REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1227 OF 1996

EDWARD KINGS ONYANCHA MAINA

T/A MATRA INTERNATIONAL ASSOCIATES…….PLAINTIFF

V E R S U S

CHINA JIANGSU INTERNATIONAL ECONOMIC

TECHNICAL CO-OPERATION CORPORATION……..DEFENDANT

R U L I N G

This application was brought under Order XXI Rule 1, 6 and 7, Order XXXIX Rule 2(3) and Order XLIV Rules 1, 2, 4 & 5 of the Civil Procedure Rules as read with all enabling provisions of the law including Section 84(1) of the Constitution of Kenya, Section 3(1) and 5(2) Judicature Act (Cap 8) and Sections 3A, 7, 27, 40, 63, 80, 81, 99 & 100 Civil Procedure Act (Cap. 21.)

In it, the Plaintiff seeks the following orders:-

> "1. This instant application be heard and disposed of without service upon the Respondent/Defendant in the first instant.
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> 2. This Honourable Court (E.M. Githinji J) do recall and vacate/ rescind its Order pronounced verbally in Chambers on 20.10.96 then later written signed and back dated to 20-10-96
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> 3. The warrants of attachment in execution of the Decree dated 14/7/93 do issue forthwith upon this Honourable Court vacating/ rescinding its Order (SC. Ondeyo J) dated 19.1.96 read with the Order of Honourable Court of Appeal (Gicheru, Kwach and Lakha JJ.A) dated 7.5.96 in Civil Appeal Nos. C.A. 193/95 and C.A.194/95.
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> 4. The judgment-debtor be condemned for repetitive contumacious Contempts of Orders of this Honourable court with impunity dated 27/7/93, 26/02/97, 19/1/96, 01/03/94, 26/7/93.
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> 5. The defence counsel James Ochieng Oduol t/a Ochieng Oduol & Co. Advocates be condemned according to provisions of Section 5(2) of Judicator (sic) Act Cap. 8 Section 114, 121, 347 (9) 349 and 354 of Penal Code Act Cap. 63 Laws of Kenya.
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> 6. This Honourable Court be at liberty to grant any other or further Orders at the request of the judgment-creditor in the interest of justice.
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> 7. This Honourable Court do certify the proceedings herein, with effect from 27.7.93 date consent Orders were entered up to date, as complex.

8. The Judgment-debtor/defendant be condemned with costs of this instant application and those of 14th/10/97, 5/11/97 and 17/12/97."

This case and other related matters have had a voluminous history in this court and a brief one in the Court of Appeal. That history has not been without controversy but the crux of this application is an order made by my Learned Brother, GITHINJI, J. on 22nd October, 1996, (Although in the application it is stated to have been made on 20th October, 1996). The Plaintiff's case is that that Ruling was given verbally and subsequently written and back dated. At the hearing, the plaintiff argued that this course offended the Provisions of section 90 of t he Civil Procedure Act which requires all orders or notices served on or given to any person under the Act to be in writing.

The Plaintiff, who argued this application in person, attacked Justice Githinji's Ruling on several grounds and also argued several matters which, in my view, will not come to bear in this application. The Plaintiff also argued that Mr. Arika had not filed a notice of change to come on record for the Defendant. This argument is baseless. There is no doubt that Mr. Arika is an Advocate employed in the firm of Advocates on record for the Plaintiff. He, therefore, did not need to file any Notice of Change of Advocates to enable him appear on behalf of the Defendant in this matter. This argument has been raised by the Plaintiff previously and this is what my Learned Brother HAYANGA, J. said on 11th March, 1997:-

"I have heard arguments by the two parties and I am of the view that the issue of representation is not pertinent. The firm of lawyers on record M/S. Ochieng Oduol & Co. Advocates is still the Advocates for the Defendant. The Advocate w ho appeared was only on standing representation of that firm. Therefore, there was no need to file Notice of Change as there was no change at all."

The situation is the same here and the Plaintiff's argument on that question is misplaced and irrelevant.

Mr. Arika for the Defendant on the other hand, argued that this application was incompetent as the Plaintiff had not extracted the order which was sought to be reviewed. He also argued that the application did not comply with section 5 of the Judicature Act as no leave had been sought to bring contempt proceedings in it. Finally, he argued that the application did not, in any case, meet the requirements of order XLIV of the Procedure Rules.

At the outset, it is important for me to explain why this application is before me rather than Justice Githinji as is usual in applications of this nature. At some point in these proceedings, the Learned Judge disqualified himself from this matter. When the matter came before my Learned Brother KULOBA, J. for directions, it was ordered that it be listed before a Commissioner of Assize as the case had been heard by many Judges (several of whom had disqualified themselves from hearing it) and it was necessary to "bring a fresh and unclouded look at the application." Although the order required that the matter be listed before a Commissioner of Assize, going by the spirit of it, the parties consented that the same could be heard before me, notwithstanding the fact that I had been sworn in as a Judge when this application came up for hearing.

Now, going back to the application before the court, I will consider the principles to be applied in an application for review.

The power of this court to review its judgment is provided for under Order XLIV Rule 1(1) of the Civil Procedure Rules. That rule provides as follows:-

"(Order XLIV) 1. (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 whic h 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 for any other sufficient reason, desires to obtain a review of the decree or order, may apply fro a review of judgment to the court which passed the decree or made the order without unreasonable delay."

The provisions of that rule are clear beyond peradventure. Can it be said that the Plaintiff has satisfied the requirements of that rule to enable this court treat his application with favour? I do not think so. In this application, the Plaintiff did not show discovery of any new and important matter or evidence which was not within his knowledge or could not have been produced by him at the time when the order was made. He did not show any mistake or error apparent on the face of the Ruling. He did not show "any other sufficient reason" for review. What he did was to attack the Ruling sought to be reviewed and that is not something within the purview of his application. By attacking the decision of the Judge, the plaintiff sought a different conclusion from the one reached by the Judge and that was tantamount to an appeal on which this court cannot sit on its own decision.

In **National Bank of Kenya Ltd v. Ndungu Njau** NAIROBI C.A. Civil Appeal No. 211 of 1996 (KWACH, AKIWUMI & PALL, JJ.A.) the Court of Appeal said as follows:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusions of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the le arned Judge would be sitting in Appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

That aside, the Plaintiff's application must also fail since he did not annex to his application the order which was sought to be reviewed. Without the order of which the Plaintiff claims to be aggrieved with, how can this court exercise the discretion given to it in favour of the Plaintiff? What will be the matter of reference? This point has been the subject of important judicial consideration starting with the case of **Gulamhusein Mulla Jivanji & Ano. V. Ebrahim Mulla Jivenji & Ano**.(1929-30) 12 KLR 41. In that case, PICKERING, C.J. (Zanzibar) sitting with SIR JACOB BARTH, C.J. (Kenya) and SIR CHARLES GRIFFIN C.J. (Uganda) said as follows at pp. 44 and 45:-

"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 precise character of the grievance which must be expressed by a person applying for a review of judgment under Order XLII.

A person applying for a review under that Order must be "aggriev ed by a decree or order". The words "decree" and "order" are here used in the sense set out in the definitions in Section 2 of the Civil Procedure Ordinance. Each decree necessarily 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, u nless 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 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 a party to a suit. In these proceedings no resultant decree on the 29th August, 1930 had yet come into existence. Indeed no attempt to draw up any has as yet to be made. 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".

This was followed by NYARANGI, J. (as he then was) in **Bernard Githii on behalf of Mutathini Farmers Company v. Kihoto Farmers Co. Ltd.** NAIROBI H.C.C.C. NO. 32 of 1974; by MBALUTO, J. in **Uhuru Highway Development Ltd v. Central Bank of Kenya Ltd & 2 Others** NAIROBI H.C.C.C. NO. 29 of 1995 (Milimani Commercial Courts); and most recently by ONYANGO OTIENO, J. in **Dr. Pere Malande Olindo & Ano. V. Diamond Trust Bank Kenya Ltd**. NAIROBI H.C.C.C. NO. 1230 of 1990 (Milimani commercial Courts).

The Plaintiff in the present application has not satisfied the requirements of order XLIV since he has not only failed to annex the order for which he seeks review but also not satisfied the court that he has a basis for such an application. On the whole, this application must fail.

Having determined that important issue, I would like to consider some other matters which appear to have been raised in the application as well. Prayer 3 of the application sought the issuance of warrants of attachment; prayer 4 and 5 sought orders for committal for contempt; and prayer 7 sought that this proceedings be certified as complex. To begin with, the Plaintiff did not seek leave to bring contempt proceedings and prayers 3 and 4 must, without more, be rejected. As to prayer 7, I am not aware whether this court can make such an order. What would be the purpose of such order? Prayer 3 has no place in this application.

In fact, it is my considered opinion that applications for review should be applied for singularly without clouding them with other prayers. To do otherwise complicates the court's function to no one's benefit.

I, therefore, dismiss this application with costs.

DATED and DELIVERED at NAIROBI this 11th day of June, 2001.

ALNASHIR VISRAM

JUDGE.