



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL SUIT 2318 OF 1997

J.B.S HALAKE.....APPLICANT

VERSUS

BURREL ENGINEERING & CONSTRUCTION CO. LTD.....DEFENDANT

RULING NO. 2

The background information to this ruling is that there is on the record an application dated 19/2/2007 and filed on the same date brought by way of chamber summons brought under order XX1 rule 36 and 91 of the CPR, section 22, 23, 24 and 63 (e) and 3A of the CPA. It sought 4 prayers namely:-

1. *That this honourable court, be pleased to examine under oath one Lucy Cheruto Kipsanai the Director of the defendant/judgement debtor company as to the judgement,*

Debtors, Company's means and assets and to produce its books of accounts, and other documentary evidence showing the same or as this Honourable court may direct.

2. *That in default of the said Director complying with the above orders, such further order be made against the Directors personally.*

3. *That any other or further relief as this honourable court, may deem fit and just to be granted.*

4. *That the costs of this application be costs in the cause.*

It is on record that counsels of both parties, appeared before the SPDR on 16/1/2009 and argued that application on merit. The learned SPDR then delivered a ruling on the merits on the 3/02/09. The learned SPDR made the following final remarks:-

“In view of the foregoing analysis, I agree with and uphold the submissions of counsel for the decree holder. The said Lucy Cheruto Kipsanai should be availed to be examined in this application without fail. If not the court, will make appropriate orders against the said Director”

An order was made for parties to appear on the 23/2/2009 for the examination of the said Director.

But before then on the 20th day of February 2009 counsel for the Judgement debtor presented an application by way of a notice of motion dated 20/2/2009 and filed the same date. It is brought under section 3A and 63 of the CPA, orders 41 rule 4 and 50 rule 1, 2, and 3 of the CPR and all other enabling provisions of the law. It seeks 4 prayers namely:-

1. *Spent*

2. *That there be a temporary stay of execution of the orders of the Honourable Mr. Muiruri SPDR issued on 13/2/2009 pending the hearing and determination of this application.*

3. *That there be a stay of execution of the order of the Honourable Mr. Muiruri (SPDR) issued on the 13/2/2009 pending the hearing and determination of the Appeal.*

4. *That the costs of this application be provided for.*

Counsel for the decree holder has filed a preliminary objection dated 4th day of March 2009 and filed on the 5th day of March 2009 against that application. It raises 7 grounds namely:-

(a) The application is totally defective as there is no appeal on the record.

(b) The orders sought are not available to the applicant as the court, has not been properly moved

(c) The application is out to defeat the execution of the decree of this honourable court.

(d) The application is un meritorious vexatious and frivolous and an abuse of the court process.

(e) The application is totally defective as the same is made up of admissions.

(f) The application is unmeritorious as there is no notice of appeal on record, nor has the same been served upon the respondent.

(g) The applicant is not entitled to equity as he has come to court with unclean hands.

Representations on the same were made on the 27/5/2009. The counsel for the decree holder objector stressed the following in his oral representations.

-There is no appeal because since the SPDR was acting on denoted powers no appeal lies.

-The move is out to defeat the course of justice as the same has no merit.

-They rely on the case law supplied to show that the applicant should have sought review.

In response counsel for the judgement/defendant/applicant opposed the preliminary objection on the ground, that there is a memo filed on 19/2/09 and as such, they are properly before this court.

-They are within the provisioning of order 48 rule 5 CPR which stipulates that an appeal from the Deputy Registrar orders lies to a judge in chambers.

-They complied with the rules by filing the memo of appeal within 7 days of the making of the order.

-Content that issues raised in the grounds are issues to be decided on their own merits and these cannot be disposed off on points of technicality and as such they call for affidavit evidence.

-Maintain that the applicant has a genuine complaint as he has maintained that she ceased being a Director of the said company.

-Maintain that the case law relied upon is not applicable.

In response to that submission, counsel to the decree holder objector reiterated the earlier submissions and then stressed the following:-

-Annexures confirm that she has been a Director.

-The judgement of this count, has been pending for long and has been delayed by the applicant who keeps on coming to court, every now and then and it amounts to an obstruction of the process of the law.

-Also maintain that the authorities cited by them are relevant.

