IN THE COURT OF APPEAL IN NAIROBI

(Coram: Masime, Gicheru & Kwach JJ A)

CIVIL APPEAL NO 39 OF 1989

Between

MCDOUGLA KAGWA.....APPELLANT

AND

WEEKLY REVIEW LIMITED.....RESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Mr Jusctice Rauf) dated the 24th day of January, 1989

in

HCCC No 4903 of 1988)

****

JUDGMENT

In December 1983, Weekly Review Ltd (the respondent), employed McDouglas Kagwa (the appellant), as a Chief Accountant. At that time, the appellant represented to the respondent that he was a Kenyan citizen and a Certified Public Accountant (CPA).

On 27th November, 1988, the appellant ceased to be an employee of the respondent. There is a great deal of conflict with regard to the manner in which the termination of the appellant's employment came about. The appellant says he resigned but the respondent says the appellant was dismissed after he had absconded. Anyway, shortly after the appellant left, the respondent filed a suit against him seeking to recover more than Shs 320,000/-, as money earned and received, salary in *lieu* of notice and the costs of replacement of a vehicle belonging to the respondent and said to have been damaged by the appellant.

The respondent then applied for a temporary injunction under order 39 of the Civil Procedure Rules (cap 21) to restrain the appellant from withdrawing such sums as might be in his accounts at Habib Bank Ltd, Koinange Street; Housing Finance Company of Kenya Ltd; and Trans National Bank Ltd. The respondent also sought an order that a motor vehicle belonging to the appellant be retained at the CID Headquarters in Nairobi.

The application was supported by an affidavit sworn by the respondent's General Manager, a Mr Wachira, in which he deponed, *inter alia*, that the appellant had been employed by the respondent on the premise that he was a Kenyan citizen and a qualified Certified Public Account and that the respondent had since discovered not only that the appellant was in fact a Ugandan, but also that the certificates of his alleged professional qualifications had been forged.

The appellant filed a defence in which he denied the respondent's claim and raised a counter-claim for terminal benefits and damages for alleged loss of his motor vehicle. He also filed a detailed replying affidavit in which he said he was born in Kenya, was a Kenyan citizen and that his certificates were genuine.

Since the precise rule under which the application was made was not specified on the chamber summons, Rauf J entertained it under rule 1(b) of order 39 of the Civil Procedure Rules and granted the orders sought. It is against that ruling that the appellant has now appealed to this Court. Although the decision has been challenged on six grounds, at the end of the day, the appellant's complaint is basically that the Judge, in granting the injunction, had exercised his discretion wrongly. His failure to order the respondent to give an undertaking as to damages has also been criticized. This was also the substance of the submissions of Mr Kibuthu, for the appellant, before us.

The Judge was faced with a situation where although the appellant was residing within the jurisdiction, evidence had been placed before him which *prima facie* indicated that the appellant could leave Kenya or move his assets to Uganda and place them beyond the reach of his creditors. The appellant has a Kenyan identity card, but it is a replacement of an original one which he says got lost. Two of his names, "Eria" and "Kagwa" give credence to the allegation by the respondent that the appellant is a Ugandan. We shall say no more about that because the substantive suit is still pending in the High Court.

What the Judge granted was not an ordinary injunction. It is a form of injunction of a recent development known as a *mareva* injunction taking its name from a case in England where it was first made. It was defined by Lord Denning MR in his judgment in the case of *Owners of Cargo Lately Laden on Board the Vessel Siskina and Others v Distos Compania Naviera SA* [1977] 3 All ER 803 at page 809:

> "During the last two years the Courts of this Country have rediscovered a very useful procedure which used to be known as foreign attachment. It is now called the '*mareva* injunction'. It is a procedure by which the Courts can come to the aid of a creditor when the debtor has absconded or is overseas, but has assets in this Country. The Courts are ready now to issue an injunction so as to prevent the debtor from disposing of those assets or removing them from this Country, thus defeating the creditor of his claims. It is a procedure familiar to all the countries of the Continent of Europe and to the United States of America, and to the province of Quebec. If you read the facts in *Mareva Compania Niera SA v International Bulcarriers Ltd* [1975] 2 Lloyd's Rep 509, you will see how desirable and important it is that the Courts should have jurisdiction to issue such an injunction. It was challenged before us recently in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1977] 3 ALL ER 324, but the challenge failed. The procedure is now established beyond question. It has been used repeatedly in the Commercial Court to the satisfaction of all concerned".

The Court of Appeal in England held in the case of *Chartered Bank v Daklouche* [1980] 1 WLR 107, that a "*mareva*" injunction can be granted against a defendant who, though served within the jurisdiction and having assets in England, was likely to leave and withdraw the assets at short notice. This is a jurisdiction which Courts in Kenya can properly and usefully exercise under order 39 of the Civil Procedure Rules. Where the Court grants a "*mareva*" injunction, it should also order a speedy trial of the action in order to avoid any possible injustice that may be caused to the defendant by delay. But a "*mareva*" injunction cannot be issued against defendants who were permanently settled in Kenya and have their assets here. In the present case, as the nationality of the appellant was in doubt, the Judge made the only order he could have made in the circumstances to meet the ends of justice. In the *Daklouche* case, the defendants, who were husband and wife, were Lebanese who lived and had businesses in Abu Dhabi. They also had a house in England where their children attended school. The wife had an account at the First National Bank of Chicago in London. It was this account to which an order of attachment was made.

The evidence here suggests that although the appellant is resident in Kenya he is not permanently settled here and he is, therefore, amenable to this special jurisdiction. For these reasons, this appeal fails and it is ordered to be dismissed with costs.

As the trial Judge did not do so we direct that an early hearing date be fixed for the suit in the Superior Court.

Dated and delivered at Nairobi this 6th day of November, 1992

J.R.O MASIME

.....

JUDGE OF APPEAL

J.E GICHERU

.....

JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR