IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo, Masime JJA & Kwach AG JA)

CIVIL APPEAL NO 5 OF 1985

BETWEEN

GEOFFREY NDUNGU THEURI.....APPELLANT

AND

LAW SOCIETY OF KENYA.....RESPONDENT

JUDGMNET

(Appeal from a ruling and orders of the High Court at Nairobi, Porter J)

July 8, 1988, **Apaloo JA** delivered the following Judgment.

Nobody who read the proceedings in this case, can help feeling that the appellant is a man who has the courage of his convictions. He cannot be otherwise if he took on the Law Society itself. Some may also say of him, perhaps not unkindly, that he is a tenacious litigant.

The appellant appears to have had some sort of education which he did not qualify him to be called a university graduate. He was minded to study law and obtain legal qualification to enable him practice as an advocate. So on the September 5, 1983 he applied to and was duly "articled" to a firm of advocates by name Gautama and Kibuchi for 3 years. This fact came to the knowledge of Law Society (which I shall hereafter call the Society). It felt the appellant was not qualified to serve as an articled clerk and so informed the firm. On hearing this, the firm wrote to the appellant on October 24, 1983, and discharged him. It informed the appellant that the Society had advised it that he was not qualified to be so articled.

The appellant's reaction to this was swift. Just about two weeks after learning of the Society's action, he commenced legal proceedings against it. He did so professedly under order 39 rule 2 of the Civil Procedure Rules and the well-known section 3A of the Civil Procedure Act. He sought orders restraining the Society from interfering with "the applicant's service under the articles of Clerkship" etc.

This matter first came before the High Court (Porter J) on November 22, 1983. At the hearing, Mr Ringera for the Society, took the perfectly understandable objection, that as no plaint was filed, the court had no jurisdiction to grant the relief sought. The appellant answered that that was "a trivial technical point" and that it was the court's duty to see that "justice is done between the parties." He pleaded with the court in the alternative, that the court should grant him an adjournment to file a suit but that the "matter be held in abeyance."

The learned judge did not agree to adjourn. He felt no doubt that the objection was sound and that as the

appellant did not bring a plaint, the court had no jurisdiction. The judge thought the then prevailing practice of bringing "miscellaneous applications" based on chamber summons should not be encouraged. So he struck out the application and ordered the appellant to pay the costs.

The appellant regularized the position. He quickly filed a plaint and repeated the application for injunction. The Society again opposed it, this time, on the merits. But the judge found for the appellant and granted the order sought. This was on December 15, 1983. One would have thought that having got the order he sought, that would be the end of the injunction episode. It was not to be.

Exactly four months after obtaining the injunction, the appellant returned to the court. This time, he invited the court to review its order of November 22 which declined to grant the injunction. He also prayed that the order of costs made on that date be set aside. As the appellant had four months previously, succeeded in persuading the judge to exercise his discretion in his favour, the request to the judge to review his decision, seems somewhat puzzling. If the judge were to accede to the motion for review and reverse his order of November 22, the result would be to grant once more the order of injunction. If that was what the appellant really wished for, it would not be out of place to say he was taking a step that was not from an abuse of the process of the court.

Subsequent events show that the appellant's real object in seeking a review of the order of November 22, was to rid himself of the order of costs made in the society's favour on that day. He is on record as having told the judge on May 3, 1984, when the application for review came up for hearing that:-

> "Assuming that without a plaint the court has no jurisdiction, then the court has no jurisdiction to award costs."

That argument may make good logic, but it is often said the life of the law is not logic but experience. The position was that the Society was obliged to go to court and resist the making of an interim order against itself when no competent action was brought. It succeeded in showing the interim remedy sought did not lie. Costs normally follow the event and it was perfectly legitimate for the judge to make an order for costs in the Society's favour.

The appellant also gave the judge a little homily on technicalities and justice and quoted the provision of order 6 rule 12 which says that:-

> "No technical objection may be raised to any pleading on the ground of any want of form."

The learned judge was unimpressed. He stuck to his decision and reiterated his earlier holding that without a plaint he had no jurisdiction to hear the application for injunction. He also refused to disturb his order for costs and indeed, awarded further costs for the day in the Society's favour because he said

> "the defendants having been brought to court for nothing must have costs in this matter and are no doubt entitled to them as the issue of jurisdiction was discussed."

The appellant says, the learned judge was wrong in holding in his ruling of November 22, 1983 that the High Court had no jurisdiction to grant an injunction"where a plaint has not been filed in advance whatever the circumstances of the case".

He said the judge also similarly erred in refusing to review that holding in his ruling of May 3, 1984. The appellant also complained against the exercise of the learned judge's discretion in refusing to grant an adjournment to enable him "file the desired plaint."

Finally, the appellant pointed to section 3A of the Civil Procedure Act and submitted that the section gave the court inherent jurisdiction to entertain the matter.

The grant of an interlocutory relief is an interim remedy and is normally sought during the pendency of a substantive suit. The law of this country is not deficient in providing the mode by which a civil suit may

be commenced. Order 6 rule 1 provides in mandatory terms how such an action may be brought.

It says:-

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

Another method of seeking judicial relief prescribed by the rules, is by originating summons under order 36 in certain specified cases. The ambit of this order is not as wide as the requirement for a plaint. The applicant's grievance, was that the Society had, by its action made it impossible for him to be "articled". He said such action was wrongful. So he sought the court's aid to prevent the Society from carrying on such conduct. It is plain that his proper judicial remedy, was to sue for perpetual injunction and pending suit, could seek temporary relief – interim injunction. It is clear to me that the method laid down by law for commencing that section, is by plaint. If he did not bring a plaint, he could not have set on foot a competent action on which he could base the claim for the grant of interim relief.

That was the learned judge's confident holding. In my opinion, he was right. For myself, I cannot see how when the legislature provided in mandatory terms how a suit like the present should be commenced, the court could properly use inherent powers conferred by section 3A to sanction any other method. It is certainly inadmissible that the court should hold that a suit could be commenced by any other method because the plaintiff is unlearned in the law. I should have thought the law is the same for lawyers and lay-men alike.

The appellant referred us to a number of cases cited by Kneller JA in which English courts made interim orders before the issue of writ, (the equivalent of plaint in the country) or before taking an originating summons. The learned Justice of Appeal referred to these cases when considering the appellant's application to file the present appeal without prior payment of court fees. The appellant drew our attention to these cases. It is clear that prior to 1965, some interim orders were made in England before the issue of plaint or originating summons. But in 1965, order 29 rule 1(3) of the English rules, granted the court power to entertain certain application before the issue of writ and"an injunction may be granted in case of urgency on terms providing for the issue of the writ of summons … and on such other terms the court thinks fit.

It is not suggested that our procedure rules contain a rule analogous to order 29 rule 1(3) of the English rules. And the fact that a new rule was passed to expressly grant the court power to entertain pre-action applications, suggests that no such power existed or its existence was doubted. In my opinion, the learned judge's holding cannot be successfully assailed. If the original ruling of November 22 was right as I think it was, then the learned judge was right in refusing to review it in his ruling of May 3, 1984.

The appellant also complained that the judge should have granted adjournment to enable him file "the desired plaint" and that he was in error in refusing to do so. Whether in any particular cause or matter, adjournment should be granted or not, is a matter for the exercise of judicial discretion. And like all discretions must be exercised judicially and on the facts of each particular case. The question is: are the facts of this case such that no reasonable judge would refuse an adjournment? I think not.

The appellant obliged the Society to go to court and defend itself against a threatened order of injunction. The appellant had not set on foot a competent action. The Society pointed this out but the appellant retorted that it was a trivial technical point. It was not. It was a substantial point that went to the jurisdiction of the court. When the appellant realized the way in which the wind might blow, he said the court should allow him time to file the suit and that "this matter be held in abeyance." Why should the society have an application which had no sub-stratum remain hanging on its neck? I think the learned judge was entitled to refuse to grant an adjournment and was right in doing so.

In my opinion, the rulings made by the court on November 22, 1983 and May 3, 1984, were right as was the refusal to grant an adjournment on November 22, 1983. It follows that this appeal fails and ought to be dismissed. As the Society has not appeared, there should be no order as to costs on this appeal.

Masime JA. I have had the advantage of reading in draft the judgment of Apaloo JA. I agree that this appeal has no merit and should be dismissed with no order as to costs.

Kwach Ag JA. Geoffrey Ndungu Theuri, the appellant (hereinafter called "the appellant") is a most indefatigable litigant. He has launched a crusade against the Law Society of Kenya a body which he considers to constitute a major obstacle in his determination to qualify as an advocate.

Long ago it used to be thought that to qualify as a lawyer requires long and painful study. That is still largely true but in Kenya it is still possible to become an advocate without being a holder of a university degree.

Those who choose the long and painful path have to comply with the provisions of section 12 of the Advocates Act (cap 16) which prescribes the minimum professional and academic qualifications that an applicant must attain before he can apply to become an advocate. But there is a shorter and less painful way and this is to be found in section 13 of the Act which provides:

> "13. A person shall be duly qualified if he has satisfied the Council of Legal Education that he has complied with such requirements as the Council may prescribe with respect to –
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> (a) service under articles in Kenya; and
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> (b) attendance at a course of legal education in Kenya; and
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> (c) the passing of examinations held by or under the auspices of the Council:
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> Provided that no person shall be disqualified for admission as an advocate for reason only that an advocate whom he has served for the whole or part of the term of articled service required in his case has neglected or omitted to take out a practicing certificate in accordance with Part VII, or by reason only that the name of an advocate whom he has served for any period after the termination of that period has been removed from or struck off the Roll."

The appellant did not have a university degree so he applied to the Council of Legal Education to be allowed to serve articles under section13 of the Act. And for this purpose he joined the firm of Gautama & Kibuchi, Advocates. It would appear that the Law Society of Kenya (the Society) was not happy with this arrangement being of the view that the appellant was not qualified to be articled and duly informed Gautama & Kibuchi, Advocates, who upon receiving this communication from the Society immediately discontinued the appellant's articles. Naturally the appellant was upset and felt aggrieved by what he considered to be un unwarranted interference by the Society with his right to serve articles, and he filed a miscellaneous application under order 39 of the Civil Procedure Rules and section 3A of the Civil procedure Act seeking injunctive reliefs against the Society, its officials, members, servants and agents restraining them from taking any steps which may be designed to or may in fact prevent the appellant from entering articles of clerkships with a member of the Society duly qualified.

The appellant did not file a plaint and when his application came before Porter J on November 22, 1983, the learned judge dismissed the application on the ground that the court had no jurisdiction as no suit had been filed and he made an order for costs against the appellant. A little later the appellant tried to get the learned judge to review this order but the learned judge stuck to his guns. The appellant did eventually file a plaint and got his injunction but he was determined to fight the earlier orders. Hence this appeal.

I have no doubt in my own mind that the learned judge was quite right in striking out the application and in refusing to review it. The mode of bringing civil suits is set out under order 4 rule 1 and order 36 in the case of originating summons. Order 39 rule 1 states:

> "1. Where in any suit it is proved by affidavit or otherwise-
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> (a) ……..

(b) …….

the court may by order grant a temporary injunction to restrain such act … as the court thinks fit until the disposal of the suit or until further orders."

The order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms:"suit" means all civil proceeding commenced in any manner prescribed under the Civil procedure Rules and an applicant is not entitled under order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction.

The power to award costs in all suits (incompetent or otherwise) is in the discretion of the court or judge under section 27 of the Act. The appellant may give this appeal any label he pleases but labels apart, I have no doubt in my own mind that it was brought for the sole purpose of resisting the order of costs made against the appellant. That is the bottom line. It is a challenge to the discretion of the judge. In so far as this was a matter of discretion I am unpersuaded that the judge had proceeded upon some erroneous principle or was plainly and obviously wrong in his conclusion.

The appeal is without substance and ought to be dismissed. As the Society has not appeared apparently taking heed of the gratuitous advice given to it by Porter J at the conclusion of his long ruling dated December 15, 1983, I would agree with the order for costs proposed by Apaloo JA.

Date and delivered at Nairobi this 8th day of July , 1988

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O KWACH

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR