REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 154 OF 2002

KHAMIS AHMED KHALIF …… PLAINTIFF

- Versus -

EZEKIEL KOTHI KALELI

(Suing thro' MARIAM EZEKIEL KITHO) …….. DEFENDANT

R U L I N G

By a chamber summons dated the 24th May 2004 the plaintiffs seeks to amend an earlier application seeking stay of execution until his appeal to the Court of Appeal is heard and determined. Before the application to amend was heard counsel for the defendants raised a preliminary objection not on the competence of the application to amend but on the intended application for stay of execution a copy of which was annexed to the affidavit in support of the amendment application. Counsel argued that the intended application for stay is stated as being brought by way of chamber summons. It is supposed to be brought by Notice of Motion. He further submitted that the application is brought under Order 41 Rule 4 as well as Order 21 Rule 22(1) of the Civil Procedure Rules. The latter provision he said has no application. In support of the first point he cited the Ugandan cases of **Salume Namukasa Vs Yozefu Bukya [1966] E.A. 433 and George Kizoya Vs Attorney General of Uganda [1966] E.A. 463.**

In the first case the application was supposed to be brought by Notice of Motion but it was brought by Chamber Summons. In the second case it was a reverse situation. In both cases the Ugandan High Court (Sir Udo Udoma CJ) held that the applications were improperly before the court and struck them out. Counsel for the plaintiff applicant quoting decisions of the High Court of Kenya in **Microsoft Corporation Vs Mitsumi Computer Garage Ltd. & Another HCCC No. 810 of 2001 and National Industrial Credit Bank Ltd. Vs Mutinda** urged me not to follow the Ugandan cases.

As it has been stated repeatedly rules of procedure are undermaids of justice. Slavish adherence to the rules which are directory and not mandatory should not be advocated. Sir Charles Newbold had this to say about rules of procedure in **Mawji Vs Arusha General Store [1970] E.A. at page 138.**

"We have repeatedly said that rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before court in such way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiation of proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with – indeed, they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties".

In that case an application had been brought under a wrong provision of law. Citing a wrong provision of law in an application is not a ground for dismissing it – **Gitau Vs Muriuki [1986] KLR 211.**

As regards the wrong mode of application my position is that an application required under the rules to be brought by way of chamber summons but is instead brought by notice of motion is not fatally defective. Order 50 Rule 11 of the Civil Procedure Rules states that:-

"Where an application which is authorized to be made in court is made in chambers, the judge may either adjourn the application into court or hear it in chambers".

It is common knowledge that Notices of Motion are supposed to be heard in court and chambers summons in chambers. After quoting the provisions of Order 50 Rules 10 and 11 of the Civil Procedure Rules in **Johnson J. Kinyanjui & Another Vs Rachael W. Thande & Another Civil Appeal No. 284 of 1997 (E.A.) the Court of Appeal stated:-"It can be seen that no application is to be defeated by use of wrong procedural mode and a judge has a discretion to hear it either in court or in chambers".**

Following this Court of Appeal decision in Microsoft Corporation Vs **Mitsumi Computer Garage Ltd. [2001] 1 E.A. 127** Ringera J (as he then was) stated at page 132 that:- **"I am of the firm view that it is in the overall interests of justice that procedural lapses should not be invoked to defeat applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party".**

In that case the court was also dealing with an application brought by chamber summons instead of notice of motion. It overruled a preliminary objection raised on the mode of procedure followed. I entirely concur with the holding in that case and decline to follow the above mentioned Ugandan cases. The complaint in this matter does not go to jurisdiction and no prejudice will be caused to the Respondent if the application for stay of execution is brought by chamber summons instead of motion on notice. I suppose, in the light of this ruling, the Applicant will, if leave to amend is granted, bring the application by way of motion on notice. In any case this preliminary objection does not relate to the application for amendment which is before the court for hearing but to the proposed application for stay of execution.

For these reasons I overrule the preliminary objection raised by counsel for the defendants and order that the application for leave to amend should be fixed for hearing.

Costs in cause.

DATED this 11th day of June 2004.

D.K. Maraga

Ag. JUDGE