REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 230 OF 2004
JOSEPH D. HALAKE ……..PLAINTIFF
VERSUS
YUNIS MALIK……..…… DEFENDANT

CIVIL PRACTICE AND PROCEDURE
- decree - form of decree to comply with judgment to which it relates
- and bear the date of the day on which the judgment was delivered
- order XX rules 6(4) and 7(1)
- Civil Procedure Rules

CIVIL PRACTICE and PROCEDURE
- failure to file grounds of opposition or replying affidavit
- whether defaulting party has a right of audience
- order L, rule 16(2) Civil Procedure Rules

CIVIL PROCEDURE ACT
- the overriding objective
- the Civil Procedure Act (Cap. 21, Laws of Kenya) SS 1A&1B

RULING

By a Notice of Motion dated 30th April 2008, the Plaintiff/Applicant sought orders:-

(a) that leave be granted to amend the decree issued on 9th December 2007,

(b) that costs be provided

The motion was supported by the affidavit of Joseph Dida Halake sworn on 30th April 2008 and the grounds that:-

(a) the decree is not drawn in accordance with the judgment of the court delivered on 18th October 2007;

(b) the decree does not specify the reliefs granted and /or other determination of the suit;

(d) The Deputy Registrar failed and/or neglected and/or refused to satisfy himself that the decree is drawn up in accordance with the judgment;

(d) the draft decree was not approved by Counsel for the plaintiff who was at the material time relevant thereto;

(e) Other - further grounds as may be allowed during the hearing.

The motion was drawn to be served, and was served upon the firm of Kimatta & Company Advocates, for the Respondent on 14th June 2008, and service was accepted by Mr. Kimatta. That is what is deponed to by the process server Erineriko Kirera Mosoba in his Affidavit of Service Sworn on 16th

June, 2008. Despite the motion having been filed way back on 30th April, 2008, no date was taken for hearing thereof apparently because the court file was pending for typing of proceedings in the typing pool. By a letter dated 6th January 2010, the firm of Kagucia & Company Advocates asked for the file to be returned to the Registry to enable them to take a hearing date for the motion the subject of this Ruling.

A Hearing Date was taken and a Hearing Notice dated 15th January 2010 was served upon the firm of Kimatta & Company Advocates on 18th January 2010, and again Mr. Kimatta accepted service, an Affidavit of Service was sworn on 10th February 2010 by Erineriko kirera Mosoba and filed on 22nd February 2010.

When the Motion came before me, on 10th May 2010, Mr. Kagucia, Counsel for the applicant drew my attention to the fact that the Respondent had neither filed an Affidavit nor grounds of opposition as required under Order L rule 16(3) of the Civil Procedure Rules and that the Motion being unopposed should be allowed. In my liberal and open-minded manner, I suggested that surely a party or his Advocate should be allowed to address the court at least on the law as the facts being evidential should be by way of an Affidavit. Mr. Kagucia disagreed and sought a reasoned Ruling taking into account the recent amendments to the Civil Procedure Act, the new sections 1A and 1B - which are now popularly referred to as "Oxygen "or "02" provisions, and that if I agreed with him the Motion should be allowed without reference to the submissions by Mr. Kimatta, Counsel for the defaulting party.

This Ruling is **firstly** in response to that altercation and **secondly** the motion itself. However, as Mr. Kimatta Counsel for the Respondent took the cue from my remarks, I will first set out his views on the question whether a defaulting Litigant or his Counsel should be granted audience without first seeking leave of court and justification for the default.

Mr. Kimattta submitted that notwithstanding failure to file any papers, by way of a replying affidavit or a statement of the grounds of opposition, the Respondent or his Counsel has a right of audience in this court because he is the decree-holder and the application before court is challenging the contents of that decree. The Respondent he said, did not respond because the averments in the Supporting Affidavit all refer to the Deputy Registrar. Counsel also submitted that it is not mandatory that he should give notice on raising points of law to the other party, that the oxygen provisions merely mean that the court will look at the general and wider issues of law, that counsel who wishes to reply on any points of law ought not t o be denied audience by the court, that a party cannot be denied an opportunity to address the court on issues of law, and that, the court itself will not grant an application without inquiry into the judgment which gave rise to the decree. Counsel also submitted that where facts are known and the law is known, there is no question of ambush, and that ultimately the court must address itself to those issues before determining the application.

While I have sympathy with the views expressed by Mr. Kimatta, I will demonstrate in the subsequent passages of this Ruling why those views should not only be modified and accommodated to comply with the requirements of Order L, rule 16 of the Civil Procedure Rules but also be compliant with the amendments made and introduced by the Civil Procedure Act/the **"oxygen"** provisions, and taking into account the submissions of Mr. Kagucia.

Section 1A and 1B of the Civil Procedure Act provides as follows:-

1A (1) *the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of, the civil disputes governed by this Act.*

(2) *the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to given effect to the overriding objective specified in subsection (1).*

(3) *a party to civil proceedings or any Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect to participate in the processes of the court and to comply with the directions and orders of the court.*

1B(1) *for the purposes of furthering the overriding objective specified in* ***Section 1A****, the court shall handle all matters presented before it for the purpose of attaining the following aims*:-

(a) the just determination of proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

Order L, (50) *of the Civil Procedure Rules is an order of general application to motions and applications under the said Rules. Rule 16 thereof provides as follows:-*

16 (1) *any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or statement of grounds of opposition;*

(2)

(3) *If a respondent fails to file a replying affidavit or statement of grounds of opposition the application may be heard "ex parte."*

It was Mr. Kagucia's (learned Counsel for the Applicant) submission that having been served with the Motion, the subject of this Ruling, way back on 14th June 2008, and further having been served with the Hearing Notice on 18th January 2010 and failed to either file a Replying Affidavit or a statement of the grounds of opposition as is required by Order L, rule 16(1) of the Civil Procedure Rules, counsel should only address the court with leave of the court and upon adequate justification. Where a party, like in this case, the Respondent has not sought leave of court, and has not given any or any adequate justification for failure to file either a Replying Affidavit or a statement of the grounds of opposition in compliance with the requirements of Order L, rule 16(1) aforesaid, the court should deny such a party audience.

The issue before me therefore is whether a Respondent or his Advocate who has been served with an application and fails to file either a Replying Affidavit or a statement of the grounds of opposition until the hearing date of the application, and also fails to demonstrate to the court why he has failed to comply with the requisite rule of the court should be granted audience by the court.

As already indicated above, Mr. Kagucia's position is that such party should only address the court with leave of court and upon demonstration of justification for the failure to comply with the applicable rules of court. I agree with Mr. Kagucia's submission.

In the case of **TRUST BANK LIMITED -vs- AMALO COMPANY LIMITED [2009] K L.R 631**, the applicant's documents were expunged from the record and the appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held;-

(*1) The administration of justice should normally require that the substance of all dispatches should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.*

(2) the spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.

In the case of the **VERY REV. JESSE KAMAU & OTHERS -VS- THE ATTORNEY GENERAL [2010**]e KLR. [MISC. APP. NO. 880 OF 2004 (OS)], a Constitutional Court (Nyamu JA, Wendo and Emukule JJ) held inter aliar that:-

"Rules of procedure, constitutional or other procedural law (like the Civil Procedure Act) are designed and enacted for the guidance of plaintiffs or claimants, and the protection of defendants or respondents and are a pillar in the dispensation of justice. In as much as no genuine litigant or litigant with a justiciable claim should be thrown away or locked out of the corridors or seat of justice, the courts, we nevertheless think that it is important for the integrity of the constitution and the constitutional process that the procedure prescribed …. be complied with at all times."

In his submissions to me, Mr. Kagucia referred to the recent decision of the Court of Appeal in **HUNKER TRADING COMPANY LIMITED -VS- ELF OIL KENYA LIMITED [2010]e KLR** where that court construed the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya). Those sections are in **pari materia** with **Sections** 1A and 1B of the Civil Procedure Act.

Referring to its decision in the case of**CALTEX OIL LIMITED -vs- EVANSON WANJIHIA (**Civil application No. Nai/190 of 2009) that courtdelivered itself thus:-

"… the powers of this court have recently been enhanced by the incorporation of an overriding objective in Section 3a and 3B of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and Sections 1A and 1B of the Civil Procedure Act (Cap 21 Laws of Kenya) following the amendments by the Statute Law (Miscellaneous Amendment Act of 2009, (No.6 of 2009). The overriding objectives provide that the purpose of the two Acts and the rules is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power. The court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective."

