REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2560 of 1988, 2559 of 1988 & 2561 of 1988

KENYA POLICE STAFF SACO..... PLAINTIFF

VERSUS

KENSING & PARTNERSCONSULTIN ENGINEER LTD.....DEFENDANT

RULING

This is an application by Decree holder for orders that:

(1 A) - Legal representatives of the defendants herein be joined as parties to the suit

(1) Court be pleased to allow *the* execution of the decree against the legal representative of the defendants herein

(2) The decree dated 28.11.97 be amended appropriately to reflect the legal representatives as the defendants

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(3) That a notice to show cause do issue against the legalrepresentatives to show why the decree should not be executed against them. The application supported by the affidavit of John Mwaura Muthabuku - manager of the decree holder. It shows that Mr & Mrs Ndubai (2nd defendants died in 1999 and were shareholders of the first defendant. It also shows that a Grant of letters of Administration to the estate of Benjamin Rewel Ndubai who died on 6.1.99 was given to Richard Mwongela Ndubai. Leon Mriti Ndubai and Lena Margret Ndubai on 15.4.99.

The application to support the petition for Grant of letters of administration which lists the assets of Benjamin Jewel Ndubai in the supporting affidavit is annexed.

The application is opposed on the main grounds that:

1. The legal representatives referred to are only legal representatives of Benjamin Revel Ndubai and not legal representatives of his wife the late Chloris Ndubai who had no estate.

2. Kensing and Partners Consulting Engineers ltd was a limited liability company which has since been struck off the Companies Register

3. Kensing and Partners does not exist in law and owns no property.

The decree arose from three consolidated suits namely:

(a) HCCC NO. 2559/88 where applicant had sued Kensing international limited (1st defendant) and Kensing Consulting Engineers Company limited *(2nd* defendant) recover shs 7,912,019 and a further shs 310,250

(b)HCCC NO. 2560/88 where applicant had sued Kensing & Partners Consulting Engineers limited (first defendant) and Benjamin Ndubai & Chloris Ndubai trading as Kensing and Partners (2nd defendant) to recover shs 8,140,000 and general damages. That suit was based on a construction Agreement dated 25.11.82 made between applicant and Kensing & Partners Company limited. Para 4 of the plaint averred that the 2nd defendant was acting as agent of first defendant in the contract

(c) HCCC NO. 2561/88 where applicant had sued Kensing and Partners Consulting Engineers limited to recover shs 6.150,000 and general damages.

Execution against the legal representatives being made parties to the suit and without the decree being amended. Moreover it is not necessary to issue a notice to show cause against the legal representatives at this stage.

It is after the court allows the decree to be executed against the legal representatives that the decree holder can apply for a notice to show cause.

Should the court allow the execution of the decree against the legal representatives of Benjamin Revel Dubai?

Firstly, the decree holder has not explained why it has become necessary to seek execution against the legal representatives. Mr. John Mwaura Muthabuku has not, in the supporting affidavit, said that the decree is incapable of being enforced against the judgment debtor companies.

Secondly, although a global award of shs 17 million was given in thethree suits, Benjamin Ndubai was only a defendant in one suit- HCC No. 2560/88.

The decree does not specify the award made in HCCC NO. 2560 of 1988 for which Benjamin Revel Ndubai as a second defendant would be liable:

Even in HCC No. 2560/88, the agreement which gave rise to liability was between the decree holder and KENSING & PARTNERS COMPANY LIMITED

The plaint in HCCC No. 2560/88 name Benjamin Ndubai and his wife as trading as KENSING & PARTNERS. Is that a distinct entity from Kensing Partners Company ltd which entered into the agreement?

Further, paragraph 4 of the plaint in HCCC NO.2560/88 show that Benjamin Ndubai and his wife were acting as agents of Kensing & partners Consulting Engineers ltd. A Director of a limited liability company acts as agent of the company. A director of a limited liability company would only be personally liable for acts of the company in the well known restricted circumstances. Thus there are several unanswered questions concerning the personal liability of Mr Benjamin Ndubai for the whole of the decretal sum of shs 17 million.

Thirdly, there is no evidence that all the properties listed still exist and have gone into the hands of the three legal representatives. The investigation report show that most of the properties were mortgaged.

For those reasons I dismiss the application with cos**ts**

E.M Githinji

Judge

28.11.2002

Mrs. Nyakundi present

Dr. Khaminwa present

Mrs Nvakundi

I apply for leave to appeal

Dr. Khaminwa

I also apply for leave to appeal

E. M. GithinjiJudgeOrder: Leave to appeal given

E. M. Githinji Judge

IN THE HIGH COURT OF KENYA AT NAIROB

I CIVILCASE NO. 2560 OF 1988

KENYA POLICE STAFF SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY LTD..... PLAINTIFF

versus

KENSING AND PARTNERSCONSULTING ENGINEERS LTD.....DEFENDANT

JUDGEMENT

These are four cases consolidated for hearing following an order made on 26th October, 1993 by Mr. Justice J. A. Couldrey, as he then was. The effect is that I have Kenya Police Staff Savings and Credit Co-operative Society fighting it out against four companies namely:-

Kensing International Ltd, Kensing Consulting Engineers Company Ltd. Kensing and Partners Consulting Engineers Ltd; and Benjamin Ndubai and Chloris Ndubai and Kensing and Partners Ltd.

For the purpose of these proceedings,. I will be referring to the Kenya Police Staff Savings and Credit Co-operative Society as the Society or the plaintiff whilereferring to the other four parties as first defendant, second defendant third defendant and fourth defendant respectively. Benjamin Ndubai and Chloris Ndubai are human beings and from the evidence, Benjamin Ndubai is said to be a director of all the defendant companies. He was the active director and signed all the agreements, on behalf of the defendants, between the plaintiff and the defendants. Although the advocate for the defendants was

served with a hearing notice for 29th and 30th October, 1997, he did not appear. The hearing therefore proceeded before me ex-parte - Mr. Tongoi conducting the case for the plaintiff. He called three witnesses and wound up with oral submissions at the end.

The evidence brings out a consolidated claim based on three contracts signed by the plaintiff on the one side and Benjamin Ndubai on the other side for the defendants. In most cases, it would look as if he was acting for the fourth defendant and that the fourth defendant was sometimes standing in for one of the

other three defendants.

The transactions related to one housing project, where the plaintiff and the fourth defendant acting as an agent of the third, defendant would construct 31 housing units plus a shopping centre on plaintiff's land at Ruaraka L.R. No.8393 within Nairobi according to the agreed specifications and plans at the cost of Kshs.20.5 million. The agreement was dated 25th November, 1982 and thebuildings were to be completed by 30th June, 1984.

It was agreed that the plaintiff would contribute Kshs.10.5 million towards the construction and that the first defendant was to provide the balance of Kshs. 10 million on loan terms to the plaintiff to be secured by the property which was being developed. To that effect the defendants were to prepare a legal charge which was to be processed arid registered at the expense of the plaintiff.

Following that agreement, work started, the plaintiff having made the sum up Kshs.10.5 million available to the contractor, the third defendant. The plaintiff then paid the sum required as legal fees on the charge Kshs.310,050/= and started paying a monthly instalment of Kshs.600,000/= towards the loan repayment which the first defendant was expected to have given to the plaintiff. Subsequently the amount rose to Kshs.700,000/-= permanently.

When the plaintiff had paid the loan money to the tune of Kshs.9,539,950/-, the plaintiff discovered that no loan had been given as agreed. Together with the legal fees, the plaintiff found that it had paid a total of Kshs.9,850,000/= to the defendants on account of the agreed loan which the defendants had failed to give.

Problems between the parties had arisen and as a result the housing project could not be completed within the contact period of 18 months. The defendants failed to meet the deadline.

At the same time the defendants were blaming the plaintiff for having made them delay commencement of work on the project. Defendants claimed the plaintiff had delayed producing approved building plans from the City Commission. From the sum of money the plaintiff was paying for the loan therefore, the defendants were taking some money on account of damages H.C.C.C. No.4694/87 is therefore mainly on this claim for damages by the third defendant against the plaintiff.

But according to the plaintiff the defendants breached the first building construction contract, that is the contract dated 25th November, 1982, when the defendants failed to complete construction of the houses within 18 months as agreed.

Secondly, there was a second breach when the contract to provide the loan of Kshs.10 million was not honoured.

The plaintiff wanted the defendants stop working on the project. A valuation of the work so far done was carried out by Mrs Murai Associates and came out with the report that work had been done to the value of Kshs.13.14 million only.

It is the plaintiff's case that by that time, it had paid a total of Kshs.21.06 million. That was in 1986.

However, parties came together into talking terms and on 13th February,

1987 entered a third contract on the grounds that the project needed more money. This contract varied the first contract and evidence is that the plaintiff now paid Kshs.700,000/= per month for the loan and was ferried to seek authority from the Commissioner for co-operatives to spend Kshs. 10.5 million more.

In the end the society spent Kshs. 17 million more as ever after the contract of 13th February, 1987 had been signed, the defendants failed to complete the project and the plaintiff was forced to terminate the contract and to employ the services of another contractor, "Safari Park Holdings" who completed the work at an overall total and final cost of Kshs,47 million.

The plaintiff, has made various claims from that scenario. That is the claim in HCCC No.2559/88, the claim in HCCC No.2560/88, the claim in HCCC No.2561/88 and the claims PW2: Mr. David M. Kombe set out in his evidence. The end result is that it is not easy to know the exact nature and extent of the plaintiffs claim against the defendants.

The plaintiff has said nothing about the claim of the third defendant in HCCC No.4694/87 and that claim has not, of course been proved.

What is before me is a consolidated claim in the three cases filed by the plaintiff society and in the one case filed by the third defendant against the society.

I find that the initial cost of the housing project was Kshs. 20.5 million. Allthat money was to be paid by the plaintiff society. The plaintiff had Kshs. 10.5 million to pay and was to take a loan of Kshs. 10 million from the first defendant. The plaintiff paid Kshs. 10.5 million for the work to start. After payment of that money the plaintiff assumed the loan of Kshs. 10 million had been given by the first defendant. But that loan had not been given. By the time the plaintiffs discovered that the loan had not been given, the plaintiff had already paid a total sum of Kshs.9,850,000/= on account of that loan being legal fees on the intended charge plus monthly instalments in repayment of the expected loan.

That brought the total sum of money paid by the plaintiff to Kshs.20.35 million. Evidence is that at that stage the defendant had done work valued at Kshs. 13.147 million only and that the contract period had already expired.

The parties proceeded to enter the second agreement where both sides agreed more money was required for the project and as a result the plaintiff agreed to add Kshs, 10.5 million thereby making the total cost be Kshs.31 million. That was to be the revised cost-worked out by the parties in the light of the fact that construction work had not been completed in the first contract period of 18 months and the fact that the first defendant had failed to provide the loan of Kshs. 10 million as had been agreed with the plaintiff.With the additional funds available, the agreement was that the constructorwould now complete work on the project within six months. The constructor could not. Three more months were added. There was no completion. The plaintiff terminated the contract citing breach on the part of the defendants in their failure to complete the work as agreed.

The implication is that had the constructor completed work on the project within the six months agreed upon in the contract dated 13 th February, 1987 or before the expiry of the three months of the extension of that period, the plaintiff would not have come to this court in this matter as the plaintiff could not have kept on complaining of a breach of contract. The impression is that previous failures or breaches or problems had been addressed and resolved and that was why the agreement dated 13th February, 1987 was struck.

The breach which should count in this matter, therefore, is the breach that occurred following the agreement dated 13th February, 1987. Construction of the housing project was not completed as agreed, and the plaintiff was forced to engage Safari Park Holdings to complete the work. The final cost of the project was Kshs.47 million, up from Kshs.31 million. It means the plaintiff, as a result of that breach, incurred a loss of Kshs.16 million. This should be repaid back to the plaintiff together with a sum in

general damages. That is the best i can make out of these varied claims and in the absence of the benefit which may have been derivedfrom the evidence which may have been adduced in defence by defendants *in* this suit.On the whole therefore, the defendants, jointly and severally, are hereby ordered to pay (the plaintiff's Kshs. 16 million being the loss the plaintiff suffered.

Further, the defendant jointly and severalty to pay to the plaintiff general damages for breach of contact in the sum of Kshs. 1,000,000/= (one million)

The defendants jointly and severally also to pay costs of these consolidated suits.

Interest will be paid at court rates.

Dated and delivered this 11th day of November, 1997.

J.M. KHAMON1 JUDGE Present:

Mr. Tongoi for the plaintiff

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2560 OF 1988

KENSING AND PARTNERS)

CONSULTING ENGINEERS LTD)..... ..APPL1CANT /3RD DEFENDANT

versus

KENYA POLICE STAFF SAVINGS)

AND CREDIT CO-OPERATIVE LTD)..... RESPONDENT/PLAINTIFF

RULING

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 hasbeen brought to my attention during the hearing of this application, it appears theApplicant is also speaking on behalf of the other three Defendants.Since it was agreed at the hearing of the application that preliminary

objectionsraised 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, Mrs. 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 filing 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 Mrs. 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 toconduct the hearing of this application, the said application is competent and theinterim orders obtained therein valid. Accordingly that preliminary objection isrejected. The second preliminary objection relates to Order 50 Rule 3 as read with Rule 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 caseof National Bank of Kenya Limited -v- Ndungu Njau, Civil Appeal No.211 of 1996at Nairobi. He said that Rule 3 is set out in terms similar to those in Rule 7 and thattherefore 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 aforesaid affidavits. 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 the opportunity

of reading the case of Castelino -v- Rodrigues (1972) EA 223 where the 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 the document. On this principle, we do not think thenotice 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 breachas a minor irregularity easily cured by amendment Therespondent 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 widepower to allow amendment should normally beexercised."

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 Rank 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, Nasr Export and Import Limited -v- Tanjal Investments Limited, the decision of the Court4in the case of Castelino, from the face value, conflicts with the decision of the courtin 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 ProcedureRules, what matters in, my view, is he type of the application in relation to theprovisions of the Civil Procedure Rules under which the Notice of Motion in questionor 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 Rank 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 mat 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 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 casein 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-shareholders who instructed the law firm of M/s Kimani & Co.

That being the position, the Applicant's Advocates, then 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 and 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 give 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 wants10set aside. The firm has just come in for the purpose of this application. 1 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.

J.M. KHAMONl JUDGE

Delivered on 8m October, 1998 before

SHEIKH S.M. AMIN DUTY JUDGE

IN THE HIGH COURT OF KENYA

AT NAIROBI CIVIL

CASE NO. 2560 OF 1988

KENSING & PARTNERS CONSULTING

ENGINEERS LTD. & ANOTHER.....
APPLICANT/3RDDEFENDANT

versus

KENYA POLICE STAFF SAVINGS 7 CREDIT

CO-OPERATIVE SOCIETY.....
RESPONDENT/PLAINTIFF

RULING

In the application by Chamber Summons dated 28th October 1998, the Applicant, Benjamin Ndubai seeks a stay of execution pending appeal. It has been specified before me, from the Notice of Appeal and from a letter dated 8th October 1998 written by the Applicant's advocates to the Deputy Registrar that the intended appeal is to be against my ruling dated and signed by me on 2nd October, 1998 and read to the parties on 8th October 1998 by Hon. Justice Sheikh Amin.

The orders I made in that ruling dismissed the Applicant's Chamber Summons dated 11th September, 1998 seeking a review of the judgment I delivered in this matter on 11th November 1997 against the Applicant, then Defendant.

By the time I was hearing the Chamber Summons dated 11th September1998, the Respondent, who was the Plaintiff in the main suit, was moving to execute the judgment in his favour. That is the judgment dated 11th November 1997. The Chamber Summons dated 11th September, 1997 therefore put that execution in abeyance until that Chamber Summons was dismissed as thereafter the Respondent resumed execution process. That was also put in abeyance following the filing of this application.

Clearly therefore the Respondent intends to execute the judgment of 11th November 1997 and from what has happened on the side of the Applicant so far, I get the impression that the Applicant intends to appeal as he is bitterly complaining on the ground that no justice has been done by me in this case.

I have always refused to be an obstacle to parties who want to appeal against my rulings, orders or judgments. I do not see the reason why I should be an obstacle to Hon. Benjamin Ndubai who complains that the sum of Kshs.18 million he was ordered to pay is colossal and that he does not have that money. He was claiming no less than that amount against the Respondent in suit No.4694/87 which was filed earlier than the three cases filed by the Respondent against him. Following the filing of the Respondent's three cases in 1988 against the applicant, he amended the plaint in his H.C.C.C. No. 4694/87 in 1989.

