



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 2560 OF 1988

**KENSING AND PARTNERS CONSULTING ENGINEERS LTD.....APPLICANT/ 3RD
DEFENDANT**

versus

**KENYA POLICE STAFF SAVINGS AND CREDIT CO-OPERATIVE LTD.....
RESPONDENT/PLAINTIFF**

RULLING

In the application by Chamber Summons dated 11TH September, 1998, the Applicant Kensing and Partners Consulting Engineers Limited makes a number of prayers; the main one being that:

"the judgment entered in this suit by the Honourable J M Khamoni on 11th day of November, 1997 in the absence and non-attendance of Counsel of the Defendant and the Defendant itself be hereby set-aside."

The Applicant was the third Defendant in the judgment complained of. From what has been brought to my attention during the hearing of this application, it appears the Applicant is also speaking on behalf of the other three Defendants.

Since it was agreed at the hearing of the application that preliminary objections raised by the Advocate for the Respondent be heard within the hearing of the application, i will first deal with the preliminary objections before i move to the substantive application.

The first preliminary objection relates to the fact that advocates, M/s. Khaminwa and Khaminwa, filed this Chamber Summons before filing notice of their appointment as advocates for the Applicant. I have considered that objection. It is my humble view that the irregularity in tiling this Chamber Summons before tiling the Notice of Change of Advocate is curable under Section 3 A of the Civil Procedure Act and was cured by the subsequent filing of that notice. The fact that M/s. Khaminwa and Khaminwa had some difficulties in knowing where the Court Case file was is an added reason for rejecting the preliminary objection as the Respondent is not being prejudiced in the hearing of the Applicant's application dated 11th September 1998.

I therefore rule that M/s. Khaminwa and Khaminwa have a locus standi to conduct the hearing of this application, the said application is competent and the interim orders obtained therein valid. Accordingly that preliminary objection is rejected.

The second preliminary objection relates to Order 50 Rule 3 as read with Rule 7 of the Civil Procedure Rules. Mr. Kowade has submitted for the Respondent that the Applicant's Chamber Summons dated 11th

September 1998 does not set out the grounds on which it is being made. He cited the Court of Appeal's decision in the case of National Bank of Kenya Limited -v- Ndungu Njau, Civil Appeal No.211 of 1996 at Nairobi. He said that Rule 3 is set out in terms similar to those in Rule 7 and that therefore this Chamber Summons was bad in law.

The Court of Appeal in the case of National Bank of Kenya Limited said.

"We are of the view that the Appellant's notice of motion did not comply with the mandatory requirements of Order L r 3 of the Civil Procedure Rules according to which every notice of motion must state in general terms the grounds of the application. It is not enough to say that the notice of motion is grounded on the grounds or evidence contained in

The afore said affidavils It is also not enough to say that the notice of motion is grounded on the grounds of opposition which had been filed in opposition of the said earlier application of the respondent.

On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought."

The court went on to say that the omission to so disclose the grounds was a fatal omission.

No other case was cited before me on that issue. But I have had fee opportunity of reading the case of Castelino -v- Rodrigues (1972) EA 223 where fee then Court of Appeal for East Africa said:

"As a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexure in fee document. On this principle, we do not think the notice of motion in the present case was in breach of the rules, especially having regard to the matters which, under 0.23 r 4, have to be included in the affidavit.

Even if we held that the notice of motion did not comply with the rules, we should have regarded the breach as a minor irregularity easily cured by amendment The respondent could not possibly have been prejudiced by the notice of motion, since he had before him all the grounds on which leave to defend was being sought. In these matters of procedural irregularities, it is the question of prejudice that is all important. If there is no possible prejudice, the wide power to allow amendment should normally be exercised."

In that case, an objection similar to the one before me now had been raised in that the notice of motion did not contain the grounds of the application. It had asked for unconditional leave to appeal and defend the suit:

"On the grounds stated in the annexed affidavit...".

The case of Castelino was not referred to in the case of National Bank of Kenya. The National Bank of Kenya case, like the Castelino case, was about a notice of motion. The application before me is a Chamber Summons. But as Mr. Kowade rightly pointed out, the wording of Rule 3 relating to notice of motion are similar to the wording of Rule 7 relating to Chamber Summons.

As I recently observed in this Court's Civil Case No. 1490 of 1997, El, Nasi Export and Import Limited -v- Tanjal Investments Limited, the decision of the Court in the case of Castelino, from the face value, conflicts with the decision of the court in the National Bank of Kenya case. Each was about a notice of motion. However, looking at the two cases more closely in light of Order 50 Rule 3 of the Civil Procedure Rules, what matters in, my view, is the type of the application in relation to the provisions of the Civil Procedure Rules under which the Notice of Motion in question or the Chamber Summons in question has been filed. Order 50 Rule 3 states:

"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

Rule 7 is in similar terms.

To me those wordings suggest the grounds of the notice of motion or Chamber Summons could either be in the main body of the application or could be in an annexed affidavit merely referred to in the main body. However, there are some Notice of Motions like those relating to review under Order 44 Rule (1) of the Civil Procedure

Rules where the grounds must be stated in the main body of the Notice of Motion.

This is because Rule (1) of Order 44 sets out specific and distinct grounds upon which a notice of motion must be grounded. Grounds not specified in Rule (1) are not acceptable for the purpose of a review. That situation makes it, not only necessary, but also important and mandatory that the ground or grounds the Applicant is relying on in a notice of motion for a review under Order 44 Rule (1) be specifically mentioned in the main body of the notice of motion to ensure that the notice of motion is properly grounded thereby avoiding vagueness, confusion and therefore injustice. While the National Bank of Kenya case was about a review, the Castelino Case was about the "unconditional leave to appeal and defend the suit."

