



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO.130 OF 2002

EZEKIEL MURIITHI NEPHAT.....PLAINTIFF

V E R S U S

KENYA BUS SERVICES LTD & ANOTHER.....DEFENDANT

RULING

This is a rather unusual matter. It is a matter involving Sections 10 and 15 of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405, which are invoked to enforce a Discharge Voucher executed on a settlement of a claim in a running down matter. The Discharge Voucher was executed on 3rd December, 2001 and returned to the Insurance company but the Insurance Company has not paid the money.

So the Applicant came to Court on 8th February 2002 and took out an Application intituled “ORIGINATING NOTICE OF MOTION”. Now that is a procedure that is not expressly provided for in the Civil Procedure Act and Rules and I therefore sought the basis for reliance on such procedure from the Applicant’s Learned Counsel Mr. Opande.

Mr. Opande cited Misc. Application No.104 of 1996 which was a Constitutional matter taken out by one Raila Odinga as a Political detainee seeking to enforce his Constitutional rights under Section 84 of the Constitution. It was filed as a Originating Motion but a Preliminary Objection was raised on the ground that it was incompetent as it was not commenced by plaint, and that the procedure was unknown. Rejecting the objection Madan Ag.CJ (as he then was) stated:

“In my opinion the procedure to commence an action by Originating Motion is known, it is recognized and it is additio nal to commencement of an action by a plaint”.

He cited a Privy Council decision in Olive Casey Juandoo v. Attorney General of Guyana (1971) P.C. 972 in support of that opinion.

It is an opinion that must be accorded the greatest respect, but I doubt whether it is binding on me as it is not a decision of the Court of Appeal. The circumstances surrounding that opinion were also special and must be distinguished.

At the time the application was filed, there was provision under the Constitution of Kenya in Section 84(6), and still is, that *“the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it for enforcement of fundamental rights and freedoms of the individ ual.”* No Chief Justice had however, for some inexplicable reasons, made any rules of procedure since the enactment of that provision! Not until 21st September, 2001 when

in Legal Notice No.133/01 the current Chief Justice made such rules. Despite such lacuna however, and apart from a few cases where applicants were prejudiced in seeking to enforce their constitutional rights, the courts were liberal about such matters and accepted any application made or suit filed under Section 84 of the Constitution by whatever procedure acceptable. Which is why I am not surprised that Madan Ag C.J. readily overruled the objections made by the state.

The matter before me however is no Constitutional matter. It is a Civil case which ought to be prosecuted under the Rules laid out under the Civil Procedure Act and the Rules made thereunder by the Rules Committee set up under Section 81 of the Act.

Under that Act and Rules:

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

“Suit” itself under the definition Section (S.2) means “all Civil proceedings commenced in any manner prescribed”. By “prescribed” I understand it to mean prescribed under the Rules or the Act being invoked to underpin the suit.

Mr. Opande concedes that there is nowhere in the Civil Procedure Act and Rules where the procedure by way of “Originating Notice of Motion” is laid out. There is only a fleeting mention of it in Order 5 rule 21(A)(1)(a) in relation to Service of Process out of the jurisdiction of Kenya. There is provision for matters that may be commenced by way of “Originating Summons” under Order 36 and there is provision for interlocutory matters by way of “Motions and other Applications” under Order 50. Was it by design or accident that the Rules Committee omitted specific provisions relating to “Originating Motions”?

It is unlikely that the Rules Committee was not aware of the position existing in England where in the Chancery Division the procedure is expressly provided for and detailed (see The Annual Practice – The White Book) The Practice is:-

“Where a statute provides for an application to the court without specifying the form in which it is to be made and the Rules do not expressly provide for any special procedure, such application may usually be made by Originating Motion”.

It is not a provision that can simply be imported into our Procedural Rules by implication and I think if the Rules Committee wanted it to apply in Kenya there was nothing simpler than providing for it. In my view the omission was by design.

At all events, the Act invoked in this matter (Cap 405) in sections 10 and 15 makes no provision for an application to be made under those sections. That would appear to be the first requirement before the option of an Originating Motion is taken. Section 18 of the Act provides:-

“The Minister may make rules prescribing anything required by this Act to be prescribed and generally for the better carrying out of the provisions of this Act”.

Some six rules have been made under that section but none of them relates to the procedure of instituting actions in court.

The Cause of action disclosed in the application filed here appears to be in contract. The procedure for pursuing such causes of action is not difficult to find and I would in the circumstances be slow to import and sanction a procedure that the Rules Committee has as I have found , omitted by design.

In the result I strike out the application as incompetent. No order as to costs.

Perhaps a copy of this Ruling may be served on the Rules Committee for their perusal.

Dated at Nairobi this 28th day of February, 2002.

P.N. WAKI

JUDGE