REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 500 of 2001

CALTEX OIL (KENYA) LTD ……..……. PLAINTIFF

VERSUS

SURJIT SINGH …… 1ST DEFENDANT

MALKIAT SINGH ……..….. 2ND DEFENDANT

RULING

This Chamber Summons, dated 30/11/04, under Order 6 Rule 13(1)(d) and Order 9B Rule 8 of the Civil Procedure Rules seeks the following orders:

1.

2. Already spent.

3. That judgment entered on 22/11/04 be set aside; the Plaint filed by the Plaint be struck out; direction that one Elvis Ochieng, a process server of this court, do attend the hearing of this application for purposes of being cross-examined and clarification of the contents of his affidavit sworn on 18/10/04 and filed on 21/10/04.

4. Costs of the application be provided for.

The application, supported by the Affidavit of Surjit Singh, is on the grounds, inter alia, that:

a) Failure by Defendants to attend the hearing on 25/10/04 was neither deliberate nor advertent but due to:

(i) Non service of the hearing notice upon the defendants personally,

(ii) Inadvertent failure by the person who was served to bring the notice to the attention of the defendants,

(iii) Failure by the Defendants' previous advocates to bring the defendants to proper notice of his withdrawal from the record;

b) The Plaint upon which the judgment emanates is a nullity, i.e. fatally defective;

c) The defence raised by the Defendants from both the pleadings and the cross-examination of PW1 Mugo Ruthiru raise several triable issues that warrant affording the defendants a chance to ventilate.

In opposition, the Respondent, vide their Notice of Preliminary Objection, filed on 10/12/04, aver that: -

1. The issues raised in the application are <u>RES JUDICATA</u>

2. The High Court of Kenya lacks jurisdiction to sit on appeal of its own decisions;

3. The prayers sought in the Chamber Summons are incompetent and lacking in law and procedure and therefore not available to the Defendants.

I begin with the issue of <u>RES JUDICATA</u>.

Learned counsel for the Respondent submitted that the issues raised in the application, regarding service of the hearing notice to Defendant/applicant had been raised and determined, by this Court, vide Emukule, Js. Judgment dated 22/11/2004.

I have closely read the entire judgment referred to, and indeed the issue as to how, and when, the Notice of the hearing was served, both on the then counsel for the applicant – Mr. Ngaira & Co. and to the applicant/defendant, directly, was exhaustively dealt with. Accordingly, the Respondents Preliminary Objection on that aspect of <u>Res judicata</u>, is upheld. Further, given the above facts, if the Defendant/applicant feels aggrieved by the above decision of this court – vide Emukule J, the only option is to move up on appeal, to the Court of appeal, but not to come back to this same court under the guise of a Chamber Summons, seeking the same reliefs and orders as those dealt with and finally determined earlier by this Court.

The application herein also prays for the setting aside of the judgment of this Court, dated 22/11/2004. This, as submitted by learned Counsel for the Plaintiff/Respondent would be tantamount to sitting on appeal over a judgment of my brother Justice A. Emukule, a judge of parallel jurisdiction with this Court. That is not legally possible.

The only occasion when a judge can sit over a matter he/she has ruled, or entered judgment, on is by way of a Review. That, unfortunately is not the nature of the application herein, and were it a Review application under the appropriate provisions, that would have to go to the judge who made the judgment in the first place.

Turning to the last of the points of Preliminary Objection, by Counsel for the Plaintiff/Respondent, which is on the competence of the prayers in the Chamber Summons herein, that calls for a look at the provisions under which this application is brought.

The application is brought under Order 6 Rule 13(1)(d) and Order 9B rule 8 of the Civil Procedure Rules.

Order 6 rule 13(1)(d) provides:

"**At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that it is an abuse of the process of the Court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**"

Order 9B rule 8, on the other hand, provides as follows:

"**Where under this order judgment has been entered or the suit has been dismissed, the Court, on application by summons, may set aside or vary the judgment or order upon such terms as are just."**

I begin by pointing out that Order 9B deals with HEARING AND CONSEQUENCES OF NON-ATTENDANCE. Rule 8 thereof must be read in its proper context, and this is where the non-attendance has been or is satisfactorily explained to the Court. Here, and again to refer to the Judgment by Emukule J; there was no explanation, satisfactory or otherwise, why the Defendant/applicant did not appear to defend itself, even though Notice and service of the hearing notice had been duly served. That issue was dealt with in the Emukule J, judgment, and I have already ruled that the issue cannot be revisited, except by way of an appeal, which this Court is not.

I need only refer to Rule 3(1)(a) of that Order 9B which provides to the effect that if on the day fixed for hearing -------- only the Plaintiff attends, if the Court is satisfied that notice of hearing was duly served "it may proceed exparte."

The Court, before its judgment on 22/11/04, had been satisfied that notice for the hearing had been duly served, not only to the then counsel for the Defendant/applicant, but on the Defendant directly, as well, and that is why the proceedings proceeded exparte.

Learned counsel for the applicant, Mr. K. Opot, in opposition to the Preliminary Objections, submitted that the same should be rejected because they were filed in violation of Order 50 rule 16, in that the three clear days had not been afforded the applicant. Further, in the absence of a Replying Affidavit, that meant that the application was unopposed and should actually be allowed on that basis.

To the above submissions, counsel for the Plaintiff/Respondent countered that they had no obligation to file a Replying Affidavit to a defective application, and that issue was taken care of by their Preliminary Objections, on points of law; [already dealt with herein earlier].

I need only add that Preliminary Objections, on points of law, can be raised at any stage, and their determination or disposal takes preference to the substantive hearing, especially in an application like this where the Preliminary Objections have the potential of disposing of the substantive application.

The applicant, in the grounds, avers that the defence raises triable issues that warrant affording the defendants a chance to be heard in their defence.

Without repeating myself, the above issue is res judicata, as it was fully and substantively dealt with in this Courts Judgment of 22/11/2004 where it was found, and held, that the so called defences were mere denials lacking in substance and merit. If the Defendant/applicant was not satisfied with that, the options, as earlier stated, are either by way of an appeal or an application for Review. The applicant chose neither.

Overall therefore, and for the reasons given above, the Preliminary Objections are upheld with the result that the application – the Chamber Summons – is hereby dismissed with costs to the Plaintiff/Respondent and against the Defendants/Applicants.

DATED and delivered in Nairobi, this 30th Day of November, 2006.

……..

O.K. MUTUNGI

JUDGE.