IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller JA)

CIVIL APPLICATION NO NAI 33 OF 1984

BETWEEN

GEOFFREY NDUNG'U THEURI ……APPLICANT

AND

LAW SOCIETY OF KENYA……..RESPONDENT

(In an intended appeal from the High Court at Nairobi, Porter J)

RULING

Geoffrey Ndung'u Theuri, the applicant, by an *ex parte* motion on notice filed by July 31, 1984 under rule 112 of the Court of Appeal Rules (cap 9), moves that the court by orders directs that his intended appeal may be lodged without prior payment of fees of court, or on payment of any specified amount less than the required fees, without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 104, and that he bears only the costs of preparing and binding the record and memorandum of appeal. The applicant intends to appeal from the ruling and orders of the High Court (Mr Justice Porter) in Nairobi of November 22 ,1983 and May 3, 1984 in Nairobi High Court Miscellaneous Application 333 of 1983, in which the parties were the same, namely, the applicant and the Law Society of Kenya as the respondent. I will return to the ruling and orders later.

First, I must treat of the applicant's means. He is married and has three children. He earns Kshs 2,500 a month gross, and his wife is unemployed. He borrowed Kshs 300,000 from the Nairobi City Commission in 1976, to buy a house of which he is now the tenant and Kshs 20,000 from City Centre Branch of the Kenya Commercial Bank Limited in 1980 to extend the house. He owes the Commissioner about Kshs 36,685.50 and the Bank about Kshs 20,737.10. The house is K165 in Umoja Estate and the Business Finance Company Limited will not lend him money on it because he has no lease for it. He has borrowed another Kshs 21,000 or so from his brother, David Gitonga Theuri, who will have to be repaid sooner or later. He owns freehold land at Kabage, Tetu and Kigumo, Kyeni but the Bank holds their title deeds and will not release them. It would probably be enough debt to crush or to silence anyone else in the applicant's position, but he has a passionate desire to qualify as an advocate and to be admitted to the Roll under section 13 of the Advocates Act which has involved him in litigation against two formidable opponents, the Attorney General and the Law Society.

The Deputy Registrar of this court is entitled to be heard on any such application and Mr Alvel Singh exercised his right. He submitted that the applicant should undertake to pay the fees and deposit the security out of any costs he might recover in the intended appeal and the applicant undertook to do so. Notice of intended appeal was filed on May, 7 and served on May 10 this year. The applicant has copies

of the proceedings, rulings and orders in the matter before the High Court, which he asked for on May, 4, and copied his letter to the Law Society so it knows the applicant is appealing. The order has been drawn but not approved because the question of costs is disputed.

Secondly, I will outline the background to the intended appeal. The applicant applied to the High Court by summons in chambers under order XXXIX rules 2, 5 and 9 of the Civil Procedure Rules (cap 21) and section 3A of the Civil Procedure Act (cap 21) on November, 10 1983, for an injunction to restrain the Law Society from impeding his progress to enrollment, damages, special and general, for having done so, and for defamation, and costs. It was supported by his affidavit of the same date. The Law Society entered appearance under protest. Mr Justice Porter struck out the summons on May 3, 1984 because it had not been filed in any suit and therefore he held he had no jurisdiction. And it followed, he continued, that he had no jurisdiction to exercise his discretion under

> "the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court",

in the words of section 3A of the Civil Procedure Act, to grant one until the filing of a plaint later.

The learned judge (unless I have misread the order), then awarded the costs to the applicant without setting out any reasons, which may be the cause of the dispute about the costs since it seems to be contrary to the proviso to section 27(1) of the Civil Procedure Act (cap 21).

The applicant not only filed his notice of appeal from that ruling in the Nairobi High Court Miscellaneous Civil Application 333 of 1983, but also went on to file a plaint against the Law Society, which was the first pleading in Nairobi High Court Civil Suit 4242 of 1983. He also filed a summons in chambers in that suit asking for the same injunctions and on December 15, 1983 Mr Justice Porter granted them and ordered the Law Society to pay the costs of that application. The Law Society, in turn, filed a notice of appeal in that action which has, I think, been struck out though it is easy to lose one's way in the morass of litigation between the parties.

The dismissal of his summons in Miscellaneous Application 333 of 1983 rankled, however, so the applicant, by another summons in chambers asked the same judge to review it giving as the main ground for doing so the provisions of order VI rule 12 (cap 21) which are that:

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

but on May 3, 1984, the judge refused to do so for these reasons:

> "I am quite satisfied that in this matter without a plaint, I had no jurisdiction to hear the application and it had to be dismissed.
>
> There was more than want of form herein. There was want of jurisdiction and I am satisfied that my order was right.
>
> I would refuse to review it even if I were satisfied that, this was a proper application for review.
>
> The defendants having been brought to court for nothing must have their costs on this matter and are no doubt entitled as the issue of jurisdiction was discussed. The costs' order will therefore remain and the defendants will have the costs of this application."

Not even the last paragraph, it would seem, has resolved the dispute about the costs of the dismissal of the first summons in chambers.

Thirdly, I recall that I have to ask myself whether or not I am satisfied that the appeal is not without [a] reasonable possibility of success? Rule 112(1).

An injunction is a judicial remedy, by which a person or society or company or some public or private body is ordered by the court to refrain from doing or ordered to do a particular act or thing. The applicant wanted to restrain the defendant from committing an injury so he could apply to the court for a temporary injunction to restrain the defendant under order XXXIX rule 2 of the Civil Procedure Rules (cap 21) if he had filed a suit to do so which the applicant had not done so and on that ground the learned judge was, with respect, correct. The applicant wishes, however, as I understand him so far, to submit that the learned judge could and should have adjourned the application to permit him to file his suit or given him his orders subject to his filing one either under that order and rule or the inherent powers of the court in section 3A of the Civil Procedure Act.

He has not referred to section 63 of the Civil Procedure Act (cap 21) which summarises the general powers of the court in regard to interlocutory proceedings. It provides, *inter alia* –

> "63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –
>
> a) …….
>
> b) …….
>
> c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.
>
> d) ……
>
> e) ……

The word 'prescribed' in that is arresting and turning back to section 2 of the Civil Procedure Act (cap 21) for its interpretation leads to the discovery that –

> "prescribed" means prescribed by rules

and

> "rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.

My researches have not unearthed any rules by the Rules Committee for the procedure of obtaining a temporary injunction save those made under section 81 of the Act which are known as the Civil Procedure Rules. None of these applications repelled by the learned judge were to be heard in the duration of a vacation, so the seemingly wide terms of the rules of the High Court (Practice and Procedure) Rules are not applicable.

Mr Deputy Registrar Kuloba drew my attention to *Mwangi Njoroge Mugwe v James Mwangi Kihara* Nairobi High Court Miscellaneous Civil Suit 255 of 1982, in which Mugwe by summons in chambers of August 20, 1982, expressed to be brought under section 3A of the Civil Procedure Act and order XXXIX rules 1, 3 and 7 of the Civil Procedure Rules applied for a temporary injunction to restrain Kihara from removing the corpse of Teresia Wangari Mwangi pending the determination of "this suit" when, in fact, no suit had been filed or "commenced". Mugwe was not represented and Mr Kogi was for Kihara. Mr Justice Chesoni began hearing the summons *inter partes* on August 23, 1982 and because it concerned a corpse decomposing in the City Mortuary from the day Teresia Wangari Mwangi died, which was on August 11, 1982, he refused to be held up by technicalities including the fact that no suit had been "commenced" and no certificate or allegation of urgency had been made so that he could or should hear it in vacation. The learned judge made by consent orders the same day for temporary injunctions restraining Mugwe and Kihara from recovering the corpse, until the elders under the chairmanship of the appropriate District Officer, had ruled on where the corpse should be buried on August 25 and the written result filed in court on August 26. The elders were not unanimous. The District Officer's view was that Mugwe

should have the corpse and bury it but Kihara would not agree to this. The learned judge returned perforce to the summons and dismissed it, with an order that each party should pay his own costs because Mugwe had not proved Teresia Wangari Mwangi was his wife, so her relatives, including Kihara, were entitled to remove and bury her corpse. I have not had any other East African authority on the relevant sections, order and rules cited to me, and I cannot find one. *Mugwe v Kihara* was not cited to Mr Justice Porter. It may or may not support one of the applicant's submissions in his intended appeal.

What, at any rate, before 1967, was the law in India on the matter? Section 63 of the Civil Procedure Act and order XXXIX of the Civil Procedure Rules, are in the same terms as section 94 of the Code of Civil Procedure, 1908 (Act V of 1908) of India and order 39 rule 1, in its First Schedule. TL Venkatarain Aiyar, the learned editor of *Mulla on the Code of Civil Procedure* 13th ed (1967), Vol 2 p 1517, has this paragraph on this point:

> "16. Inherent power of the Court – There was a conflict of judicial opinion on the question whether the court could issue a temporary injunction under s. 151, when the case did not fall within the terms of O 39, r 1 and r 2. One view was that resort to inherent jurisdiction was inadmissible when there were express provisions in the Statute covering the question and that therefore if the case did not fall under O 39 r 1 and r2, no injunction could be issued under s 151. (2) The other view was that 0 39, r 1 and r 2, were not exhaustive of the circumstances under which an injunction could be issued, and that the inherent jurisdiction of the Court remained unaffected. (a) The point is now concluded by the decision of the Supreme Court, in *Manohur Lal Chopra v Seth Hira Lal* (b) wherein it has been held that the Court has powers under s 151 to issue an injunction in cases not falling within O 39, r 1 and r 2".

The Supreme Court was divided on this. The majority held that the provisions of the Code are not exhaustive because the legislature cannot contemplate all the possible circumstances which may arise in future litigation, and cannot provide the procedure for them. (This would be true of the Rules Committee, or so I think). When the Rules prescribe some circumstances in which a temporary injunction may be issued then ordinarily the court cannot use its inherent powers to make orders in the interest of justice or to prevent abuse of the process of the court, but must see if the circumstances of the case bring it within the rule. The court would issue a temporary injunction even if section 96 and order XXXIX rules 1 and 2 were not there, for they do not take away the court's inherent power to do so. They do not limit or affect that inherent power (as section 151 says). It went on to deal with the injunction that had been issued, which was the subject of the appeal and held that it could not be said to have been necessary in the interests of justice or to prevent abuse of the process of the court. The parties had each instituted a suit properly in a different court against the other but one obtained a temporary injunction against the other purporting to prevent the other from proceeding to prosecute his action in the court he chose. The Supreme Court held that the temporary injunction was therefore not an appropriate exercise of the court's inherent jurisdiction to make any necessary orders in the interest of justice or to prevent abuse of the process of the court.

The law and practice in England before 1965 seem to have been that no injunction, even an *ex parte* one, would be granted, unless proceedings had been commenced by bill or the issue of a writ or originating summons or unless the circumstances of the case were very urgent: *Thorneloe v Skoines* (1873) LR 16 Eq 126; *Young v Brassey* (1875) 1 Ch D 277; or its issue delayed because the court offices are closed: *Carr v Morice* (1873) LR Eq 125; *Campana v Webb* (1874) 22 WR 622; *Chanhoch v Hertz* (1888) 4 TLR 331: or the applicant gives, in addition to the usual undertaking in damages, another to issue the writ when they open.

So, in England, Sir Richard Malins, Vice Chancellor, granted an interimorder at his house on Saturday May 24, 1873, to restrain a transaction before the bill and the affidavit in support had been filed, because the court and all the offices were closed that day in celebration of Queen Victoria's birthday: *Carr v Morice*: and on a weekday in court, he granted an interim injunction to restrain a sale before the bill and affidavit in support were filed, on the applicant giving, in addition to the usual undertaking in damages, another to file them in the course of the day. *Thorneloe v Skoines*. Mr Justice North in the Chancery Divisions, on February 17, 1881 allowed the applicant to file a writ by handing it to the Registrar, who

was in court, and the affidavit by leaving it with him, when he granted a temporary injunction restraining the respondent from disposing of two pictures, one a Raphael and one a Titian, when he dealt with a motion in court after hours, and there had been difficulty in finding an interpreter for the applicant, a Russian. *Chanhoch v Hertz*.

But after 1965, order XXIX rule 1(3) provided that:

> "(3) The plaintiff may make such an application, before the issue of the writ or originating summons by which the cause or matter is to be begun, except where the case is one of urgency, and in that case, the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the court thinks fit."

The order is headed "In the matter of an intended action between A and B", etc and dated the day the judge makes it.

Chapman J, the Queen's Bench Division judge in chambers, at his house, made an order for an *ex parte* injunction on Sunday, October 16, 1966, on behalf of a wife against her husband who had removed their two children the day before, though no proceedings had been instituted, on an undertaking by her solicitors that they would issue an originating summons the next day and later, on a summons for directions, Stamp J of the Chancery Division held that all this had been done lawfully. In *re "N" (Infants)*, [1967] 7 Ch 512; *L v L*, [1969] p 25. Indeed Donaldson J as the vacation judge, tried an action for a declaration *inter partes* on Saturday September 16, 1967, on a draft writ without pleadings and gave judgment on an undertaking to issue the writ on Monday. The learned author of *Halsbury's Laws of England*, 4th ed, (1979) Vol 24 p 586 para 1049, asserts that, the "same procedure could have been followed, had an injunction been sought" (footnote 4).

Returning to this motion, it is not yet clear that the circumstances of the case before Mr Justice Porter were very urgent or that the court offices were closed. The applicant never said so then and has not said so. There is no rule, in the Kenya Civil Procedure Rules such as the English order 29 rule 1(3).

On the other hand, the applicant might make such assertions for what they would be worth at such a late stage, if he appeals. He might also repeat his submissions that the Kenya order XXXIX rule 2, does not limit or affect the power of the court to grant an injunction under its inherent power to do so, though he may be hard put to suggest it was necessary to do so in the interests of justice or to prevent abuse of the process of the court when he went to Mr Justice Porter for his *ex parte* order. He may repeat his argument that the learned judge could have adjourned the application or let the order go forth upon the applicant giving the usual undertaking in damages and one to file and serve the plaint forthwith for other sufficient reasons not yet revealed. He may, in the end, be able to say he did not know, for he is still a layman in these matters, that in Kenya an *ex parte* injunction will not ordinarily be granted under order XXXIX rule 2, in any suit for restraining a defendant from committing an injury of any kind until the suit has been commenced. In all, however, I am satisfied that he lacks the means to pay the required fees or to deposit the security for costs and that his intended appeal is not without [a] reasonable possibility of success but whether or not if it were successful it would profit him at all, is another matter and I hope he will weigh that in the balance carefully. He has his injunction and the costs of his first and third summonses in chambers, so whether there is any personal profit to the applicant in appealing from the striking out of his first application and the rejection with costs of his application to review it, is for him to decide because there may be matters to be taken into account which have not been revealed yet.

The application is granted on terms, namely, that the applicant pays the fees and deposits the usual security out of any costs he may recover in the appeal, if he proceeds with it, and recovers sufficient costs to cover them from the respondent. Meanwhile, if he still wishes to appeal, I direct that he may lodge it without prior payment of fees and without security for costs being lodged for doing, so, but he must pay the costs of preparing and binding the record and memorandum of appeal.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of December, 1984.

A.A KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR