REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

H.C. MISC. CIVIL APPLICATION NO. 287 OF 2000

JUJA ROAD FANCY STORE

WANJOHI PROVISION STORE

GIKONDI AFRICAN HOTEL……. APPLICANTS/RESPONDENTS

V E R S U S

THE ESTATE OF G.V.

SHAH & L.V. SHAH …… RESPONDENT/APPLICANTS

R U L I N G

The application dated 14th May, 2002 is brought under provisions of Order XLIV Rule 1, Order XVI Rule 5 and Order XLI Rule 31 (2) of Civil Procedure Rules. The orders sought are:

(a) That the orders of this Honourable court made on 10th May, 2000 be reviewed and/or varied.

(b) The Appeal be dismissed for want of prosecution by the Applicants and/or alternatively that the Registrar be directed to forthright to issue notice and place the Appeal filed on 17th March, 2000 before this Honourable court for dismissal.

(c) Costs of the application be provided for.

The Respondent has filed preliminary objection on 28th June, 2002.

The main objections are three fold namely: (1) The application is incompetent as no signed or sealed order has been extracted, (2) The Applicant is no longer a registered owner of the suit premises and has no locus standi to continue presenting the appeal and (3) Under Order XLI Rule 31 (2) of Civil Procedure Rules the applicant cannot move this court to seek orders.

It is conceded by Mr. Savary the learned counsel for the

Applicant that no formal order is extracted.

The application for the review of this court's order is brought under order XLIV Rule 1 which provides for circumstances under which a review application can be made. The review must be of a decree or order by which the applicant is aggrieved.

The analogy as to the definition of a decree or order can be made from section 80 of the Civil Procedure Act which stipulates:

Any person who co nsiders himself aggrieved :

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the cou rt which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

The Court of Appeal in the case of G.M. Jivanji Vs. M. Jivanji and another

(1929-30) 12 KLR 44 has held and I quote:

> ***"Apart from any consideration whether the course adopted by the learned judge in relation to the exparte order of the 8 th July, 1930, was or was not well founded, the question emerges as to the 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 "*
>
> ***are here used in the sense set out in the definition in section 2 of the Civil Procedure Ordinance. Each decree necess arily 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 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 ju dgment 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 grievance to party to a suit. In these proceedings no resultant decree on the 29 th 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."***

I am bound by the above observations and I find that this application so far as it is seeking order under Order XLIV Rule 1 is incompetent and should be struck out.

However, it I also made under other provisions of Civil Procedure Rules and seeks different order. Ms Nyagah also submitted that the applicant cannot come before this court under order XLI Rule 31 (2) because it is only the Registrar who can issue the notice to parties and list the appeal before a judge in chambers for dismissal if within one year after the service of memorandum of appeal the appeal is not set for hearing.

It is evident in this case that the appeal was filed on 17th March, 2000 and the Registrar has failed to issue the notice as specified in Rule 31 (2).

This applicant is seeking in alternative that the registrar should be directed by this court to issue such notice. I cannot deny any litigant such order when the appeal is not set for hearing after more than two years after the filing of Memorandum of Appeal.

I therefore grant alternative prayer made by the applicant and direct the Registrar to issue notice to both parties under Order XLI Rule 31 (2) of Civil Procedure Rules within 14 days from the date hereof. The cost of the application be in the appeal.

Dated and delivered at Nairobi this 10th day of December, 2002.

K. H. RAWAL

JUDGE.