This case was therefore a case involving big money and I do not see why the Applicant expected small money only to be awarded in a judgment against him. Could be he did not think any sum of money could be awarded against him. He should, however, realise, with due respect, that the court was not bound by that way of thinking.

It was pointed out during the time I was hearing the Chamber Summons dated 11th November 1997 and the same was repeated at the time I was hearing this Chamber summons dated 28th October 1998 that the main suit still remains to be heard because it was the Counter Claim only which was heard and that that was a counterclaim in one suit. This suggests that only one of the four cases then before me, was heard.

With due respect, that is not so. Otherwise, what was I saying in the opening

paragraph of the judgment dated 11th November 1997 when I stated:

"These are four cases consolidated for hearing followingan order made on 26th October 1993 by Mr.

JusticeCouldrey, as he then was. The effect is that I have KenyaPolice Staff Savings and Credit Co-operative Societyfighting it out against four companies.... "

I then proceeded to mention the four companies the fourth one being Benjamin

Ndubai and Chloris Ndubai at Kensing and Partners Ltd. I went on to say:

"For the purpose of these proceedings, I will be referring to the Kenya Police Staff Savings and Credit Co-operative Society as the Society or the Plaintiff whilereferring to the other four parties as first defendant, second defendant, third defendant and fourth defendant respectively. Benjamin Ndubai and Chloris Ndubai is said to be a director of all the defendant companies. He was the active director and signed all the agreements, on behalf of the Defendants, between the Plaintiff and the Defendants."

At mid page 2 of the typed judgment I said:

"The evidence brings out a consolidated claim based on three contracts signed by the Plaintiff on the one side and Benjamin Ndubai on the other side for the defendants. In most cases, it would look as if he was acting for the fourth Defendant and that the fourth Defendant was sometimes standing in for one of the other three In the last paragraph on page 3 of the typed judgment, I stated:

"From the sum of money the Plaintiff was paying for the loan therefore, the defendants were taking some money on account of damages. H.C.C.C. No. 4694/87 is therefore mainly on this claim for damages by the third Defendant against the Plaintiff."

At the bottom of page 4 to top page 5 I said:

"The Plaintiff, has made various claim, from that scenario. That is the claim in H.C.C.C. No. 2559/88, the claim in H.C.C.C. No. 2560/88 and the claim PW2, Mr. David M. Kombe set out in his evidence."

From the above and reading the whole judgment, I was handling all theaspects of each one of the four cases before me. The learned counsel for the Applicant may be taking advantage of the fact that I did not specifically state thatI had dismissed H.C.C.C. No. 4694/87. But it should be remembered that I wasseized of a consolidated case made up of four cases. When I therefore said inparagraph 2 at page 5 that

"The Plaintiff has said nothing about the claim of the third defendant in H.C.C.C. No. 4694/87 and that claim has not, of course been proved."that meant that while the Plaintiff had said nothing about the claim of the thirdDefendant in H.C.C.C. No.4694/87, the third defendant, because of its absence, hadnot proved its claim. In such a situation, who looses? It is the owner of the case,the third defendant, who lost H.C.C.C. No.4694/87 as it was the duty of the thirdDefendant to prove mat case before me on that day. It could not mean that that caseremained pending, unless one is saying that case had not been consolidated with theother three.

From the final orders I made in that judgment therefore, the implication was clear that the third defendant's case, H.C.C.C. No. 4694/87, had failed, not having been proved, and therefore stood dismissed, although I may not specifically have said the case was dismissed. That case's subsistence cannot be consistent with the final orders I made in the judgment dated 11th November 1997.

However after saying all that above, I should remark that I do understand allthe authorities cited during the hearing of this application. I have no problem with any of them. As I have already indicated elsewhere, the Applicant should be allowed to file his appeal in the absence of worry about execution of the decree in this suit. The condition I will impose is that the stay I grant will be limited.

Accordingly the Chamber Summons dated 28th October 1998 be and is hereby granted in terms of prayers 2 and 3 with the limitation that the stay in respect of prayer 2 will subsist only up to the date of filing the appeal in the Court of Appeal by the Applicant.

The Respondent is at liberty to apply to this court if filing of the appeal delays.

Costs of this application be in the cause.

Dated this 2nd day of December, 1998.

J.M. KHAMONI JUDGE