REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL 150 of 2000

OMAR NAAMAN OMAR ……..…… APPELLANT

- Versus -

JOHN MUASYA NGUMU……..……. RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

RULING

By this application, the applicants seek orders that –

1. The appellant's counsel, James Gathuku & Co., be at liberty to charge the suit property No. 1450/VI/MN being the property of the appellant for the sum of Kshs. 105,900/00 being their costs of this appeal, for the purpose of securing their costs.

2. That such other orders be made for the recovery of the said sum as may appear just.

The application is brought by way of notice of motion dated 31st August, 2007, under section 52 of the Advocates Remuneration Order. It is supported by the annexed affidavit of J. K. Gathuku, Advocate, and is based on the grounds that –

(a) This appeal was for the preservation of the appellant's property being plot Number 1450/VI/MN, and the applicant acted for the appellant.

(b) The party and party costs of this appeal have been assessed in the sum of Kshs.70,600/00 making the client/advocate costs Kshs. 105,900/00 which the appellant has neglected or refused to pay.

(c) If the appellant disposes of the suit property the applicant would have no recourse.

(d) It is therefore necessary to charge the said property to secure the advocates' costs.

On 2nd October, 2007, the Advocates for the appellant filed a notice of preliminary objection of the same date on the basis that –

(i) The application is bad and incurably defective as it isbrought under the wrong provision of the

law.

(ii) The application is not supported by a valid supporting affidavit.

(iii) The application is not provided for by law.

These same grounds are also filed as grounds of opposition of the same date as the preliminary objection.

Mr. Mutungi for the appellant argued that the application is brought under the wrong provisions of the law contrary to O.L rule 12 of the Civil Procedure Rules which requires that the appropriate rule be cited. It purports to be brought under section 52 of the Advocates Remuneration Order which is non existent. The application is therefore fatally defective and incompetent. It can only be cured by an application for amendment but this has not been done. It is the section which is cited which gives the court jurisdiction. Mr. Mutungi at this juncture, referred to JOEL K. YEGON & 4 OTHERS v. JOHN ROTICH & 4 OTHERS, Nairobi HC Civil Application No. 995 of 2003. Secondly the supporting affidavit does not state who drew and filed it contrary to section 35 of the Advocates Act and it thereby becomes flawed. And, thirdly, the cited section does not assist at all.

Mr. Gathuku told the court that the application was made under section 52 of the Advocates Act and that what was typed by the computer was erroneous. He requested for leave to amend the error, submitting that an amendment can be made at any stage of the proceedings. He also argued that the supporting affidavit was sworn by himself and submitted that failure to state who had drawn it was not fatal to the validity of the affidavit since it was not a commercial document to which section 35 applies. He further submitted that the mode of drawing an affidavit is set out in rule 5 of Order XVIII of the Civil Procedure Rules. He also submitted that the submissions on the preliminary objection are not valid and that under section 3A of the Civil Procedure Act, the court should be concerned with substantive justice. He asked the court to disregard the technical objections and consider the substantive merits of the application.

Replying to the above response, Mr. Mutungi argued that a supporting affidavit is another legal proceeding within the context of section 34 of the Advocates Act, and that section 3A cannot be invoked in circumstances such as those in this matter. He finally submitted that Mr. Gathuku's application to amend should have come before the preliminary objection, and urged the court to strike out the application.

I have considered the application and the submissions of counsel. There are three main issues to be determined. These are whether an affidavit which does not state who drew and filed it is valid; whether failure to specify the correct rule or section under which an application is made is fatal; and whether it would be prudent to grant leave to the applicant to amend the application. My view of section 35 of the Advocates Act is that it criminalizes the omission by any person who draws or prepares any document or instrument referred to in section 34(1) thereof to endorse or cause to be endorsed thereon his name and address. The documents in issue are set out in that subsection. They include any documents or instruments for which a fee is prescribed by any order made by the Chief Justice under section 34 of the Act, and documents relating to any other legal proceedings. This wording is wide enough to cover affidavits. In my view, therefore, if an affidavit is not endorsed as required under section 35(1), the omission invites a criminal sanction and I don't see why anyone should be criminally punished if the validity of that document remains sacrosant. At the same time, I am aware that there is another school of thought whereby, in spite of the criminal sanction, such documents are held as good as ever. Left on my own, I would strike out such a document which is non compliant with section 35(1). If the Court of Appeal has not yet done so, and no authority was cited to me on the point, it will no doubt give some guidelines on the matter.

The application before this court is said to be made under section 52 of the Advocates Remuneration Order. This Order is not an Act of parliament. It is subsidiary legislation. Therefore it is devoid of sections. Consequently it has no section 52. However, it has a paragraph 52 which states that the costs awarded by the court on any matter or application shall be taxed and paid as between party and party unless the court otherwise directs. The applicant does not purport to rely on this paragraph. His

application was meant and intended to be founded upon section 52 of the Advocates Act, and he conceded as much. By stating that the application was grounded on section 52 of the Advocates Remuneration Order, he cited the wrong section of a non existent law.

The purpose of citing the order, rule or other statutory provision under or by virtue of which any application is made is to invoke the court's jurisdiction without which the court cannot act. Where a wrong provision is invoked, then the court is not properly called upon to act. I am afraid that is what has happened in this matter. The court's jurisdiction has not been invoked and therefore the court has no jurisdiction to grant the orders sought. I am fortified in this view by the decision of the High Court at Nairobi in the case of JOEL K. YEGON & 4 OTHERS v. JOHN ROTICH & 4 OTHERS, Nairobi Misc. Civil Application No. 995 of 2005, in which Nyamu J. stated, correctly, I think, that "…if the jurisdiction of the court is not properly invoked an application becomes incompetent." Since there is a specific provision of the law under which the court's jurisdiction should have been invoked, to wit, section 52 of the Advocates Act, section 3A of the Civil Procedure Act does not apply. And since the respondent had taken the preliminary objection before the applicant applied for leave to amend, it would be neither fair nor proper for such leave to be granted at this stage.

In sum, this application is incompetent and it is hereby struck out with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 18th day of December, 2007

L. NJAGI

JUDGE