The court also observed at P.7 of its judgment as follows:-

"it seems to us that in the exercise of our powers under the "02"Principle" what we need to guard against is arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are "02" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the"02 principle" could easily become an unruly horse."

And in **MRADULA SURESH KANTARIA** -vs- **SURESH NANALAL KANTARIA** (Civil Appeal No. 277 of 2005) unreported) that court said:-

*"while enactment of the **double "OO Principle"** is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case* of **PURUSE PTY LIMITED -vs- COUNCIL OF THE CITY OF SYDNEY [2007] NSW LEC** *163 where the court underscored that in exercising the power to give effect to the principle it must do so judicially and with proper and explicable foundation**."***

And it further observed in the same **KANTARIA** case:-

"the overriding principle will no doubt serve us well but it is important to point out that it is not panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefit of its application judicially ascertained."

I have already set out above **Section 1A (3)** of the Civil Procedure Act but it is necessary to reiterate it at this point. It reads:-

"*A party to civil proceedings or an Advocate for such party, is under a duty to assist the court to further the overriding objective of the Act and, to that effect to participate in the process of the court and to comply with the directions of the court."*

In the matter at hand, I have already observed that the motion herein was filed on30th April, 2008. It was served upon the Respondent's Counsel on 4th June 2008. A hearing date was taken by the applicant's Counsel and **Hearing Notice** was served upon the Respondent's Counsel on 18th January 2010. During all that period the Respondent's Counsel has failed to either file a **Replying Affidavit** or a **Statement of the Grounds of Opposition,** all contrary to Order L, rule 16.

Indeed as Counsel for the Applicant submitted the earliest version of Order L rule 16 came to our statute books in **1985 (Legal Notice No. 50 of 1985).** It provided:-

16(1) In the High Court where any motion or other application is served either without a hearing date or more than seven days before the date fixed for its hearing any respondent who wishes to oppose th application shall within seven days file and serve on the applicant, in addition to any affidavit, a statement of the grounds upon which he will oppose the application.

(2) If no affidavit and no statement under sub-rule (1) is filed an order may be made

on the application ex-parte.

(3) No ground of opposition not contained in a statement filed under sub-rule (1) may be argued without leave of the court which may be granted upon terms.

(4) This rule does not apply to the application to a Registrar, nor applications under Order LI. LII or LIII.

Rule 16 was revoked and replaced in its entirety by Legal Notice Number 128 of 2001 which also introduced a new rule 18. The new rule 16 provided as follows:-

16(1) *Any respondent who wishes to oppose any notice or other application shall file and serve on the applicant a Replying Affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.*

(2) *Any applicant upon whom a Replying Affidavit or statement of grounds of opposition has been served under sub-rule (1) may, with leave of court, file a supplementary affidavit.*

(3) *If a respondent fails to file a replying affidavit or a statement of the grounds of opposition, the application may be heard* ***ex parte.***

(17)

(18) *The High Court may in its discretion limit the time for submissions by the parties or their Advocates.*

I set out the old and new rule16 to demonstrate that even before the new rule came into effect, the previous rule laid a duty on the opposite party (or respondent) to give reasons why he did not file either a replying affidavit or a statement of the grounds of opposition to avoid ambush. It is the reason why courts remind Counsel whether or not they have served process on the other party.

As Mr. Kagucia rightly submitted this rule provided the structure for the orderly conduct of litigation. The court is alerted of what parties intend to agitate, and the other party is equally alerted. It is through these rules and practices that the court acts as an arbiter and requires parties to follow the rules. Mr. Kagucia submitted that if a party or parties do not follow these rules then such a party should be shut out; that rule 16(1) is in mandatory terms.

Mr. Kagucia submitted that courts could well avoid any impression (such as the one created in this case), that Counsel could ignore to abide by the rules and walk into court willy-nilly that if they have a point of law and thereby get audience without following the rules. This, Counsel submitted, was a recipe for chaos and anarchy because on the one hand one party is required to file papers in accordance with the rules and the other party can afford to wait and walk into court and say I have points of law to raise.

In real terms, instead of Counsel for the Applicant sitting and waiting in court for two or more hours while the court was processing other matters, such Counsel could well have occupied himself preparing to argue in response and be not ambushed if he had the response communicated to him earlier.

The court would only allow any Counsel who failed to file his statement of grounds of opposition to argue his points of law if he first gave reasons for not filing either grounds of opposition or an affidavit in reply to the application. Unless he first does so, such a party, or his Advocate is totally undeserving of audience.

From the above discussion on the submissions from Mr. Kimatta, Counsel for the Respondent and Mr. Kagucia counsel for the Applicant, consideration of the precedent from the Court of Appeal, and the decision of the three judge bench in the **Rev. Dr. Jesse Kamau & 47 others -vs- Attorney General** and **others**, on the application of both procedural law, and rules thereunder, certain conclusions may be drawn:-

(1) *Rules of court, both substantive and procedural, are a pillar in the dispensation of justice, the non-observance thereof leads to abuse of the process of court which is a recipe for anarchy and chaos in the process of court.*

(2) *Under both LN. 50 of 1985, and LN 36 of 2000, and Legal Notice No. 128 of 2001, Order L rule 16 laid an obligation upon the respondent to answer an application and serve his response to the Application within seven days (under Legal Notice No. 50 of 1985),three days (under both Legal Notice Number 36 of 2000 and 128 of 2001).*

(3) *The court had and has the discretion to grant orders sought without regard to the opposite party or respondent if he fails to respond as required under Order L rule 16.*

(4) *If the Respondent or his Advocate feels aggrieved he has an avenue or a window under rule 17 of the said order to apply to have the order set aside;*

(5) *Where a party or his advocate who has not filed either an affidavit in reply or a statement of grounds of opposition but is present in court and applies to address the court, he must give justification for failure, in the first place, to file either of those documents within the time prescribed in the same way as if he were applying to set aside the ex parte order under rule 17 referred to in sub-paragraph (4).*

(6) *Where a party or his Advocate fails to justify his failure or his Advocate's failure to file a response to an application the court is at liberty to exercise its discretion to determine the application ex parte - as if there had been no response;*

(*7)* *Under the current provisions of Sections 1A and 1B of the Civil Procedure Act the overriding objective of the Act and the rules is to facilitate the just and expeditious, proportionate and affordable resolution of civil disputes governed by the Act:-*

(a) *it is not just that a respondent should be allowed to ambush the applicant by offering opposition on vague grounds of law;*

(b) *it is not expeditious that a simple application takes long to determine because of one party's failure to do what the rules require him or his Advocate to do;*

(c) *it is not proportionate that after such lapse of time, (beyond the prescribed period) there should be a possibility of an applicant being compelled to seek time to rebut submissions not before court and only after the applicant has exhausted his cause;*

(d) *as to affordability it means that no litigant or Counsel of such litigant should be spending more time in court than necessary. Similarly the court also should not spend more time on a matter when it could hear other matters.*

In terms of subsection IA (3) of the Civil Procedure Act, taking into account what I have already stated about the time the application was filed and served, a hearing date was taken and a hearing notice was served, and failure by the Respondent's Counsel to file either a replying affidavit or a statement of grounds of opposition, the Respondent's Counsel herein has not discharged his duty to the court as he is required to do under Section IA(3) of the Civil Procedure Act.

Order L, rule 16(3) (supra) provides that if a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard **"ex-parte."**

The expression "ex parte" is a Latin phrase which in law means **"on behalf of or with reference to only one of the parties concerned (and without notice to the adverse party).**

In this case the Respondent' Counsel, Mr. Kimatta was given audience. His contention was limited by his submissions to stating a Respondent's Counsel has right of audience to raise points of law notwithstanding the failure to raise those points of law in a statement of grounds of opposition; and the fact that the court would itself always look at the general and wider issues of law. None of these submissions raised any objection to the Application the concern of this discussion. For this and the other reason I have set out above, the Applicant's Motion dated 30th April, 2008, and filed 14th May 2008 is allowed, in terms of prayer 1 thereof.

For reasons stated by the Hon Mr. Justice Kimaru in his judgment herein, I will also direct that

each party bears his own costs.

Read, signed and dated this 25th day of June 2010

M. J. ANYARA EMUKULE
JUDGE