REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 137 OF 1993

NATIONAL BANK (K) LIMITED.....PLAINTIFF

-VERSUS

JOSEPHKIBET CHEROP.....DEFENDANT

RULING

This is a preliminary objection to an application dated 15th April 2005. The application is by way of Chamber Summons said to have been brought under Order 9A rule 10, Order 21 rule 6, 7(2) and 35 of the Civil Procedure Rules as well as section 3 and 3A of the Civil Procedure Act (Cap.21). It seeks for orders that –

1. The defendant be released from detention in civil jail pending the hearing of the application interpartes.

2. There be temporary stay of execution of the court's decree and consequential orders pending the hearing of the application interpartes.

3. The court's judgement, decree, and consequential orders be set aside.

4. The defendant be allowed to enter appearance and lodge statement of defence in terms of the draft statement of defence annexed hereto.

5. The costs of this application fall in the cause.

When the application came up for hearing on 18th May 2005 Mr. Fundi for the respondent raised preliminary objections. He submitted that there is already a judgement on record. That judgement is not an exparte judgement. The provisions of Order 9A of the Civil Procedure Rules do not apply. There was a memorandum of appearance filed and the advocate for the defendant filed a notice of appointment to validate the appearance that was filed by the applicant in person. He submitted that the application should have been brought under Order 9B of the Civil Procedure Rules. There were specific provisions in the law for the application. Therefore the provisions of section 3A of the Civil Procedure Act (Cap.21) did not apply. He sought to rely on the case of **Kipkosgei Arap Kanus –vs- Nganymet Cooperative Society, Eldoret HCCC. 287 of 2000 (unreported).**

He also submitted that on the 12th May 2005 this court made a ruling on the matter. This court refused to grant orders for release of the applicant. That ruling had not been appealed against and no application for review of the same had been made. That ruling decided on the release of the applicant from civil jail. The

present application also sought for the release of the applicant. It was an abuse of the court process. In terms of section 7 of the Civil Procedure Act (Cap.21), the prayers sought were res judicata. He sought to rely on the same case of of **Kipkosgei Arap Kanus –vs- Nganymet Cooperative Society, Eldoret HCCC. 287 of 2000**. He submitted that the application should be struck out.

He further submitted that execution had already commenced and therefore there was nothing to stay. The applicant had already served two months in jail. He asked the court to invoke the provisions of section 27 of the Civil Procedure Act (Cap.21) to order the advocate for the applicant to personally pay costs of the application.

Mr. Ng'eno for the applicant submitted that the request for judgement in the suit was made under Order 9A rule 3 of the Civil Procedure Rules. It was not made under Order 9B. In that request for judgement under Order 9A rule 3 Civil Procedure Rules, the plaintiff was admitting that the defendant did not enter appearance. The record in the court file showed that on 30th June 1994 the Deputy Registrar certified that the defendant did not enter appearance or file a defence. That was the true position. The defendant was not served and therefore could not enter appearance.

He submitted further that, in this application Order 9B of the Civil Procedure Rules would be the wrong order to apply. In case the procedure adopted in this application under Order 9A rule 10 Civil Procedure Rules was a wrong procedure, then even the judgement obtained by the respondent was incompetent. Therefore that objection should fail.

He also submitted that the prayers sought were not res judicata. The applicant had asked for interim orders, but Justice Gacheche declined to grant the same. The applicant was now seeking prayers 3, 4 and 5 of the application. The previous application was not successful because the court was not satisfied that the applicant was seriously ill. The fact that the applicant was still asking for release did not imply the application the principles of res judicata. The reasons for the current request for release of the applicant from civil jail were different. The applicant was now coming to court for setting aside of the judgement of the court.

He submitted further that it was not true that the applicant admitted entering appearance. He had in fact denied the same. His counsel filed notice of appointment, but that did not amount to validating the appearance of the applicant. The filing of notice of appointment by counsel for the applicant was done in accordance with Order 3 of the Civil Procedure Rules. In his view, the preliminary objection was not based on points of law. On the request by counsel for the respondent that the court should invoke section 27 of the Civil Procedure Act, he submitted that that section had a provisal. An advocate should not be penalized to pay costs as he was not a party. Costs should ordinarily be paid by parties and not by counsel.

I have considered the arguments of both counsel in the preliminary objection. I have also perused documents filed in the application and the record of the case file. These are the preliminary objections raised by Mr. Fundi to the application dated 15th April 2005. The first objection of Mr. Fundi is that the application is defective. It should have been brought under Order 9B of the Civil Procedure Rules. The reason for his argument was that the judgement entered was not an exparte judgement as appearance had been filed by the applicant in person, which was later validated by his counsel when he filed a notice of appointment of advocate. Mr. Ng'eno on the other hand argued that this application was brought under the correct Order, that was Order 9A rule 10 of the Civil Procedure Rules, as the judgement was entered exparte.

I have perused the record and documents in the file. I find that a plaint was filed on 23rd August 1993. I also see a memorandum of appearance filed by the applicant (who was the defendant), Joseph Kibet Cherop on 28th October 1993. He entered appearance in person. Then a request for judgement was filed on 29th November 1993 by the plaintiff's advocate under Order 9A rule 3 of the Civil Procedure Rules. That request for judgement was based on the ground that the defendant had failed to file defence within time as prescribed. Then a decree was issued by the court on 17th March 1995.

It was specifically acknowledged in the decree that the defendant had entered appearance but had failed to file a defence within the time prescribed. It is my finding from the foregoing that the defendant did in fact enter appearance. The request for judgement cited Order 9A rule 3, instead of rule 9. It should have been made under Order 9A rule 9 which provides for request of judgement where the defendant has defaulted in filing a defence. Be that as it may, the application for judgement was exparte, and judgement was given exparte. There is no evidence that the request for judgement was to be served on the defendant. It does not indicate that it was to be served. There is no evidence that it was served. The judgement was obtained in his absence. The request for judgement as well as the default judgement were therefore exparte. (See **Jesse Kimani –vs- McConnel and Another [1966]EA 134)**.

Mr. Fundi argues that this application should have been brought under Order 9B of the Civil Procedure Rules. I do not agree with him. The judgement entered was a judgement in default of filing defence. Order 9A rule 9 covers situations where judgement can be obtained in default of filing defence. Order 9A covers both judgements in default of entering appearance as well as judgements in default of filing defence. Rule 10 of Order 9A provides for setting aside or varying judgements entered under that Order. The said rule 10 provides -

> **10. Where judgment has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.**

I therefore find that this application has been properly brought under Order 9A rule 10 of the Civil Procedure Rules. The rule is applicable in situations where judgement has been entered in default of appearance as well as judgments entered in default of filing defence. With due respect therefore, the case of **Kipkosgei Arap Kanus –vs- Nganymet Cooperative Society, Eldoret HCCC. 287 of 2000 (unreported**), is not relevant on this objection.

On whether the ruling of this court of 4th May 2005 made the issue of release of the applicant res judicata, I disagree with Mr. Fundi. My ruling of 4th May 2005 was on an application for release of the applicant on medical grounds. The main prayer in the current application is for setting aside the judgement, decree and consequential orders of the court. The law on res judicata in civil cases is set out in section 7 of the Civil Procedure Act (Cap.21). That section provides –

> **7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

In my ruling of 4th May 2005, I declined to release the applicant from civil jail on health grounds. If such a similar application with same issues came before me again I would not hear it. It would have been res judicata. However, this application is for setting aside of the judgement, decree and consequential orders. The issues herein are different, though the consequences might be the same, that is the release of the applicant, As the issues in this application are different from the issues in the previous application, res judicata as provided for under section 7 of the Civil Procedure Act (Cap.21) does not apply to this application.

Mr. Fundi has urged me to invoke the provisions of section 27 of the Civil Procedure Act (Cap.21) and order counsel for the applicant to pay the costs of the application. I find no basis for doing so. That section gives this court wide discretion in awarding costs, or declining to award costs. However, costs, if awarded, are ordinarily paid by parties to the action. I find no compelling reasons to justify an order for counsel for the applicant to pay costs. In any event I have already held that the objections raised are not tenable.

For the above reasons, I find no merits in the preliminary objections. I dismiss the preliminary objections and order that the application dated 15th April 2005 will proceed to hearing and will be determined on its merits. The costs will be in the cause.

Dated and delivered at Eldoret this 22nd Day of June 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Ngeno for the defendant/applicant

N/A for the plaintiff/respondent