REPUBLIC OF KENYA

HIGH COURT NAKURU

CONSTITUTIONAL APPLICATION 1 OF 2008

KENNETH NDUNG'U……..…..……APPLICANT

VERSUS

ATTORNEY GENERAL……1ST RESPONDENT

KISHOR KUMAR DHANJI VARSANI……..…..2ND RESPONDENT

RULING

The respondents herein have raised a preliminary objection to the applicant's chamber summons dated 12th August 2009 in which they seek an order for stay of execution of the respondents' taxed costs pending the hearing of the applicant's objection to the taxation. The chamber summons is founded on the grounds that the applicants have filed an objection to the taxed costs but despite their request to the taxing officer to give reasons for the award, none have been forthcoming. The applicants are apprehensive therefore that unless the on-going execution is stayed their objection will be rendered nugatory.

The preliminary objection raises two points of law, namely, that:

1) The application is bad in law, misconceived and an abuse of the process of court for violating the provisions of Order XLIX rule 5 of the Civil Procedure Rules and Rule 11 (1) and (4) of the Advocates Remuneration Order.

2) That the applicant is guilty of latches.

The chamber summons is stated to have been brought under **Order XLIX rule 5** *(which deals with enlargement of time),* **Section 11(1)** and **(4)** of the **Advocates Remuneration Rules** and **Section 3A** of the **Civil Procedure Act.** Submitting in support of the preliminary objection learned counsel for the applicant, Mr. Ojienda, told the court that the applicant ought to have moved the court by way of a Notice of Motion as provided by **Order L Rule 1** which requires that where there is no specified procedure for moving the court a Notice of Motion ought to be filed. To support his argument, counsel cited the authorities of **SALUME NAMUKASA –VS- YOSEFU BUKYA [1966] E.A. 433** and **MORRIS & CO. LTD –VS- KENYA COMMERCIAL BANK LTD [2003]2 EA 600.** Mr. Ojienda did not argue the second ground of opposition.

Learned counsel for the applicants, Mr. Gacheru, submitted that the objection is misconceived and did not meet the criteria laid down in the celebrated case of **MUKISA BISCUIT CO. LTD –VS- WEST END DISTRIBUTORS [1969] E.A. 696,** firstly because the facts are disputed and secondly because the application seeks the court's discretion as is demonstrated by the invocation the court's inherent jurisdiction under **Section 3A of the Civil Procedure Act.** Counsel argued that **Section 3A** was the

applicable law since the application related to a reference and not proceedings and that it mattered not that a chamber summons, other than a Notice of Motion was filed. On that basis, Mr. Gacheru submitted that the authorities cited by counsel for the respondent were not applicable.

The applicant challenged the taxing officer's decision on 31st March 2009 a day after the same was delivered. Although they went to sleep until a certificate of costs was issued on 22nd June, 2009 and an attachment warrant issued and execution put in motion, it is not clear at all why **Order XLIX rule 5** was cited since no enlargement of time is sought. The procedure for execution of orders is the same as the one for decrees and is provided for under **Order XXI** of the **Civil Procedure Rules.** The attachment challenged and sought to be stayed is proceeding under the said Order, specifically **rules 26 and 61**. In my view therefore the stay ought to have been applied for under **Rule 22 (1)** of the said order which provides, inter alia, as follows:

"***The court to which a decree (read order) has been sent for execution shall upon sufficient cause being shown stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court ….. for an order to stay the execution or for any other order relating to the execution…"*** *(Modifications by this court).*

"***Sufficient cause"*** will be determined by the court before which an application is brought and a stay will be granted upon that court being satisfied of the need to grant the same. Clearly therefore, the applicant is correct in submitting that the court's discretion is what is sought in the application dated 12th August 2009. It is not correct, therefore to say that there is no provision as to procedure. In my view this is a case where the wrong procedure has been invoked and **Order L Rule 1** does not, in those circumstances, apply.

Stating what constitutes a preliminary objection, the East African Court of Appeal in the **MUKISA BISCUITS** case had the following to say:

"***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

Whereas the Notice of Preliminary objection herein has raised pure points of law, and the facts as stated in the grounds in support of the application and the supporting affidavit are not disputed, being matters of the record, I am persuaded that the objection herein fails the third test laid in the **MUKISA BISCUIT'S** case for reasons that the application seeks the exercise of judicial discretion, namely, whether a stay of execution of the order for costs should be granted. That being the case, I am of the considered opinion that the objection cannot stand. The same is hereby over ruled with no order as to costs. The application shall proceed to hearing on merits.

Orders accordingly.

Dated, signed and delivered at Nakuru this 25th day of September, 2009

M. G. MUGO

JUDGE