



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 534 of 2004

DEVJI MEGHJI & BROTHERS LTD.PLAINTIFF

VERSUS

PROSPECTUS THIKA LIMITED.....1ST DEFENDANT

DR. PETER KIBUNA GITAU.....2ND DEFENDANT

DR. MWANGI M. GITONGA.....3RD DEFENDANT

R U L I N G

The 3rd Defendant filed a Chamber Summons dated 17th June 2005, seeking the dismissal of the suit for want of prosecution.

When the application came up for hearing, the advocate for the Plaintiff raised a Preliminary Objection. This Ruling relates to that Preliminary Objection.

The gist of the objection is that the application had been brought under the wrong rules. It was therefore said to be incompetent to form the basis of an application to dismiss the suit.

As far as the Plaintiff is concerned, the application should have been brought by way of Notice of Motion, as opposed to a Chamber Summons. Mr. Khan, advocate for the Plaintiff, submitted that the alleged defect went to the root of the matter, and that therefore there was no competent application before the court. He emphasized that the rules of the court were not made in vain.

He cited the case of **SALUME NAMUKASA V. BUKYA [1966] E.A. 433** as authority for the proposition that an application which did not comply with the rules ought to be struck out.

He then cited **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD [1969] E.A. 696**, as authority for the proposition that an application for the dismissal of a suit for want of prosecution should be made by way of motion.

Finally, Mr. Khan cited **LOTAY V STARLIT INSURANCE BROKERS LTD [2003] 2 E.A. 550**, to justify his submission that if the applicant moved the court through a wrong procedure, his application must fail.

When called upon to respond, Mr. Njuguna, advocate for the 3rd Defendant submitted that the

application was proper and competent. He pointed out that under Order 50 rule 12 of the Civil Procedure Rules, an application cannot be dismissed only for want of form or for other irregularities.

Secondly, it was submitted that the Plaintiff had failed to demonstrate any prejudice which it could suffer, if the application was heard on merits. The 3rd Defendant said that the Plaintiff had already filed and served a Replying Affidavit, and therefore there was no reason why it should stand in the way of the substantive application. He contends that it would be in the interests of justice to hear the substance of the application, rather than dismissing it on a technicality.

The other point taken by the Respondent was that the **SALUME NAMUKASA** case (supra) was a Ugandan decision, which was therefore irrelevant to the Kenyan situation. Mr. Njuguna submitted that this court should be guided by the Civil Procedure Act only, as the Civil Procedure Ordinance of Uganda was not applicable in Kenya.

In my considered view, the views expressed by Mr. Njuguna, regarding the case of **SALUME NAMUKASA V. BUKYA** (supra) is somewhat disturbing. I say so because, as I understand the law, when a party cites an authority from outside the jurisdiction of the courts in Kenya, he cannot be accused of seeking to import the statutes applicable to that case, into Kenya. Similarly, even though the statutes of one country are not applicable to another country, that alone is not reason enough to conclude that caselaw from that other country was irrelevant.

First, I consider it to be an obvious statement of fact that the laws in Uganda are only applicable to that country; and not to Kenya. The converse is equally true. However, the laws of the two countries are similar in numerous aspects. Indeed, it is because of that fact that the three countries of East Africa, Uganda, Tanzania and Kenya, at one time had a common Court of Appeal. Secondly, the history of the law in both countries is common, in the sense that it was derived largely from the English common law.

Therefore, it is my considered view that one could only term a Ugandan authority as irrelevant if he could illustrate either that the law applied therein was at variance with the law in Kenya, or alternatively if the decision was on an issue that was not in issue in the Kenyan case. In other words, the person who alleges that the authority was irrelevant needs to demonstrate the fact.

In my reading of the case of **SALUME NAMUKASA V. BUKYA** (supra) it dealt with a situation in which an application had been brought for setting aside an *ex parte* judgement. The said application was brought by way of a Chamber Summons. However, the Respondent thereto raised a preliminary objection to the application, contending that it ought to have been brought by way of a Notice of Motion.

After the respondent, in that case, conceded that the application was defective for non-compliance with the rules, he argued that by virtue of Section 101 of the Civil Procedure Ordinance, and Order 47 rule 6, the application was properly before the court, for the purposes of meeting the ends of justice.

When dealing with that matter, Sir Udo Udoma C.J. cited the provisions of the Ugandan Order 48 rule 1, which reads as follows:-

“1. All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court. “

A comparison between the provisions of the Uganda Order 48 rule 1, reveals that it is, word for word, similar to the provisions of Order 50 rule 1. That fact re-emphasizes the point I made earlier, that it is wrong for anyone to dismiss decisions made in Uganda as being irrelevant simply because of that fact alone.

In this case, the application has been brought under Order 10 rule 20 and Order 16 rule 5(A) (sic!).

Order 10 rule 20 reads as follows:-

“where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly.”

By virtue of the provisions of Order 10 rule 23, the only applications under Order 10 which could be made by way of summons in chambers were those made under rules 2 and 11. Therefore, there is no express provision as to how an application made pursuant to Order 10 rule 20 should be brought. That would therefore bring into play the provisions of Order 50 rule 1 of the Civil Procedure Rules. In other words, an application under Order 10 rule 20 should be brought by way of motion.

Secondly, under Order 16 rule 5, there is no provision for the procedure to be utilized in bringing an application for the dismissal of a suit for want of prosecution. Therefore, by virtue of Order 50 rule 1, an application under Order 16 rule 5, should also have been brought by way of motion.

However, the application by the 3rd Defendant has been brought by way of Chamber Summons. The question that arises is as to whether the application can be salvaged, by reference to Order 50 rule 12, or if the said application is irretrievably defective.

In the celebrated case of **MUKISA BISCUITS MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD**, the Court of Appeal held that:-

“the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a “preliminary objection”, which it is not.”

Thus, on a matter of detail, that case was, to some extent, distinguishable to the case now before me. The distinction lies in the fact that in that case the respondent had put forward a preliminary objection as a mode of having the suit dismissed for want of prosecution, whilst in this case, the objection was with regard to the fact that the application was made by summons instead of by motion.

But the bottomline is common to both cases; and that is the acknowledgement that an application for the dismissal of a suit for want of prosecution should be made by way of motion. Therefore, there is no doubt that the procedure utilized by the Applicant is defective.

The next question is as to whether or not the said defect was or was not curable by virtue of the provisions of Order 50 rule 12 of the Civil Procedure Rules. That rule provides as follows:-

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

In this matter, the applicant has stated the Orders and Rules under which he has made the application. The Plaintiff has not faulted the application for a failure to state the provisions under which it had been brought. The objection was simply against the use of a Chamber Summons, instead of a Notice of Motion.

In the **NAMUKASA V. BUKYA** case (supra), Sir Udo Udoma held as follows:-

“In my view the defect is a serious one. It goes to the very root of the application, and as far as this court is concerned, there is no competent application before it.

It was submitted by counsel for the applicant that despite this defect in that the application was not properly before the court, the court should invoke its inherent powers under Section 101 of the Civil Procedure Ordinance and treat the application as properly before it for the purpose of meeting the ends of justice.”

In a manner of speaking, the latter part of that citation was similar to the submissions made by the Applicant herein. He urged me to allow the application to proceed to hearing as it would not prejudice the Respondent. Having considered that point, Sir Udo Udoma C.J, expressed himself thus:-

“It was difficult to appreciate the point of this submission, having regard to the provisions of Section 101 of the Civil Procedure Ordinance. It seems to me that before the provisions of this section of the Ordinance can be invoked the matter or the proceedings concerned must have been brought before the court, the proper way in terms of the procedure prescribed by the Rules of this Court. In the present case the application has not been brought before this court in the manner prescribed by law.”

In my considered view, those words of the learned Chief Justice still hold true today.

The applicant is asking the court to dismiss the suit because the Plaintiff has failed to comply with some rules of the court. But his application also does not comply with the rules of the court. In the circumstances, I think that it would be unfair to excuse one party who flouts the rules of court, and allow him to challenge the other party for not complying with other rules.

Furthermore, I consider that the dismissal of the suit is a serious matter. Therefore, it would be prudent to insist that he who seeks the court’s discretion to exercise its jurisdiction in that regard should be required to strictly comply with the rules.

In the circumstances, as the applicant has utilized a defective procedure I hold that justice demands that the application be struck out. I therefore strike out the application dated 17.6.05, with costs to the Plaintiff.

Dated and Delivered at Nairobi this 17th day of October 2005.

FRED A. OCHIENG

JUDGE