



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 261 of 1999

**TRUST BANK LIMITED (Under Statutory Management of
CENTRAL BANK OF KENYA) PLAINTIFF**

- Versus -

1. MANSI VEGEXT LIMITED

2. MANSUKH MARU

3. VIRCHAND MALDE

4. VIPUL AMICHAND SHAH DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Chekera h/b for Shah for Applicant

N/A for Respondent

R U L I N G

This is an application for the review and setting aside of an order made by this court on 27th October, 2006, dismissing this suit for want of prosecution. The application is brought by a notice of motion dated 2nd March, 2007, and made under Order XLIV rule 1 of the Civil Procedure Rules.

The application is supported by the annexed affidavit of SYED KASSIM SHAH, Advocate, and is based on the grounds that it is in the interests of justice that the suit be reinstated, and that non attendance by counsel was as a result of misinformation.

In so much as the respondent has not filed either a replying affidavit or grounds of opposition, this application is treated as unopposed. However, I note that instead of applying for the dismissal of the suit to be set aside under Order IXB rule 8 of the Civil Procedure Rules, the applicant has opted to seek a review of the order under Order XLIV rule 1.

The latter states as follows:-

“1.(1) Any person considering himself aggrieved –

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
or
- (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error on the face of the record, or from some other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It is well settled that before the court can review a decree or order by which an applicant considers himself aggrieved, a copy of such decree or order ought to be attached to the application. In this application, that has not been done. That renders this application technically incompetent and one for dismissal.

If the application is considered on merit, the first ground on which the court may review its order or decree is where the applicant has discovered some new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. The applicant herein does not purport to have discovered any such new and important evidence. Secondly, the applicant does not allege that there is any mistake or error on the face of the record. This leaves the court with only one option to consider, which is whether there is some other sufficient reason for a review of the order made.

The background to this matter is that by an application dated 14th March, 2006, the defendants sought a dismissal of the plaintiff’s suit for want of prosecution. On 16th May, 2006, by consent of the parties, the application was fixed for hearing on 12th October, 2006. On that date, Mr. Shikely appeared for the applicants, but the respondent neither attended nor was it represented. Seeing that the hearing date had been taken by consent, the court opted to proceed ex parte. The ruling was reserved for 27th October, 2006. It was duly delivered on that day, dismissing the plaintiff’s suit as prayed.

In paragraphs 3 and 4 of the supporting affidavit, Mr. Shah avers as follows:-

“3. THAT the order made in the morning on 27th October, 2006 dismissing the Plaintiff’s suit for want of prosecution ought to be set aside as the Plaintiff’s counsel knew and counsel for the defendant ought to have known that as per Justice Njagi’s practice all applications are heard in the afternoon.

4. THAT on the aforesaid date I duly arrived in court at about 2.15 p.m. The Court clerk of the day, Mr. Kinyua, informed me that the Judge was traveling to Nairobi for tribunal hearings and that therefore there would be no court sittings at that time as all matters were returned to the Registry ...”

The above statements confirm that counsel for the plaintiffs did not attend court on 12th October, 2006, when the application was heard and the ruling reserved. He is talking of 27th October, 2006, when the ruling was delivered in the morning and the judge left for Nairobi in the afternoon. With respect, Mr. Shah seems to be under the impression that the suit was ordered to be dismissed immediately when it was called out and there was no attendance for the plaintiff. But that was not the order of things. October 27, 2006, was a Friday when the court does not, usually, entertain contested matters. The Cause List for that day will also confirm that the matter in question was not listed for that day, let alone in the afternoon thereof. Why, then, did counsel come to court at 2.15 p.m. on that Friday? To say the least, all is not well. The court heard the application for dismissal of the suit on 12th October, 2006, and delivered a considered ruling on 27th October, 2006. It was not that the court ordered that the suit be dismissed for non attendance on 27th October, 2006, a date on which it was not listed, anyway.

For the above reasons, I find that the applicant has failed to satisfy any of the conditions for review of court orders. The application for review is accordingly dismissed with costs.

It is so ordered.

Dated and delivered at Mombasa this 7th day of December, 2007.

L. NJAGI

JUDGE