



**REPUBLIC OF KENYA**

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

**ELCA NO 25 OF 2016**

HUSSEIN GULAKHAN .....1<sup>ST</sup> APPELLANT  
ANWAR KHAN MURADKHAN.....2<sup>ND</sup> APPELLANT  
ZAKIYA HASSAN ALI.....3<sup>RD</sup> APPELLANT  
ALI ABEID.....4<sup>TH</sup> APPELLANT  
MASSOODKHAN HABIBKAN.....5<sup>TH</sup> APPELLANT  
BAKHIT BIN SAAD AL-MAHRY .....6<sup>TH</sup> APPELLANT  
MOHAMED NAZIR MOHAMED.....7<sup>TH</sup> APPELLANT  
AMINA M. ABOO SALIM.....8<sup>TH</sup> APPELLANT  
MOHAMED SALIM.....9<sup>TH</sup> APPELLANT  
C. M. JINA.....10<sup>TH</sup> APPELLANT  
NARANDAS SAVERSHAND.....11<sup>TH</sup> APPELLANT

-VS-

MARKET MANSION.....RESPONDENT

**RULING**

1. By a Notice of Motion dated 31<sup>st</sup> March 2016 made under Order 9 Rule, Order 45 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules; Section 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, the Applicants seek orders:

**1. Spent**

**2. THAT this Honourable Court be pleased to grant leave to the firm of M/S Apollo Muinde & Ngonze Advocates, Mombasa to come on record for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Appellants in place of M/s Kiarie Kariuki & Company Advocates, Mombasa previously on record and the Notice of Change of Advocate filed herewith be deemed to be properly on**

record;

**3. That there be a stay of execution of the decree of this Honourable Court made on 24<sup>th</sup> day of September, 2015 and all consequential orders pending the hearing and determination of the Application herein;**

**4. That this Honourable Court be pleased to review, vary and/or set aside the judgment delivered on 24<sup>th</sup> day of September 2015 and all other consequential orders made therein.**

**5. That this Honourable Court be pleased to hear the Appeal lodged herein de novo and on merits;**

**6. That the costs of this Application be provided for.**

2. The Application is premised on the grounds:

**a. THAT there is judgment which was delivered on 24<sup>th</sup> September 2015 dismissing the Appellant's appeal;**

**b. THAT the Respondent has instructed Work-no-words Auctioneers who descended on the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> premises on 22<sup>nd</sup> March 2016 and proclaimed their assets therein and the same are due to be removed from the Applicants premises and sold by Public Auction after the lapse of 14 days;**

**c. THAT the Respondent herein is not a juridical person and/or legal entity capable of suing and being sued in its own name since it is only a business name;**

**d. THAT there is an error apparent on the face of the record in that the substantive issue before the Court, that is to say, the issue of standard rent has never been articulated throughout this proceedings both in the Court of first instance and before this Court since the parties only confined themselves to technical arguments on matters of procedure;**

**e. THAT there are other ample good grounds to warrant this review;**

**f. THAT no prejudice shall be suffered should this Application be allowed as prayed;**

**g. THAT it is in the interest of justice, fairness and equity that the Application is allowed as prayed without any further delay on/or expense.**

3. The Application is also supported by an Affidavit sworn by Mohamed Salim, the 9<sup>th</sup> Applicant on 31<sup>st</sup> March 2016 in which he deposes inter alia that the Applicants are all tenants in the **PLOT NO.484/XVIII SITUATE AT MWEMBE TAYARI WITHIN MOMBASA COUNTY** the same registered in the name of Market Mansion; that they appealed to this Court challenging the ruling of the Rent Restriction Tribunal delivered on 25/12/2001 by Honourable Chairlady Emily Ominde which appeal was dismissed on 24<sup>th</sup> September 2015 by Honourable Mary Kasango. He further deposes that by an honest but genuine mistake it would appear that the parties hereto only ventilated on the technical issues on this matter and the issue of the standard rent was not deliberated on which would have led to a different result in this appeal and that the tenants have been living in the subject building in excess of forty (40) years and have been paying rent all along despite the fact that no repairs have been done by the Landlord and as such they stand to suffer irreparably if at all this matter is not entertained by this Court.

4. The Application is opposed by the Respondent and both parties filed Written Submissions. I have considered all the issues raised in the Application and the rival submissions. Prayers 1 and 2 of the Application were granted by the Court on 6<sup>th</sup> April 2016. What remains for determination are prayers 4, 5 and 6 of the Motion.

5. Section 80 of the Civil Procedure Act provides as follows:

**“80 Any person who considers 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 Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit. ”**

**Order 45 (1) of the Civil Procedure Rules states as follows:**

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

6. It is clear from the above provisions of the law that whereas Section 80 gives the power of review, Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds: **a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made, or; **b)** on account of some mistake or error apparent on the face of the record, or **c)** for any other sufficient reason and whatever the ground, there is a requirement that the Application has to be made without unreasonable delay.

7. In the case of **National Bank of Kenya Ltd –v- Ndungu Njau (1997)eKLR**, the Court of Appeal held that:

***“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 conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review. ”***

8. In the instant case, the Application is made principally on the ground that there is an error apparent on the face of the record in that the substantive issue before the Court, that is the issue of standard of rent has never been articulated throughout these proceedings, both in the Court of first instance and before this Court. The Appellants presented four (4) grounds of appeal and one of the grounds is that the Tribunal erred in assessing rent in contravention of the Rent Restriction Act and/or all other relevant laws in reaching the figures that it did. In the judgment sought to be reviewed, it is recorded in paragraph 4 that ***“learned Counsel for the Appellants in his submission stated that Appellant’s appeal is only against the procedure adopted by the Tribunal in assessing the rent and that it was not against the quantum of rent assessed.”*** In paragraph 12 of the judgment, it is recorded that ***“Appellant’s learned Counsel argued that it is the Tribunal which was obligated to determine the standard rent of the premises and it was***

***not the assessment officers who could make that determination.***” It was after hearing those and other arguments that the Court upheld the finding of the Tribunal and found that there was no merit in the appeal. It is evidently clear that the issues of standard rent was articulated both at the Tribunal and before this Court and the decision of the Court was informed by the arguments advanced by the parties including the Applicants. The matter in dispute had been canvassed before the learned Judges who made a conscious decision in favour of the Respondent. I would be sitting on appeal against a judgment of this Court if I was to decide otherwise, which is against the law. It was held in the **National Bank of Kenya Ltd case (supra)** that an issue which has been contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.

9. The Applicants have also stated that the Respondent herein is not a juridical person and/or legal entity capable of suing or being sued in its own name. The Applicants have not disclosed when this matter or evidence came to their knowledge. In the Supporting Affidavit the Applicants are relying on information from their Advocates but is not shown when the Advocates got to know about this. The Applicants have not shown that the new and important matter or evidence after exercise of due diligence, was not within their knowledge or could not be raised by them at the time the matter came up before the Tribunal or the Court. The order sought to be reviewed was made on 24<sup>th</sup> September 2015 and this application was filed on 1<sup>st</sup> April 2016. This was a delay of about six (6) months. I have looked at the Affidavit in support of the Motion and the submissions by the Applicant. The Applicant has not explained what occasioned the delay which in my view was inordinate. In the absence of any explanation, the same is not excusable.

10. By reason of the foregoing, I find that the Application has not passed the test for grant of an order for review. Accordingly, the Application dated 31<sup>st</sup> March 2016 is hereby dismissed with costs to the Respondent.

**Delivered, signed and dated at Mombasa this 7<sup>th</sup> February, 2018.**

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**C. YANO**

**JUDGE**