and 4th Defendants*” and that the court do award costs to the applicants the application is based on the grounds that there were no special circumstances to deny the 1st and 4th Defendants their costs in the suit and that the Trust Bank has deposits of Kshs.192 Million in its deposits and investments and that Deposit protection Fund Board is able and capable of meeting the costs.

That there are sufficient reasons to warrant considering this application. Affidavit in support is sworn by Mr. Billing Advocate annexing all necessary documents.

On the part of opposition, it is said that notices of appeal had been made against that decree and it is for the applicants to file cross appeal when the record of appeal is filed.

Matters of review of decree or order are provided for under Order 44 of Civil Procedure Code. “Review is allowed for any other sufficient reasons.”

Furthermore, review is only permitted where there is a decree from which an appeal is allowed and has not been filed or where no appeal is allowed.

In a case where there are several parties, a party who is not appealing may apply for review of the decree except where the ground of such appeal is common to the applicant and appellant or when being a Respondent he can present to the Appellate Court the case on which he applies for review.

The applicant has referred to the case of Kuruma son of Kaniu –vs- Reginam, 1955 All E.R Bol1 236. Privy Council decision where it was held that:

“in considering evidence admissible the test is whether it is relevant to the matters in issue and if relevant to the matters in issue and if relevant, the court is not concerned with the method by which it was obtained. There is no difference in principle between criminal case and Civil Case.”

Regarding Notice of Appeal the case of Yani Haryanto –vs- E.E. & F. man (sugar) Ltd Civil Appeal No. 122 of 1992, the Court found that an appeal is not constituted in the Court of Appeal until the record of appeal is lodged in its registry. In this matter, only notice to appeal is filed pursuant to order 41 (4) of Civil Procedure Code. Record of Appeal is not lodged. For the purpose of review, the applicant is entitled to pursue this application.

This Court is of the view that the evidence alleged to have been illegally obtained is relevant and the court rules that the evidence is admissible. On the issue of review of the decree, the reasons given by the court in referring to award of costs to the Applicants is that *“the Plaintiff is said to be on death bed. The Plaintiff is a public Body which was managed 1st Defendant The 4th Defendant is a Director In the special circumstances of this case, I will depart from the normal rule that costs follow the event and order each party to bear its own costs.”*

The Applicants have sworn that the financial position of the Plaintiff has changed. There is substantial deposits to its credit. Furthermore the Plaintiff is authorized to deal with property borrow money and do other financial things and activities. This is provided under Banking Act Section 36 (2).

In view of the changed circumstances< I allow the application for review and set aside the part of judgment quoted above. I grant costs to the 1st and 4th Defendants in this suit to be agreed upon or taxed by the Taxing officer of this Court.

It is so ordered.

DATED this 20th day of November 2008.

JOYCE N. KHAMINWA

JUDGE