REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI

Civil Case 232 of 2002

FIDELITY COMMERCIAL BANK ……. PLAINTIFF

VERSUS

MICHAEL RURAYA MWANGI……1ST DEFENDANT

ARTHUR RUNYENJE NAMU……...2ND DEFENDANT

RULING

On 2nd December, 2004, I dismissed the Applicant's Application to set aside a judgment entered against him in default of appearance. He considered himself aggrieved and filed the Notice of Motion dated 21st January 2005 seeking review of my said order under the provisions of Order XLIV Rules 1,2,3 and 6, Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

When the Application for review came up for hearing before me on 20th May 2005, Counsel for the Respondent raised a Preliminary Objection on the ground that there was no extracted order and without the same, the Application had no substratum and consequently was fatally defective. Counsel was of the view that there was an order which was not valid as it did not comply with order XX Rule 6 and 7 of the Civil Procedure Rules. I have not seen the purported order. Counsel placed reliance upon two decisions of this Court for the proposition that failure by the Applicant to extract a formal order is fatal to an Application for review:

1. **Bernard Githii –v- Kihoto Farmers Co. Ltd: HCCC No.32 of 1974 (UR**) in which Nyarangi J. as he then was dismissed an Application for review on a Preliminary Objection based on failure by the Applicant to apply for and have a decree drawn up and issued.

2**. Uhuru Highway Development Ltd –V- Central Bank of Kenya & 2 Others: HCCC No.29 of 1995 (UR)**. In this case Mbaluto J. agreed with Nyarangi J. that failure by the Applicant to extract a formal decree was fatal to an Application for review. The Learned Judges relied upon a decision of the Court of Appeal for Eastern Africa in **G.M. Jivanji –V- M. Jivanji & Another, (1929 -30) 12 KLR 44.**

The Preliminary Objection was opposed by Counsel for the Applicant. Counsel submitted that the record of the Court should be looked at as an order is owned by the Court. In his view a defective order would not invalidate the Application for review as the defective order can be amended.

I have now considered the rival submissions for and against the Preliminary Objection. I have also given due consideration to the authorities cited. Having done so I take the following view of the matter. As I have stated above, I have not seen the extracted order. It was the duty of the Applicant to exhibit the

same. His affidavit in support of the Application does not depone to the fact that a formal order was extracted.Without the extracted order, is the Application for review competent? The two High Court decisions cited above are categorical that an Applicant should have the order sought to be reviewed drawn up and issued before making the Application for review under Order XLIV Rule 1 of the Civil Procedure Rules. I cannot fault their interpretation of the said order. The order reads:

XLIV

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 apparent on the face of the record, or for any 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."***

A plain reading of this rule shows that an extracted order is a prerequisite of an Application for review because, as the rule reads it is a review of a decree or order passed or made.

In the case of **G.M. Jivanji –v- M. Jivanji & Another: (1929-30 12 KLR 44** which was relied upon by both Nyarangi J. and Mbaluto J. above, the Court of Appeal for Eastern Africa held:

> ***"Apart from any consideration whether the course adopted by the Learned Judge in relation to the exparted order of the 8th July 1930 was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under Order XLII.A person applying for a review under that Order must be "aggrieved by a decree or order." The words "decree" and "order" are here used in the sense set out in the definitions in Section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his Application should be for a review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable.The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievances to a suit.In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. 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."***

On the authority of the decision in the case of **G.M. JIVANJI –V- M. JIVANJI AND ANOTHER (supra),** I uphold the Preliminary Objection raised by Counsel for the Respondent. The Application dated 21st January, 2005 by the 2nd Defendant is incompetent and is struck out with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-