REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

Misc Civ Appli 100 of 2005

JIWA NADMUDIN DHANJI.....APPLICANT.

VERSUS

TEBORAH NALIAKA WABWAYI & ANOTHER.....RESPONDENTS.

R U L I N G.

The applicant has moved the court by way of chamber summons under section 17 and 3A of the Civil Procedure Act, Order 1 x A Rules 10 and 11, Order 21 r. 22 Civil Procedure Rules and all enabling provisions of the law. He is basically seeking the following orders inter alia.

(a) That the Honourable court do order the transfer of Kitale SPMCC No. 433 of 2004 to the Eldoret Chief Magistrate's court or any other court of competent jurisdiction to hear and determine the applicant's application dated 11/7/2005 filed therein.

(b) That the court do grant an order staying execution of the decree in Kitale SPMCC No. 433 of 2004 ……. Pending the hearing and determination of the Applicant's application dated 11/7/2005 filed therein before a court of competent jurisdiction.

The application is premised on the six grounds enumerated on the face of the application along with the supporting affidavit of Andrew Mukite Musangi sworn on 15/7/2005.

The same is opposed by defendant/Respondent vide the replying affidavit dated 11/11/2005. Counsel for the Respondents filed a preliminary objection dated 11/11/2005 which was nonetheless argued together with the application. He has raised 3 issues in the preliminary objection.

(a) That the application for stay cannot competently be brought pursuant to 021 r. 22 as no decree has been forwarded to the High court for execution.

(b) The application can only be commenced by motion and not by a chamber summons.

(c) Section 17 of the Civil Procedure Act contemplates Transfer of the suits that are pending for trial and not suits that have been concluded.

These in my view are very pertinent points of law and I will therefore deal with them even before I can consider the merits or otherwise of the application. On the first point, all I need to do to address that issue is to refer to OXX 1r. 22 Civil Procedure Rules. The relevant part of it provides as follows:-

OXX1 r. 22 (1) "***The court to which a decree***

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 by which the decree was passed, or to any court having appellate jurisdiction ……..."

I am in full agreement with Mr. Fundi for the respondent that this order applies only to a court to which the decree has been sent for execution. The decree from the subordinate court is not before this court either for execution or for any other purpose. OXX1 r. 22 is therefore totally irrelevant in this situation.

On (b) it is noted that an application under OXXI r. 22 (1) is supposed to be brought to court by way of Chamber Summons, so is an application under O1X A r. 10 – although. I must admit that this provision is also irrelevant since the prayers before me do not include one for setting aside the Ex-parte judgment. Applications under section 3A and 17 should nonetheless be brought to court by way of motion since the applicant could not bring the same application by way of Notice of motion and at the same time as Chamber summons, my view is that he could have brought it to court either way. I will not therefore penalize him for bringing the application as a Chamber Summons. My view however is that where the application is straight forward and the same is filed by a competent counsel, then rules of procedure should be adhered to. Rules in my considered view were not made in vain and I do not hesitate to strike out an application which fails to comply with the requirements set out in the Civil procedure Rules. Though this may not be necessary now, I still wish to state that the case of BOYES VS GATHURE (1969) EA 357 should not be taken as a panacea or refuge for all those advocates who think that rules of procedure should not be observed or complied with. If courts were to encourage such an attitude, that would be encouraging mediocrity on the part of the advocates and also rendering the Civil Procedure rules and the Rules Committee irrelevant. I also wish to point out that the issue of procedure came in Boyes vs Gathure after the matter had already been heard and concluded, and there was an application that the said proceedings be declared a nullity. The court declined to do so with Sir Charles Newbold P (as he then was) commenting:

"***In my view, the concept of treating something which has been done and acted upon as a nullity is a concept that should be used with greatest caution …….."***

He nonetheless noted in the same authority that bringing the application to court by way of Chamber Summons instead of by way of originating summons was wrong. The case of Boyce vs Gathure would not have assisted the applicant at all if the application was purely supposed to be brought by way of motion.

On the 3rd point, it is noted that counsel for the applicant did actually drop the provisions of section 17 and decided to proceed under section 18 of the Civil Procedure Act. He was thus admitting that section 17 was not applicable. My view on this however is that he could not do so at that stage. Having been served with the notice of preliminary objection, he should have filed the necessary application to amend his application or even make the application to amend before he started prosecuting his application.

He nonetheless decided to proceed with it knowing very well that it was premised on the wrong provisions of the law. The court also agrees with counsel for the respondent that section 3A would only apply where there are no other applicable provisions. I may add that this section should not be dragged in every application as a contingent measure just in case of party might find himself in trouble.

As stated earlier on, there is no prayer made before me for setting aside the Ex-parte judgment and so O1X A Civil Procedure Rules is otiose and irrelevant in the circumstances. I do not therefore need to go into the issue of whether the defendant in the trial court had been properly served with the summons or not.

Overall therefore, the application before me has been brought under the wrong provisions of the law and although counsel for the applicant was notified about this in good time, he chose to ignore it. It would be too presumptuous on his part to expect the court to ignore all these flaws in his application. I find it extremely difficult to endorse such kind of application. I also note that although the Senior Principal Magistrate is said to have disqualified herself on account of want of pecuniary jurisdiction that order was

not annexed to the applicant's affidavit and the court cannot therefore confirm whether the said magistrate has the pecuniary jurisdiction to deal with the matter in question or not. All in all therefore, I find that the applicant has failed to properly move the court and to base his application on the correct provisions of the law. He has failed to convince this court to grant him the orders he is seeking. His application is accordingly dismissed with costs to the respondents.

W. KARANJA.

JUDGE.

Delivered, dated and signed at Kitale this 7th day of March, 2006 in presence of:-