REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 109 OF 1991

PARBAT & COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYATTA UNIVERSITY.....DEFENDANT

RULING

This ruling relates to a preliminary objection raised by counsel for the plaintiff Mr Gikandi to a Chamber Summons dated 28.4.2000 taken out by the defendants through their counsel M/S Lawrence Mungai & Co advocates.

That Chamber Summons seeks two substantive orders:-

"(1) That there be stay of execution of the court orders of 29.5.95 and 29.6.95 pending a determination by the Court of the defendant's indebtedness to the plaintiff in terms of the said court orders.

(2) That the Court do determine the indebtedness, if any, of the defendant to the plaintiff pursuant to the court orders of 29.5.95 and 29.6.95. aforesaid."

The four grounds raised in the preliminary objection for determination are:

"1. That applications under section 3A of the Civil Procedure Act and order XXI rule 18 must be filed under a Notice of Motion and not under Chamber Summons.

2. That the decree herein has not been sent from another Court to this Court for the purposes of execution proceedings and consequently order XXI rule 22 is completely inapplicable to this matter.

3. That the issuance of warrants herein was a matter that was dealt with by the Registrar/Deputy Registrar of this Court under the special powers within the exercise of judicial power by the Registrar/Deputy Registrar and in law, any party aggrieved by such an exercise of power can only apply for a review before the same Registrar/Deputy Registrar under order XLIV Civil Procedure rules 5 (5) and therefore the matter is now wrongly before the judge as an ordinary Chamber Summons application.

4. That the honourable judge hearing the matter as an ordinary suit filed herein has therefore no jurisdiction whatsoever to revisit, review, vary, set aside or interfere with the orders made by the Deputy Registrar in any manner and therefore the application should be struck out as being improperly before the Court."

Although the raising of preliminary points of law is allowed, it is one that is circumscribed and should be in the nature of what used to be a demurrer. In the words of the Court of Appeal in *Mukisa Biscuit Company vs Westend Distributors Ltd* [1969] EA 696.

"It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issue. This improper practice should stop."

Do the objections raised comply with those standards?

The Chamber Summons was taken out under section 3A of the Civil Procedure Act and order 21 rules 18 and 22. It is only in applications under rule 22 that the Rules provide for a Chamber Summons to be filed.

The other provisions require a Notice of Motion. But such situation has previously been considered by the Court of Appeal when similar objection was made, amongst other cases in CA 284/97, *Johnson Kinyanjui & Anor vs Rachel Thande & Others (UR)*. It was stated:

"If an application is brought under different rules one calling for a Notice of Motion and another calling for a Chamber Summons application, then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of Notice of Motion the application does not become incompetent.... It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in Court or in chambers."

With respect this is not a serious issue as it is curable by amendment even if the wrong form of application was adopted. The Court also has the discretion to consider the substance of the application, the defect in form notwithstanding.

The second objection relates to the inapplicability of order 21 rule 22, the submission being that it only applies where a decree was issued by another Court; and that there is no provision for the Court which issued the decree to stay its own orders. No authority was cited by Mr Gikandi for such profound statement of law. Nor was any cited by Mr Mureithi for the equally profound statement that the rule applies because rule 25 is not applicable. I therefore have to resolve the issue on my own.

The two rules were imported word for word from the Indian Code of Civil Procedure 1908. Order 21 rule 22 of the Kenya Act corresponds with order 21 rule 26 of the Indian Code, while rule 25 corresponds with rule 29. Rule 22 is easier to understand in the Indian code because India is a federal State and has High Courts in different States which for one reason or another will execute decrees forwarded from other States. The same situation does not prevail in Kenya where there is only one High Court sitting in different parts of the country and not different High Courts. The rule would however apply in subordinate courts which have different jurisdictions. It may well be argued therefore that the rule does not apply to the High Court and one may therefore invoke it to obtain stay orders in decrees issued by the same Court.

Rule 25 on the other hand appears on the face of it to cater for a situation where a cross suit is pending against a decree holder in another suit and between the same parties, so that a stay of execution of the decree is granted to enable the judgment debtor and the decree holder to adjust their claims against each other and to prevent multiplicity of execution proceedings. Indeed this is the manner in which a Tanganyika magistrate in *(Iddi Halfan v Hamisa Binti Athumani* [1962] EA 761 understood it. But the Chief Justice on appeal held that it was a restrictive interpretation of the rule. He stated:

"the words of order XXI, rule 29, impose no condition regarding the nature of the pending suit, or the effect of a stay of proceedings granted under the Rules as regards adjustment of claims or prevention of multiplicity of execution proceedings. All that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed. And in the present case there was and is

such a pending suit, even though it is no cross pecuniary claim but is a suit to set aside the judgment in the earlier suit."

Can the proceedings taken out herein by the judgement debtor relating to the decree issued in the suit be considered as a "suit" for purposes of rule 25?

I think it can. Indeed section 34 of the Civil Procedure Act expressly requires that the proceedings be so treated. The section is under the rubric: "Questions to be determined by Court executing decree", and provides in *pari materia*:

"Section 34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding and may, if necessary, order payment of any additional court fees."

None of the advocates cited that section as relevant to the main application although it is the very provision that resolves it. Which brings me to the 3rd and 4th preliminary objections made.

In Mr Gikandi's view the execution process was being handled by the Deputy Registrar of this Court and therefore if any question arises therefrom the matter ought to go back to the Deputy Registrar to resolve it. That is because order 48 rule 5 (x) gives the Deputy Registrar special powers. The only way out is therefore to apply for review before the Deputy Registrar or to appeal under rule 5(2). The matter in his view goes to jurisdiction and not merely a question of accounts.

Mr Mureithi however submitted that the judgment debtor was not seeking to set aside the decree but asserting that they have satisfied the decree in full. They also say the decree is more than one year old and therefore only a notice to show cause can be issued. He further submitted that the Deputy Registrar under order 48 rule 3 can only make formal orders for execution of decree. All further proceedings are expressly reserved for a judge.

I think Mr Mureithi is right that the special powers of the Registrar on execution are limited to formal orders and not to contentious applications. Those are not only expressly reserved for a judge by order 48 but also expressly left to the "Court" under section 34 of the Act. Under the Act "Court" means "the High Court".

The upshot is that, subject to such minor amendments as may be made to reflect the provisions of the law under which the main application is made, I do not find it misconceived and I reject the preliminary objections raised. The judgment debtor shall have costs of the preliminary objection.

Dated and Delivered at Mombasa this 30th day of November 2000.

P.N.WAKI

JUDGE