**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 168 OF 1981 (O.S.)**

**GACHUMA GACHERU ……………………… PLAINTIFF**

**VERSUS**

**MAINA KABUCHWA ………………………DEFENDANT**

**R U L I NG**

When this case came up for further hearing on 31st January, 2002, counsel from the firm of Messrs P.N. Mugo and company advocates appeared and said he had taken over from the firm of Messrs Kaai and Mugambi, advocates and was now acting for the plaintiff.

He stated further that he had filed an application for review of the order made in the case to reject vital documentary evidence from the plaintiff.

As I did not have the application on the file, I asked counsel for his copy which he gave me. On perusal of the same and in comparison with the court record, I tried to explain to counsel that there was no order on the file to the effect of what he was saying but he insisted he wanted to be heard on his application before the court could make its ruling.

The application dated 12th and filed in court on 13th September, 2001 was in the following terms: namely: that

(a) The Hon. court do review and vacate its orders declining to accept as court ex a contract of land sale and schedule of payment between the plaintiff and the respondent relating to the land subject matter of this suit.

(b) The honourable court do allow reopening of applicant case and recalling of applicant to produce ex. the contract of sale and schedule of payment between the applicant and the respondent in regard to the land subject matter of this case. (c) The honourable court do allow the application to call further evidence for conclusion of his case. (d) Costs of this application be provided for. Grounds upon which the application was based are stated on the body thereof and include:

(1) that the court rejected production of the signed written sale agreement as court ex in error or oversight…………

(2) that the sale agreement forms the main case of the applicants claim;

(3) that no prejudice will be caused to the respondent by recalling the applicant to adduce further evidence;

(4) that the applicant would also wish to adduce further evidence in form of production of documents on tea bush on this land; and so forth.

There was also a supporting affidavit which referred to the sale agreement and the schedule of payments of the purchase price for the land and confirming the grounds stated on the body of the application.

I allowed counsel to submit on the application on 31.1.2002 and counsel for the applicant repeated what was contained in the grounds of the body of the application and the supporting affidavit referring the court to various provisions of the civil procedure rules, the Evidence Act and decided cases.

Counsel for the respondent opposed the application and stated that it was not covered by Order XLIV of the Civil Procedure Rules as there was no decree or order.

He submitted that the case was in the middle of hearing and that the plaintiff had closed his case.

That the court did not make any order declining to accept the plaintiff's documents. He explained what transpired in court on 10th July, 2001 to give rise to this application.

That in fact after that 2 other witnesses were called for the plaintiff before he closed his case.

According to counsel it is too late in the day for the applicant to be allowed to produce the documents which have been in his hands all this long since 10th July, 2001.

He submitted that the provisions of law and authorities quoted do not apply to the present case and that the only remedy open to the applicant is to wait for the conclusion of the case and, if need be, to appeal. Order XLIV of the Civil Procedure Rules provides that

**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 any other sufficient reason, desires to obtain a review of the decree or order may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

The marginal note to this order refers to :application for review of judgement" which infers that there must be some final decision to the case or application before Order XLIV can come into play.

When then was the alleged order made or what really transpired on 10th July, 2001?

As has been explained by counsel for the respondent, Mr. Kaai, then counsel for the plaintiff was leading his client in evidence when the client was apparently shown a document by his said advocate. He said,

***"We had an agreement in writing. I see a chit forming part of the agreement".***

Counsel for the respondent must have raised an objection to it and I signed off to prepare to record the objection.

This did not happen because counsel for both parties consulted on the document and Mr. Kaai withdrew or retrieved it from Mr. Gaturu who had been handed the same for perusal. The two counsel agreed and told me that the document was not an agreement as per the law of contract Act because it was

not signed or witnessed; See Section 3(3) of the Law of Contract Act.

Mr. Kaai kept his document back in his file and the case continued. This is how these remarks came to be reflected on the file.

There were no submissions for or against reference to and/or production of the document which would then have been the basis of a formal ruling on, it, perhaps to form the basis of either appeal or review.

Given this background and the provisions of Order XLIV of the Civil Procedure Rules, can one reasonably say there was a formal or even informal order or decree,

> ***"from which an appeal is allowed or from which no appeal has been preferred or decree or order from which no appeal is hereby allowed",***

to give rise to this application for review? I am nor examined the answer to this question is in the affirmative. Counsel for the applicant then went on to refer to various provisions of law. First on his list was Order XLI rule 22.

In the first place that order deals with appeals and the rule quoted refers to "production of additional evidence in the appellate court" (see marginal note). This is not the position obtaining here.

Next was Section 170 of the Evidence Act, Chapter 80 Laws of Kenya. This Section deals with witnesses summoned specifically to produce documents of doubtful admissibility – not the position in our case.

Then counsel went on to refer to Order 27 rule 12 of the Civil Procedure Rules which refers to commissions and references which has absolutely nothing to do with the situation obtaining here.

Civil Appeal No.174 of 1999 is irrelevant to the present case as it was a case dealing with an application to adduce additional evidence while in our case counsel for the applicant himself declined to pursue the documentary evidence his client intended to adduce.

Severally Civil Appeal Number 264 of 1996 dealt with the discretion vested in the court to review its own decrees or orders and the wider interpretation given to the phrase "any other sufficient reason" in Order XLIV of the Civil Procedure Rules, very different from the present situation.

From submission of counsel for the applicant, his client is blaming former counsel for failing to adduce evidence as per instructions but the court has got nothing to do with the relationship of the two.

This application fails and is hereby dismissed with costs to be paid by counsel personally.

**Delivered this 14th day of February, 2002.**

**D.K.S AGANYANYA**

**JUDGE**