

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 991 of 2004

(From the original Civil Suit Senior Resident Magistrate's Civil Case No. 3039 of 2001 of Chief Magistrate's Court at Milimani)

HIND CONSTRUCTION COMPANY LTD APPELLANT

VERSUS

WILSON ONGESO NDUBI RESPONDENTS

RULING

This is a case in which the Appellant, for some reasons unknown to the court, is not showing interest yet the Respondent, with interest in the appeal, somehow finds it difficult to follow the correct Civil Procedure to have the appeal dismissed.

In the Chamber Summons dated 26th January, 2007 therefore, the Respondent appeared before Lady Justice Nambuye who after hearing the Chamber Summons unopposed, she found that the Respondent/Applicant had not relied on the correct provisions of the law in bringing the Chamber Summons in this court. She dismissed it advising that the Applicant could file a proper application. One of the provisions the learned Judge advised the Applicant not to use was section 3A of the Civil Procedure Act.

The Applicant has therefore now filed the Notice of Motion dated 27th August, 2007 on the basis that it is the proper application Lady Justice Nambuye advised it could be filed. But the Applicant had again used section 3A. Together with that section, he has used Order XLI Rule 8B of the Civil Procedure Rules so that Rule 8B now replaces Rules 27 and 31 of Order XLI the Applicant had used in the Chamber Summons.

But when I look at Order XLI Rule 8B of the Civil Procedure Rules and section 3A of the Civil Procedure Act, I do not find the situation being different from what Lady Justice Nambuye saw. That is because I do not find any good reasons why the Applicant has ignored what Lady Justice Nambuye told him about section 3A of the Civil Procedure Act. That was very useful, yet the Applicant has ignored it and therefore continues to use section 3A. I do not see why I should differ from what the leaned Judge said about that section.

Now turning to Rule 8B, it stands alone and is very clear. It is about a Notice which should be given by the Registrar of this court to the parties for directions after an appeal has been filed. The procedure is intended to give general directions regarding the newly filed appeal, normally filed by way of a Memorandum of Appeal. That Rule 8B does not require the filing of a Notice of Motion like the one before me now dated 27th August, 2007. That Rule does not require an application in the form of a Notice of Motion or Chamber Summons filed by a party in the relevant case.

In that respect, what Lady Justice Nambuye said in her ruling dated 28th May, 2007 should not confuse the parties because Rule 31(1) becomes useful only after Order XLI Rule 8B was used earlier `on and separately and order XLI Rule 31(2) comes in independently and under use by the Registrar only and when the Registrar uses Rule 31(2), he needs or makes no application.

In the circumstances therefore, again the Applicant has filed a misconceived and incompetent application which I should not grant even if the application is not opposed. The correct procedure has to be used and the correct law applied. Correctly move the Registrar to act or if you decide to file the application yourself, do so using correct provisions of the law. Meanwhile I do hereby strike out this Notice of Motion dated 27th August, 2007.

Dated and delivered this 5th day of November, 2007

J.M. KHAMONI

JUDGE