REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1908 OF 2000 (O.S.)

CHHAGANLAL ODHAVJU VISHRAM VADGAMA
(Beneficiary in will of Odhavji Visramm Vadgama) …… PLAINTIFF
VERSUS
TRAVIS (E.A.) LIMITED …….....…….. DEFENDANT

R U L I N G

Amended Notice of Motion dated 12th July 2000 is seeking one main order and that is an order that judgment herein and all consequential orders be reviewed and/or set aside. The other prayer is for costs to be provided for. The application is supported by photostat copies of two affidavits — one sworn by Bernard N. Wamalwa and another by Eric K. Mutua. There are two grounds for the application and these are first that there is a mistake and error in the proceedings and judgment and that there is an error on the face of the record. The Affidavit sworn by Bernard Wamalwa states that the deponent was surprised to hear that the Applicants filed and taxed a bill of costs, whereas he had never been served with any Bill of costs and/or notice of taxation; and that to the best of his knowledge this matter has never been heard save for the Preliminary application. Eric K. Mutua states in his Affidavit that this matter came up for full hearing on 25th January 1999 before Justice Ang'awa; that he appeared and the Judge did order that parties prepare issues and exchange documents pursuant to Order 10 of the Civil Procedure Rules; that he was surprised to hear that a Bill of Cost had been taxed when the matter had not been heard; that the Applicants should have complied with the order of Justice Ang'awa before taking other steps. He ended that affidavit by praying that the orders of taxation be set aside and matter to proceed to full hearing.

The application is opposed and Grounds of Objection were filed as well as Replying Affidavit sworn by Bhaskar Sheth.

I have considered this application, the affidavits in support of it, the grounds of opposition, Replying affidavit as well as the submissions by the learned counsels. This application cannot be granted on the following grounds.

First Order 44 rule 1 under which this application is brought is clear that the court can only review a decree or order and that in effect means that such a decree or order must be extracted and annexed to the application for review. This was not done here and Mr. Mutua has readily admitted in his submissions that the decree to be reviewed has not been annexed. In the case of G.M. Jivanji vs. M. Jivanji & Another (1929-30)12 KLR 44 the Court of Appeal for Eastern Africa had this to say inter alia.

> "But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called under question in review unless the resultant decree is a source of legitimate grievance to party 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 review of a decree or order to move the court to draw up and issue the formal decree or order".

This is the law. Honourable Justice Mbaluto says in the case of Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others HCCC No. 29 of 1995 that the omission to annex the decree or order to the application for review is fatal and I do agree with him. Nyarangi J. (as he then was) says as follows in the case of Bernard Githinji vs. Kirata Farmers Co-operative Ltd, HCCC No. 32 of 1974:

> "The Applicant should have applied for a decree to be drawn up and issued. At this stage there is nothing upon which the court's judgment can be arrived. In view of what is stated above, the failure by the Applicant to extract a formal decree was fatal to the application and it should on that count fail".

This is the first reason why I also say this application should on that count fail.

The second reason is that Order 44 Rule 1 specifically states that an application for review should be made without unreasonable delay. Here the Judgement sought to be reviewed was delivered on 1st October 1998. This application was filed on 7th February 2000 and amended on 12th July 2000. There is no explanation for the same delay. This is more important when it is clear that Mr. Mutua, the learned Advocate for the Applicant indeed argued the originating summons before me on 28.9.98 and knew that Ruling was to be delivered on 1.10.98 at 2.00 p.m. Although notwithstanding that knowledge, he did not attend court for the Ruling, he nonetheless knew the date of the ruling and he had no reason for not informing Mr. Wamalwa of the ruling date and advising their client over the next course in time. The delay of over one year has not been explained and it is clearly inordinate and is unreasonable.

Third reason is that this application in so far as it concerns the prayer for review lacks support completely. The two Affidavits purportedly in support of it do not say anything in support of what Mutua said at the bar that Directions were not taken and were not dispensed with before the matter was set down for hearing. It is not possible for the court to act on allegations from the bar unsupported by any affidavit as were made here. I am on my part not prepared to do so.

Fourth ground is that the Originating summons that was heard on 28th September 1998 had four prayers one of which was that the Summons for Directions be dispensed with. That was prayer No.2. On 22.5.98 the Originating summons was fixed for hearing on 10th June 1998 by consent of both parties and on 10.6.98 Applicant was allowed to serve the application by registered post and hearing was fixed for 29.7.98. On 29.7.98 the matter was stood over to 28.9.98 by consent of both parties. On 28.9.98 both parties attended court. No party asked for directions and in my ruling I did comment on that and ruled that Summons for Directions was dispensed with as indeed it was dispensed with my implication since the parties proceeded with the main hearing. If that conclusion I came to was not proper then the only proper course for the Applicant would have been to appeal, for I directed myself to that issue and specifically ruled on it. It can no longer be considered a mistake on the face of the record. It can only be (if it is) a wrong decision which could have only called for an appeal.

The last reason why I feel this application cannot succeed is that reading the Affidavit of Mutua it would appear that Mutua did not know that this matter had been heard. He says at paragraphs 4 & 5 that the matter came up for hearing on 25th January 1999, and that he appeared in court on that day and they were ordered to exchange documents pursuant to Order 10 of the Civil procedure rules. At paragraph 6 and 7 he says he was surprised to hear that a Bill of Costs had been taxed and that a Bill of Cost cannot be taxed when this matter had not been heard. Mutua could not be serious when he said that as on 7th February 2000 when he did swear that Affidavit, he had not known that this matter had been heard. He was present when this matter was heard on 28.9.98 and he did address the court on that day. Such a blatant lie cannot expect the court's discretion. The Applicant is not coming to court with clean hands and does not deserve any discretionary remedy. In my humble opinion, the story as put forward by Mr. Mutua very well solicit further investigations to see if no crime has been committed. I need not say any more He had a professional duty to tell Hon. Justice Ang'awa the truth and this court the truth. He attempted to mislead both courts.

The record shows clearly that the Notice of Taxation was served and the Taxing Officer was satisfied with that aspect. I have no reason to review the taxation as it was carried out elsewhere. In my mind Order 9B Rule 8 does not apply as both parties were present when the matter was heard.

The sum total of the above is that Application dated 7th February 2000 and amended on 12th July 2000 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 14th day of February 2002.

ONYANGO OTIENO
JUDGE