



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 41 of 2005

NATIONAL BANK OF KENYA..... APPELLANT

AND

BEHAN & OKERO ADVOCATESRESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Kisumu (Mr. Justice Barabara K. Tanui) dated 3rd December, 2004

in

H.C. MISC. C. APPLICATION NO. 114 OF 2004)

R U L I N G

This is a reference from the decision of the Deputy Registrar of this Court pursuant to *rule 9* of the Court of Appeal Rules.

The matter was before the Deputy Registrar for taxation of a bill of costs. It would appear that the applicant had not drawn the order for approval as required by *rule 34(2)* of the Rules. This is the point that was taken up by way of preliminary objection. It was Mr. Kenyariri's contention that the correct procedure had not been followed. The Deputy Registrar accepted Mr. Kenyariri's preliminary objection and proceeded to strike out the bill of costs.

It is that order that has given rise to this reference. It was Mr. Odunga's contention that *rule 34(2)* of the Rules, deals with preparation of orders and has nothing to do with execution proceedings. He submitted that the holding by the Deputy Registrar was erroneous.

On his part Mr. Kenyariri contended that the Deputy Registrar was correct in striking out the bill of costs as the proper procedure had not been followed.

This reference raises the issue of procedure to be followed. *Rule 34(2)(a)* of the Rules provides that the party who has substantially been successful *shall* as soon as practicable, prepare a draft of the order and shall submit it for the approval of the other parties.

Having considered *rules 34(2)* and *105* of this Court's Rules, what was before the Deputy Registrar and the submissions by counsel I am of the view that the Deputy Registrar was right in upholding the preliminary objection raised by Mr. Kenyariri. It is my view that the correct procedure must be strictly adhered to and that is what the Deputy Registrar, not in so many words, accepted by upholding the

preliminary objection.

In view of the foregoing this reference is dismissed with costs.

Dated and delivered at KISUMU this 30th day of November, 2007.

E. O. O’KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR