



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.58 OF 1998

1. BURKA AHMED SALIM

2. SHALHA AHMED APPELLANTS

VERSUS

STEPHEN C. NGALA RESPONDENT

R U L I N G

A Notice of Motion dated the 18th August 2003 has been referred to this court for directions by Hon. Mr. Justice Sergon on two grounds – (i) He had already disqualified himself from handling this matter on 26th May 2003, and (ii) Lady Justice Khaminwa who would have heard it cannot do so because her law firm did represent the appellants.

The application is filed under Order XLIV Rule I of the Civil procedure Rules. The order sought is one of Review of a decree in appeal which Hon. Mr. Justice Sergon delivered on the 12th May 2003 when he dismissed the appeal. Essentially review is now applied for so that the entire appeal may be heard de novo on the grounds that there are apparent errors on the face of the record.

I have also noted that there is another prayer for an injunction to issue against the decree holder restraining him from further demolition of the suit property pending the determination of this application.

Even before the motion dated 18/8/03 is heard and concluded, the appellants again filed another motion dated 29/8/03 in which they seek the review of Mr. Justice Sergon’s order disqualifying himself. This new prayer is based on the ground that such disqualification (albeit continued disqualification, shall cause grave miscarriage of justice and that it was made in error without calling upon the authors of the letter to give an explanation contrary to the principle “AUDI ALTER PARTEM (the right to be heard)

I do note that a letter dated 10th April 2003 was written to His Lordship the Chief Justice by Mahmud M. Awadh and signed also by Burka Ahmed Salim (the appellants). They were in court on 26th May 2003 when the learned Judge called upon them to say something about that letter. They admitted to have written, signed and sent the same to the Chief Justice. They were in fact heard.

Thereupon Mr. Justice Sergon made the following ruling:

“Court: The letter raised doubts on the way the court has handled this matter. It would appear they are not comfortable with Justice Sergon handling this case. In the circumstances I will disqualify myself from handling this file. The same should be allocated to another court. The letter written to

the Judge should be photocopied and supplied to Mr. Asige for the Respondent.

J.K. Sergon
Judge

It would appear that the appellants now have had second thoughts about this matter and want the Judge to reinstate himself to this case.

It is doubtful whether Mr. Justice Sergon will oblige. Appellants have however filed this motion and I will ask Mr. Justice Sergon to record his position in terms of prayers 2 and 3 only as it is not possible to order a Judge to deal with a particular case, which he has already, disqualified himself from.

I do direct the Deputy Registrar now to place Notice of Motion dated and filed on 29th August 2003 before Mr. Justice Sergon for directions before application dated 18/8/2003 can be heard.

It is so ordered.

Date, signed and delivered at Mombasa this 3rd September 2003.

A.G.A. ETYANG

JUDGE