It seems to me therefore that where the notice of motion is filed under provisions like Order 35 Rules (1) and (2) which do not require particular and limited grounds or where a Chamber Summons is similarly brought, the notice of motion or Chamber Summons may be grounded on evidence by an affidavit annexed and served as the Applicant did in the Chamber Summons before me. If that is considered an irregularity, the Court of Appeal in the Castelino Case held that such an irregularity amounted to a minor irregularity curable by amendment. It was the view of the court that such irregularity could not prejudice the Respondent and leave to amend could be given.

Even in the National Bank of Kenya case, after the court had spoken tough, it remarked later as follows:

"Although this in our view was a fatal omission, yet in the broad interest of justice, we asked Mr. Njuguna to say on which ground under Order XLIV he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court."

It appears to me from that passage that when the court, "In the broad interest of justice," sought for and obtained an explanation from Mr. Njuguna, that in itself was as good as an amendment to the notice of motion. The court, though in a different language, was saying in the National Bank of Kenya case what the court in the Castelino case had said. As a result, although the court in the National Bank of Kenya case said it was important and mandatory to include grounds of application in the main body of the notice of motion and that it was fatal to omit doing so, nevertheless that court did not dismiss the appeal because the Appellant had not complied with Order 50 Rule 3 in the notice of motion from which the appeal had arisen. The court dismissed the appeal simply because the appeal lacked merit, the decision of the High Court having been upheld. The question of compliance with Order 50 Rule 3 had not been raised in the High Court and therefore had not been canvassed in the High Court.

From the above therefore, and also relying on Section 3 A of the Civil Procedure Act. I am not accepting the preliminary objection raised on this issue. I could order an amendment as suggested in the Castelino case, but "in the broad interest of justice" where both sides must be looked at, I do not think amendment is necessary in the circumstances of this case. I do not see any prejudice being suffered by the Respondent on the basis that the main body of the Chamber summons does not contain grounds of the application. Moreover, the Chamber Summons has, by consent of the parties, already been heard and there is no way it can properly be amended at this stage. That preliminary objection fails.

Moving to the substantive application by Chamber Summons, there is no dispute that the Respondent and its advocates are not to blame in any way for non appearance on the part of the Applicants. In exercising my discretion I must realise that justice cuts both sides. The question is whether the Respondent who, as Plaintiff, has done everything in accordance with the provisions of the Civil Procedure Act and Rules and

has obtained a valid judgment should be ousted from enjoyment of the fruits of his judgment.

As Mr. Kowade rightly pointed out the Applicant had counter claims against the Respondent in this matter. But the Applicant never took any step until the filing of this Chamber Summons. The Applicant did not even bother to go to their lawyers to find out what was happening in the case. Although they became aware of the judgment dated 11th November, 1997, they took no step until their resistance to execution proved to be no longer successful.

If the firm of M/s. Kimani & Co., Advocates took over the conduct of the case in 1996, how is it that the firm of M/s Khaminwa & Khaminwa feels justified to bring This application on the ground that the main suit was heard and decided without the knowledge of the Applicant? Moreover if the Applicant did not like the firm of M/s Kimani & Co., Advocates, why did the Applicant have to wait until resistance to execution of the decree herein failed in order to go to Dr. Khaminwa's rescue?

The position as revealed from the court record and from submissions before me is that sometime in 1996 the firm of M/s Kimani & Co., Advocates, lawfully took over the conduct of this case for the Applicant from the law firm of M/s Khaminwa and Khaminwa. That fact may or may not have been known to Dr. Khaminwa. But it is highly doubtful whether the Applicant remained ignorant of the change over. Even if the Applicant were ignorant the Applicant was bound by the action of its associates or partners or co-share holders who instructed the law firm of M/s Kimani & Co.

That being the position, the Applicant's Advocates, men on record, were properly served with the hearing notice. They did not care to appear in court. They did not care to bring their clients and client's witnesses. The Plaintiff, witnesses and advocate appeared. Hearing proceeded properly in the absence of the Applicant and their advocates. By that time the firm of M/s Khaminwa and Khaminwa was no longer conducting this case for the Applicant. That firm of advocates had gone out of this case and that explains why it was necessary for them to file a notice of Change of Advocates when they came back into this matter with the filing of the Chamber Summons I am hearing now.

It is curious that they are making this application while the law firm of M/s Kimani & Co had not bothered to file such an application; and they are making this application on the basis that they were the ones to have conducted the Applicant's case at the time. I do not agree with that.

I think the re-appointment of M/s Khaminwa and Khaminwa as advocates in this matter is only being done for the sake of convenience to given the Applicant some ground for this application. Moreover if that firm had not ceased acting for the Applicant, there would have been no need for the firm to refile another notice of change of advocate as was done on 18th September, 1998.

The court case file may have been mistaken by the Applicant's Advocates to have been lost, The relevant case file in the firm of M/s Khaminwa & Khaminwa may have gone missing. But perhaps I would have had different thoughts if only I were satisfied that the firm of M/s Khaminwa & Khaminwa has been acting for the Applicant in this matter throughout and that therefore they were not aware when this case came before me for hearing.

On the contrary, what I find is that that firm of advocates was not acting for the Applicant at the time I heard this case and entered the judgment the Applicant wants set aside. The firm has just come in for the purpose of this application. I do not therefore accept as good the reasons which have been given in support of the Applicants Chamber Summons dated 11th September 1998.

There being no good cause shown for reinstatement of these suits and the court case files being available as strong room files, the aforesaid Chamber Summons be and is hereby dismissed with costs to the Respondent.

Dated and signed this 2nd day of October 1998.

JUDGE

Delivered on 8th October, 1998 before

SHEIKH S.M. AMIN DUTYJUDGE