



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

COMMERCIAL DIVISION – MILIMANI

MISC. APPL. NO. 86 OF 2005

PETER MWEMA KAHORO :::::::::::::::::::::1st APPLICANT

**SAMUEL KUNGU (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF JOSEPH KAHORO-DECEASED)::::::::::::::::::::2ND APPLICANT**

VERSUS

BENSON MAINA GITHETHUKI: :::::::::::::::::::: :RESPONDENT

RULING

On 4th February, 2005, the Applicants filed a Misc. Application in which this Chamber Summons was filed under Section 7(1) of the Arbitration Act of 1985 Rules 2 and 11 of the Arbitration Rules of 1997 Order XXXIX Rule 1(a) and 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. In the Application the Applicants mainly seek a temporary injunction restraining the respondent from selling, transferring alienating, charging, wasting, damaging or howsoever disposing of L.R. No.2787/967/Nanyuki pending the hearing and determination of this Application and referral hearing and determination of the dispute between the parties to arbitration. The Application is supported by an affidavit sworn by Peter Mwema Kahoro one of the Applicants.

The Application was filed under a Certificate of urgency and when it went before Hon. Kasango J. the Learned Judge certified it as urgent and granted interim orders in terms of prayer 3 of the Application.

On 3rd March 2005 M/S Mwangi Kariuki & Company Advocates filed Grounds of Opposition/Notice of Preliminary Objection.

When the application came up for hearing inter parties before me on 11th March 2005, Counsel for the Respondent applied to raise a Preliminary Objection as per the grounds set out in the document filed on 3rd March 2005. Counsel for the Applicants did not object to arguments on the Preliminary Objection being made first before hearing the Applicants' application aforesaid.

Mr. Kariuki Learned Counsel for the Respondent submitted that the Applicants' claim is statute

barred by the Limitation of Actions Act and is also procedurally defective as it offends the provisions of Order L. Rule 15 of the Civil Procedure Rules. For this latter proposition Counsel relied on a decision of Hon. Justice K.H. Rawal in **ROSE ATIENO –V- CITY COUNSEL OF NAIROBI: NAIROBI H.C.C. NO. 1848 OF 2000 (UR).**

Counsel further submitted that the Applicants should have come to Court by way of a suit and not by way of application as they have done. In Counsel's view an order of injunction cannot issue in the absence of a suit. Counsel for the Respondent therefore urged me to strike out the application for being incompetent.

Mr. Mureithi Learned Counsel for the Applicants opposed the Preliminary Objection and submitted that the question of Limitation cannot be determined without looking at the evidence. Counsel further argued that none compliance with order L Rule 15 of the Civil Procedure rules is not fatal as there was no question of service of the Application and the Respondent had sent a representative to oppose the application.

The above are the rival submissions made by the Counsels appearing. I have carefully considered the submissions. I have also carefully perused the application. Having done so I take the following view of the matter. The issue of Limitation cannot be determined at this preliminary stage because there are facts that are disputed and that will require to be ascertained from evidence at the trial if one will be held.

The complaint raised against failure to endorse the application with the warning of the consequences of failure to attend at the hearing of the Application as stipulated in Order L Rule 15 (2) of the Civil Procedure Rules, in my view has not been well taken. The purpose of the warning at the footnote of the Application was achieved when the Respondent on being served sent his Counsel. I find and hold that despite the apparent mandatory language of the sub rule none compliance is not fatal especially where the party intended to be warned attends by himself or by Counsel.

The only objection which has caused me anxiety is the one directed at the manner in which the Applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:-

“19. Every suit shall be instituted in such manner as may be prescribed by rules.”

And Order IV Rule 1 of the Civil Procedure Rules reads:

“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed.”

The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under the Advocates Act.

In the light of the above, I am not persuaded that the Applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the Application dated 2nd February, 2005 and filed on 4th February, 2005 is incompetent and is struck out with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2005.

F. AZANGALALA

JUDGE

Read in the presence of: