



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 140 of 2006

1. OMAR MOHAMED

2. SAID ALI.....APPELLANTS

VERSUS

1. DR. ABEID KOMBO

2. JOHNSTONE MOKAYA.....RESPONDENTS

RULING

I have before me an application for one main order that the order made on 12th November 2009 be reviewed to the extent that the applicants be allowed to deposit the Original Title Deed Number Mtondia/Roka/10 as security as opposed to a bank guarantee in the sum of Kshs. 500,000. The application has been brought under the provisions of sections 1, 3A and 80 of the Civil Procedure Act, Order L Rule 1, Order XLIV Rule 1 of the Civil Procedure Rules, Sections 3A and 3B of the Appellate Jurisdiction Act and all other enabling provisions of the Law. The main reason for the application is that the appellants, due to their financial constraints and inadequate time are unable to honour the conditional order of 12th November 2009.

The application is supported by the affidavit of Dr. Abeid Kombo (hereinafter "*the 1st Applicant*"). In the affidavit, it is deponed, among other things, that the applicants are unable to provide the bank guarantee of Kshs. 500,000/= as ordered but wish to replace the same with a Title Deed in the deponent's name which is valued at Ksh. 700,00/= . The application is opposed and there is a replying affidavit sworn by counsel for the respondent in which it is deponed, *inter alia*, that the applicants have not made a full disclosure. Besides, according to counsel for the respondent, this application is incompetent since the order sought to be reviewed has not been exhibited.

When the application came up before me for hearing, counsel agreed to file written submissions which they duly filed by 15th March 2010. The submissions merely substantiate the parties' stand-points taken in their respective affidavits.

I have given due consideration to this application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The applicants have grounded their application on discovery of new and important matter which is the discovery that their bank accounts would not be able to furnish security worth Kshs. 500,000/= and that the said title can act as an alternative and adequate security. The said accounts are not exhibited. The replying affidavit put the applicants on notice of that deficiency, yet no further or supplementary affidavit was filed to introduce the alleged accounts. In the premises the respondent's contention that there has been lack of candour is not altogether without merit. There is therefore no foundation for the assertion that the applicants made any new discovery regarding their bank accounts. In any event those accounts must have been there at the time they made their application for stay of execution and so was the said title. That title attracts further criticism. It was issued on 13th March 1992. The current status of the register is unknown since a current certificate of official search was not exhibited. It is the register that constitutes the real title for purposes of security. In the event, even if the applicants had satisfied the requirements of Order XLIV of the Civil Procedure Rules and section 80 of the Civil Procedure Act, the security offered in my view would not be adequate.

Before concluding this matter, counsel for the applicants objected to the replying affidavit sworn by counsel for the respondents arguing that the affidavit contravenes Rule 9 of the Advocates Practice Rules. I have carefully considered the impugned affidavit. The only alleged contentions issue therein is comprised in paragraph 6 of the affidavit. The rest of the affidavit cannot be said to contain contentious issues. The entire affidavit is therefore not incompetent. In any event even if the said paragraph were struck out, that event *per se* would not save the applicants' application in view of my above findings.

In the end, the application dated 27th November 2009 and filed on the same date is without merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF APRIL 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Khatib for the Appellants and Ogola holding brief for Njanga for the Respondents.

F. AZANGALALA

JUDGE

23RD APRIL 2010