



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 316 of 2002

COMMUNICATIONS COMMISSION OF KENYA.....
.....PLAINTIFF

VERSUS

ROYAL MEDIA SERVICES LIMITED.....
.....DEFENDANT

R U L I N G

By an order made on 2nd March 2004, this suit was stayed pending the hearing and determination of HCCC No. 15 of 2000.

By a notice of motion dated 6th April 2006, the plaintiff seeks the following order: -

“That this Honourable court be pleased to vacate review or otherwise discharge the order made by the Honourable lady Justice Kasango on the 2nd day of Marcy 2004 staying the suit herein.”

Before the plaintiff could proceed with prosecution of this application, the defence raised preliminary objection that the application is incurably defective and ought to be struck out with costs to the defendant.

The defence counsel in submission stated that the plaintiff had failed to extract the order of 2nd March 2004, and had failed to annex such an extracted order to the application rendering the application incurably defective.

Defence relied on three authorities:

(i) HCCC NO. 586 OF 2001 AGRICULTURE SYNDICATE LTD

RARAMOUNT BANK Ltd where Hon Justice Njagi states:

“...the applicant has not complied with that procedure, which requires an applicant not only to extract the decree or order sought to be reviewed, but also to annex such decree or order to the application I think that it alone suffices to knock out this application.”

(ii) HCC MISC NO. 66 OF 1997 CAPTAIN JAMES N. WAFUBWA V HOUSING FINANCE COMPANY OF KENYA LTD

Hon Justice Njagi stated

“...there is an abundance of authorities in this country to the effect that a party seeking a review of a

decree or order should extract and attach a copy of the decree or order in respect of which the review is sought.....Failure or omission to attach a copy of the order or decree is fatal, and on that ground alone, this application ought to fail.”

(iii) HCCC No. 1938 of 2001 DICKSON MBUGUA & OTHERS V STEWALT L. HENDERSON & OTHERS

The court held in this case that a later application to attach a copy of the order or decree could not cure the application.

Plaintiff in opposition to the above objection stated that the court’s ruling of 2nd March 2004 was annexed to the application, and that later the plaintiff filed a supplementary affidavit whereby the extracted order was attached.

Defence finally stated that for an application to succeed under Order 44 of the Civil Procedure Rules, the order or decree, the subject of the review ought to be annexed to the application, and not to be brought before the court subsequently.

The objection being raised failed to take into account that the application is not merely for review but is prayed in the alternative, that is the plaintiff sought to vacate, discharge or review the order of 2nd March 2004. That being the case the preliminary objection fails because as stated by Law, J.A. in MUKISA BISCUIT CO V WEST END DISTRIBUTORS [1969] E.A.: -

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

It is clear that the objection raised by defence does not meet the above criteria. The objection will not dispose the application because the plaintiff has alternative prayers for discharge or to vacate the order.

Even if the plaintiff did not have alternative prayers, as stated above, the defence objection would have failed. The reason it would have failed is because the plaintiff had attached the extracted order to the supplementary affidavit, an affidavit that had been filed to further support the plaintiff’s application. I reject the defendant’s argument that attachment of the extracted order to the supplementary affidavit would not cure the application. I am of the view that the order attached to the supplementary affidavit would suffice for what is important is that the order being reviewed be extracted and be before the court as the court considers the application for review.

The objection raised by the defendant is typical of the objection that are frequently raised in our courts today, which objections are raised with out much though being applied and not to mention that they are sometimes raised as a means to delay the hearing of a matter. That ought to be discouraged and to so discourage the courts ought to order the objector to pay costs of that objection, even before the main taxation.

The objection by the defendant dated 11th May 2006 is hereby dismissed with costs to the plaintiff, which costs are hereby assessed at kshs 10, 000/-. The costs shall be paid by the defendant to the plaintiff within 7 days hereof. Failure to so pay the plaintiff may execute for those costs.

MARY KASANGO

JUDGE

Dated and delivered this 31st July 2006.

MARY KASANGO

JUDGE