On case law the objector relied on the case of **POPIN (KENYA) LIMITED AND 3 OTHERS VERSUS HABIB BANK A.G. ZURICH NAIROBI CA NO. 80 OF 1988** decided by the CA on the 5th day of October 1990. What was in issue before the CA is an appeal arising from a ruling of the superior court, that the suit was, barred by both the doctrine of estoppel and Resjudicata. The courts', attention was drawn to two observations on the issues raised running from page 3-4. At page 3 line 8 from the bottom the observation goes thus:-

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgement upon a different assumption of fact.... parties are not permitted to begin fresh litigation because of new views they may entertain of the law, of the larger now which they presents as to what should be a proper apprehension by the court, of the legal result either of the construction of the document or the weight of certain circumstances. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle. It is a principle of law that this cannot be permitted”

At page 4 line 29 from the bottom it is stated thus on the doctrine of Resjudicata:-

*“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of Resjudicata the judgement in Wigram V.C. in **HENDARSON VERSUS HENDERSON (1843)** Hare 100,115 quoted with approval in the case of **YAT TUNA INVESTMENT CO. LIMITED VERSUS DAO HANG BANK LIMITED AND ANOTHER (1975) A.C. 581** thus:-*

“where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court, requires the parties to that litigation to bring forward their whole cases and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contests, but which was not brought forward, only because they have, from negligence. Inadvertence or even accidents omitted part of their case. The plea of Resjudicata applies except, In special case, not only to point upon which the court, was actually required by the parties to form an opinion, and pronounce judgement, but to even point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time”

The case of **MUTERA M, LIMBUTO VERSUS M. IMATHIU MWIRICHIA MERU HCCC A NO 21 OF 2005** decided by Sitati J on the 27th day of October 2005 on an application for stay of execution pending appeal, the learned judge declined to grant stay pending appeal because the applicant was found to have been the author of his own troubles by failing to comply with the court order.

Due consideration has been made by this court, of the Rival Arguments herein and the same considered in the light of the provisions of law and case law and the court, makes a finding that in order to succeed the D/H objector has to bring the grounds of objection raised within the ambit of the ingredients established in the celebrated case of **MUKISA BISCUIT MANUFACTURING CO. LIMITED VERSUS WEST END DISTRIBUTORS LIMITED (1969) EA 696**. In a summary form these are:-

1. The objection must be on a pure point of law.
2. It must be argued on the assumption that all the facts pleaded by the other side are correct.
3. It must be capable of disposing off the suit if upheld.

4. It cannot be raised if what is being sought is the exercise of the court's discretions.

These principles have been applied to the grounds of objection raised herein, and the court, finds any grounds (a) (b) fit that test of being on points of law and secondly if upheld they will dispose off the application. Whereas the rest require affidavit evidence to prove how the application is out to delay the execution of the decree, how the application is un meritorious, what amounts to admissions and in equitable in the said application. This being the case grounds c-g are disallowed as objections.

On the merits, the sum total of grounds (a-b) is two fronts namely:-

1. *That no appeal lies in the manner sought.*

2. *There is no jurisdictions as the Deputy Registrar orders were made on the basis of donated jurisdiction"*

It is on record that there is no dispute that the exercise of the jurisdiction by the Deputy Registrar is on the basis of donated power under order 48 CPR. This court, has therefore to interrogate the same to determine whether there is an in built appeal mechanism and if so to which forum. The court, was referred to the provisions of order XLVIII rule 5 (1) which relates to orders to which the Registrar may give directions of 19/02/07 was bought among others order XXI ruled 36 and 91. This is one of the orders under which the Deputy Registrar exercised donated jurisdiction as shown by order XLVIII rule 5 (b) (IX), the Registrar was properly seized of the matter. The appeal mechanism is found in order XLVIII rule 5(2) and (3) which provide:

" (2) An appeal shall lie from a decision of the Registrar under the orders referred to in sub rule (1) TO A JUDGE IN CHAMBERS.

(3) The memorandum of appeal setting out the grounds of appeal shall be filed within 7 days of the decision of the Registrar"

The respondent alleged that they complied with this provision. The court, has revisited the record, and found that the decision was made on 13/2/2009 and memorandum of appeal dated 19th February 2009, FILED, a period of 6 days from the date of the decision and filed on the same date. The court, is therefore satisfied that the appeal was not only directed to the correct forum but also filed within the prescribed time. The time frame within which to serve the opposite party with the memo of appeal is not given, and as such the assumption is that the same has to be served on the opposite party within reasonable time.

For the reasons given in the assessment, the D/H preliminary objection dated 4/3/2009 and filed on 5/3/2009 as against the judgement debtors application dated 20/2/2009 has been declined and dismissed with costs to the objector for the following reasons.

1. The SPDRs exercise of jurisdiction leading to the ruling of 13/02/2009 was properly exercised in accordance with order XLVII rule 5(1) (b) (IX).
2. The judgement debtor became aggrieved by those orders, and desired to appeal against the same.
3. The right of appeal is in built, and is donated by order XLVIII rule 5(2) (3) and it lies to the same forum, and all that an aggrieved party is required to do is simply to file a memorandum of appeal within 7 days of the decision.
4. The judgement debtors memo of appeal was filed within time and directed to the correct forum.
5. The judgement debtor will have costs of the objection.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE