

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 272 of 1996

AL-AMIN AGENCY.....PLAINTIFF

VERSUS

SHARIFF M.A. OMAR.....DEFENDANT

R U L I N G

On 15th September 2006, I dismissed this suit for want of prosecution. The plaintiff has now applied under sections 3A and 80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules for the review of that order dismissing the suit.

The application is opposed by both the defendants. The second defendant, in opposition to the application filed both grounds of opposition and a replying affidavit. Mr. Kiarie for the plaintiff contended that I should disregard both of them as a respondent to an application is only entitled to file either grounds of opposition or a replying affidavit but not both.

This argument has no basis. I do not understand Order 50 Rule 16 under which the argument is based to suggest that a respondent who wishes to oppose an application cannot file both grounds of opposition and a replying affidavit. In my view he can. This is because if he wishes to oppose the application only on grounds of law he only needs to raise those points in grounds of opposition and need not file a replying affidavit. Conversely if he wishes to oppose it only on factual points he only needs to file a replying affidavit. However if he wishes to rely on both points of law and fact, he can file both grounds of opposition and a replying affidavit.

The application is based on the ground that in dismissing the suit I failed to take into account the fact that due to the shortage of judicial personnel, in Mombasa law firms are given quotas of cases they can fix for hearing in any quarter. Mr. Kiarie, counsel for the plaintiff submitted that is a ground for review as it falls under the ambit of “or for any other sufficient reason” in Order 44 Rule 1 and that it does not have to be analogues to the two other grounds in that Rule.

I agree with that submission. On the authority of the Court of Appeal decision in **Wangechi Kimita -VS- Wakibiru (1982-88) 1 KAR 978** followed in **The Official Receiver and Liquidator –VS- Freight Forwarders Kenya Limited, civil Appeal Number 235 of 997 KA)** and even on the reading of the Rule itself the ground “or for any other sufficient reason” does not have to be analogous to the other grounds in the Rule. But that is not the issue in this matter and I did not understand the Respondents to say that the quota system, if I may call it so, is not “any other sufficient reason” for reviewing the order. I dismissed the suit on the ground that the plaintiff had not complied with the consent order recorded earlier on in this suit requiring it (the plaintiff) to make discovery within 60 days. Even if the quota system had not been there the case could not have been heard without the plaintiff complying with that order of discovery.

That counsel’s mistake should not be visited on his client is not a ground for review. To purport to review the order on that ground would, in my view, be sitting on appeal from my own order which the law does not permit me to do. In the circumstances I find no merit in this application and I hereby dismiss it with costs to the defendants.

DATED and delivered this 17th day of January 2007

D.K. MARAGA

JUDGE