



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civ Suit 1757 of 2004**

JEMIMAH NJERI NJOROGE 1ST APPLICANT

JOSEPH GIKARU MUIRURI 2ND APPLICANT

VERSUS

RUTH WANJIRU NJOROGE RESPONDENT

RULING

By a Chamber Summons dated 22nd December, 2005 the applicants herein filed an application seeking leave of Court to enlarge the time within which to object to a certificate of Taxation issued against them on the ground that the same was unprocedural. They later filed a Chamber Summons dated 11th January, 2006 under Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act praying, inter alia for.

- 1. Stay of execution**
- 2. Cancellation and setting aside of warrants of attachment issued against them**
- 3. A setting aside of the certificate of costs issued against them.**

The latter application is premised on the ground that there is no judgment in existence and there are no proceedings in the Court file to show how or that any costs were actually assessed.

On 28th February, 2005 the Respondents filed a Notice of Preliminary Objection bearing the same date, containing 5 grounds, to wit:

- 1. That the suit is incompetent as the same had been filed by the wrong Plaintiff**
- 2. That the proceedings are wrongly instituted as a Miscellaneous Application without distinguishing whether the suit is a Miscellaneous Civil Application or a Miscellaneous Criminal Application.**
- 3. That the application for leave, not having been brought under the substantive suit, H.C.C.C No.330 of 2004 is misconceived and on abuse of the process of court**
- 4. That the application had been served outside the hours statutorily allowed for service.**
- 5. That the Procedure adopted in bringing the application is premature as the main suit HCCC No.330 of 2004 has not been heard, and determined or any losses and costs awarded and taxed or**

final decree issued.

The above Preliminary Objection which appears to have been filed in relation to an earlier application by the Applicants dated 8th December, 2005, but later withdrawn was nonetheless argued by the Respondents on 8th February, 2006 without addressing any of the above five grounds specifically. Counsel for the Respondents Mr. Gitau submitted only that the provisions of the Advocates Remuneration Rules and the Civil Procedure Rules cannot be invoked at the same time and that the application for stay of execution was misplaced since costs cannot be stayed pending the hearing of an appeal and that the court lacked jurisdiction to grant such a stay in the absence of a determination under Rule 11 of the Advocates Remuneration Rules. Two authorities were cited to support the objection with counsel for the Respondents finally submitting that he had no objection to the Chamber Summons of 22nd December, 2005 proceeding to hearing as he was ready to oppose the same.

In reply to the Preliminary Objection counsel for the Applicant Mr. Machio' made submissions which amounted to arguments in support of the Respondents' two applications. She even went ahead to urge the court to invoke the Civil Procedure Rules, to stay execution so that the intended reference is not rendered nugatory and also to set aside the warrants of attachment and certificate of costs ...

“As there is no judgment or decree in issue.”

In reply Mr. Gitau submitted that

“The issue before the court is whether the application dated 11th January is competent and whether the reliefs sought are available in the absence of a reference. There is an application for enlargement of time and we submit that that is what should have been heard. I leave the matter to the court and pray that it finds that the application should be struck off.”

Clearly from the above submissions by both counsel and considering the authorities submitted, which I have studied, no Preliminary Objection in the legal sense was presented before this court or argued. The Grounds stated in the Notice of Preliminary Objection dated 28th February, 2005 do not in my view not raise pure points of law and include matters which are otherwise the subject of inquiry contrary to the requirements as to what constitutes a Preliminary Objection as set out in the celebrated case of **MUSKISA BISCUIT MANUFACTURING CO. LTD –vs- WEST END DISTRIBUTORS 1969 E.A 696**. My discretion is also sought by both sides at this stage which ought not to be the case.

For reasons stated hereinabove I have no option but to find that the Respondent's Preliminary Objection fails as the same was nothing but a waste of the court's time. The Preliminary Objection is overruled. The circumstances of this case dictate that costs of the Preliminary Objection be awarded to the applicants.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of November, 2006

M. MUGO

JUDGE

Ruling delivered in the presence of

Ms Machio for Applicant

Mr. Gitau for Respondent

M. MUGO

JUDGE