



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 88 OF 1998

IN THE MATTER OF: SECTION 3 OF PARTITION ACT

AND

IN THE MATTER OF: MOMBASA/XVIII/122

BETWEEN

SALEH BURAN SAID BASMER APPLICANT

VERSUS

SAID ALI SALIM DAKIK & OTHERS RESPONDENTS

RULING

Notice of Motion dated 31st July 2002 seeks two orders. These are first, an order that the order dated 15th March 2002 issued by the Deputy Registrar be set aside and parties herein be ordered to abide by the provisions of Order 20 Rule 7 (6). Secondly that this Honourable Court reviews its decision and ruling dated 15th March 2002 and in particular the order striking out the application and awarding costs to the Respondents and in particular to the Second Respondent. The third prayer was for costs to be provided for.

Only the first prayer has been dealt with and I will confine this ruling to that prayer only. The ground for that prayer was that the Deputy Registrar has issued Order dated 15th March 2002, without regard to the provisions of Order 20 Rule 7 (6) which were not complied with.

The learned counsel for the first set of Respondents conceded during the hearing that the learned Deputy Registrar did not comply with the provisions of the Civil Procedure Rules and did not refer the matter to the Judge who delivered the ruling. Although Mr. Mwakisha should strictly not have had audience as his client died and thus he was not representing anybody he was earlier on for the second set of Respondents and he also conceded that the learned Deputy Registrar erred in failing to refer the matter to the Judge. It was thus agreed by consent that the order issued by the learned Deputy Registrar would be set aside and it was further agreed that settlement in respect of the decree would proceed before me.

The parties mainly Mr. Kasmani for applicant and Mr. Kimani for Respondent addressed on the same on 25th November 2002. The parties do not seem to have any disagreement on the way the reliefs granted or determination of the application was drawn. I have seen the draft purportedly signed by the Deputy Registrar and the draft prepared by Mr. Kasmani. Mr. Kimani the learned counsel for the Respondent says

he agrees with Mr. Kasmani's draft except that he submits that the summary of the prayers should be set out in the preamble. Mr. Kasmani feels that to do that will take out the draft from the acceptable format. Thus both agree that the reliefs granted by the order have been properly extracted and reflect the ruling correctly. The dispute is only on what should be reflected in the preamble. Order 20 Rule 7 (6) states as follows:

“(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.”

And Order 20 Rule 6 (1) and (2) state as follows:

“6(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and description of parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.”

Order 20 Rule 7 (1) adds that a decree shall bear the date of the day on which the judgment was delivered. Thus my understanding of order 20 Rule 7 (6) is that an order shall be prepared (if it required to be prepared) in the same way as the decree is prepared and thus in preparing an order one is to follow the provisions of Order 20 Rule 6 (1) and (2) and Order 20 rule 7(1). I have perused APPENDIX C in the Civil Procedure Act and I do feel the position in law is that stated in Order 20 Rule 6 (1) and that is that particulars of claim is one of the items that must be included in the order or decree. Mr. Kasmani did refer me to case of **Fuad Mohamed Abdulla vs. Ali Mohamed Abdulla Court of Appeal Civil Appeal No.20 of 1999.** I have carefully perused that case. In my humble opinion, whereas that case dealt very exhaustively with Order 20 Rule 6(1), the problems that were posed by that case is not the same as the problem in this case. In that case it was obvious that what the Appellant did was to write out a part of the judgment and call it an order. He in fact never extracted an order at all. Secondly he drew what he called an order instead of a decree. What was called an order was reproduced by the Kenya Court of Appeal at paragraph 2 of the typed judgment and it is no more than the ruling that was given by the High Court Judge. To stress what I am saying I do reproduce herebelow what the court stated at paragraph 4 of that judgment:

“We have already set out the order as drawn by the Appellant from the judgment of Etyang’ J. All that the Appellant did was to quote verbatim from a portion of the judgment and in our view, that cannot constitute a valid order. Etyang’ J. wrote a judgment and we think the appellant should have extracted a decree, not an order from it.”

In my mind anybody reading that purported order in that case would immediately see first that it was wrongly called an order as it was supposed to be a decree, it having been extracted from a judgment and not from a ruling and secondly it was clearly a verbatim quotation of a portion of judgment and not an extracted decree at all. In this case however, as I have stated, parties do not have a dispute as to the extract of the order as far as the relief is concerned. All that is in dispute is on what should or should not be in the preamble. Order 20 Rule 6(1) is clear that particulars of the claim must be in the preamble. My understanding of Mr. Kasmani's submission is that even the particulars should reflect what is extracted and not verbatim quotation of the particulars of the claim. Mr. Kimani says the order as approved by the Deputy Registrar is in the proper format and should not be set aside. With respect, I find it difficult to understand Mr. Kimani on that submission as he had earlier on on 3rd September 2002 conceded that the Deputy Registrar did not comply with Order 20 Rule 7(4) and so his approval of the order was unlawful and that order could not therefore stand. That was the reason why it was agreed that I would do the settlement myself instead of returning the order to Deputy Registrar for settlement.

I do feel that the order issued on 9th April 2002 which set out the particulars of the claim as appears in the originating summons and sets out an extract of the relief granted is a properly drafted order. Those are the reliefs the Applicant claimed and he particularized them. Those particulars according to Order 20

rule 6(1) are required to be in the order and it is not in the rule that a preci of the particulars is what is to be put in the order. I do adopt it and approve it. As the learned Deputy Registrar did not comply with requirements of Order 20 Rule 7 (4) and his order approving the order was set aside, this order settling the orders takes effect from the date of this ruling. No order as to costs.

Dated and delivered this 16th day of December 2002.

J.W. ONYANGO OTIENO

JUDGE