



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION 995 OF 2003

JOEL K YEGON & 4 OTHERS APPLICANTS

VERSUS

JOHN ROTICH & 4 OTHERS RESPONDENTS

RULING

The application dated 19th February 2004 seeks a stay of execution of the orders of the taking master made on 24th January 2003. The application further seeks the enlargement of time within which to file objection to the taking officers decision, the letter having been filed a day beyond the 14 days prescribed under Rule 11(1) and (2) of the Advocates Remuneration Order. Application is expressed to be brought under Rule 11 (4) and S 48 of the Advocates Act. The application is supported by an affidavit of one Sonoiya Serser sworn on 19th February 2004.

In opposition the respondents have filed a Notice of Preliminary Objection dated 27th February 2004 in which they have contended:-

- (a) That the jurisdiction of this court has not been properly invoked**
- (b) That the application does not lie in law**
- (c) That no grounds have been disclosed for exercise of court's discretion**
- (d) That the application is an abuse of the court process. The submissions made by the counsels just highlight the points raised.**

The applicant's claim is that there is no specific order for costs whereas the applicants claim that there was a consent order upon which the objected, cited bill is based. This is obviously an important point which should be heard on merit. However S 48 of the Advocates Act is not applicable because it only provides the procedure for recovery of advocates costs. The applicants have not served the 3 days written notice required under Rule 11 (4) of the Advocates Remuneration Order nor have they applied to the court to dispense with it because the court does appear to have a discretion.

The delay in complying with Rules 11(1) and (2) has not been explained properly and it is not clear to the court why the firm them on record had not obtained instructions. The bill objected to has not even been exhibited. While our procedural law does not permit the court to deny relief to a party for not citing the law or the provisions under which an application is brought where a party quotes the wrong provisions and does not apply to amend such applications are incompetent and ought to be struck out. I agree with

the learned counsel for the respondent Mr Arusei that failure to demonstrate that the application has been properly brought under Rule 11 (4) and S 48 of the Advocates Act is fatal. In this regard I agree with the decision of **Bosire J as he then was in JOHN KARURI & OTHERS v P INVESTMENT PRIVATE LTD HCCC 1575 OF 1991** where he held:-

“Order L Rule 12 above, to my mind deals with omissions to state statutory provision under which or by virtue of which an application is brought. However to my mind it does not cover situation where a wrong or incorrect provision of the law is stated. When such is the case a party has the liberty to seek the leave of the court to amend the application in that regard.”

A statutory provision cited invokes the jurisdiction of the court. If the jurisdiction of the court is not properly invoked an application becomes incompetent. This is not the sort of matter the inherent powers of the court can be invoked.

It is also important to mention that the application seeks stay yet the court has not been shown how this is being invoked. Granted that the court has jurisdiction under Rule 11 to grant the extensions, the required written notice has not been given. Rules of procedure are aimed at safeguarding the rules of natural justice and equality of hearing.

The discretion of the court cannot be sought where wrong provisions have been invoked and important steps not taken. The applicant has had a litany of mistakes which militate the exercise of court's discretion even if it would have ordinarily been available.

For the above reasons the application is struck out with costs to the respondent.

DATED and delivered this 19th day of March, 2004.

J G NYAMU

JUDGE

Editorial Note
Civil Procedure

- Invoking wrong provisions is a fatal defect
- Rules of procedure aimed at ensuring that rules of natural justice are attained
- Litany of mistakes militates against exercise of courts discretion.