IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, SHAH & O'KUBASU, JJ.A.)

CIVIL APPEAL(APPLICATION) NO. 29 OF 1999

BETWEEN

AIR ALFARAJ LIMITED.....APPLICANT

AND

1. RAYTHEON AIRCRAFT CREDIT CORPORATION

2. NAC AIRWAYS LIMITED.....RESPONDENT

(An application to strike out and dismiss the Record of Appealfrom the Ruling and Order of the High Court of Kenya at Nairobi (Mbogholi Msagha, J) given on 8th October, 1998

in

H.C.C.C. NO. 1611 OF 1998)

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RULING OF THE COURT

The applicant, Air Alfaraj Limited, seeks to have the appellants' (respondents here) appeal struck out with costs for the reason that the order appealed against is not an order pursuant to the ruling of the superior court delivered on 8th October, 1998. The crux of the arguments, as regards the said order, as advanced by Mr Ahmednasir for the applicant, is that the ruling by the superior court (Mbogholi Msagha, J) arose as a result of a preliminary objection taken by Mr Muigai, counsel for the respondents, and that therefore the order should have taken the form of a preliminary objection being overruled rather than arising out of the hearing of an application under order 39 of the Civil Procedure Rules.

It becomes necessary to inquire into what was before the learned judge. He was to hear an application brought by chamber summons under order 39 rules 1, 2, 3, 5 & 7 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. That application was lodged by the present applicant seeking the following orders:

"1. That the Court in the interests of justice, do dispense with service of this application in the first instance.

2. That the Court do issue an injunction restraining the defendants jointly and severally from deregistering

from Kenya register of the aircraft 5Y-BND to the plaintiff.

3. That the Court do issue an injunction compelling the defendants jointly and severally to redeliver an Aircraft Beechcraft 1900c, registration No 5Y-BND.

4. That the Court do issue an injunction compelling the\ defendants jointly and severally to return the Aircraft 5Y-BND to the jurisdiction of this honourable Court.

5. That the Court do issue an injunction restraining the defendants, jointly and severally, their agents, servants from selling, disposing of, charging, leasing or in any way interfering with the plaintiff's rights over the said aircraft.

6. That the defendants be condemned to pay cost of this application."

The application was supported by an affidavit sworn by Mr Abdalla Mohammed Ahmed, the Managing Director of the applicant . Before the application came up for hearing before the learned judge, the respondents had filed their defence and grounds of opposition. They had also filed a notice of preliminary objection. A replying affidavit was also filed on behalf of the respondents by Mr Peter Obonyo Mboya, then the advocate for the respondents. The applicants had also filed an amended notice of preliminary objection. The amended notice of preliminary objection reads as follows:

"Take Notice

1. That the first defendant/respondent and the second defendant/respondent shall at the time of the hearing of the plaintiff/applicant's application dated 22nd July, 1998 raise a preliminary objection with respect to the matters the subject of the plaintiff/applicant's application and suit; and (emphasis supplied)

2. That the first defendant/respondent did before the plaintiff/applicant's application with respect to such matters commence civil proceedings against the plaintiff/applicant in the proper court and jurisdiction.

3. That by reason of the above matters the proceedings ought to be stayed."

In the defence filed on behalf of the respondents it was pleaded in paragraph 11 as follows:

"10. Paragraph 11 of the plaint is denied and the defendants put the plaintiff to the strict proof thereof and the defendants will aver at the hearing of this suit that this honourable Court has no jurisdiction to determine the dispute the subject-matter of this suit such jurisdiction having expressly and voluntarily by provision of the lease agreement been excluded by the parties. The defendants shall refer to the lease agreement at the hearing of this suit for its full tenor and effect."

In the replying affidavit Mr Mboya had deponed, so far as relevant to this application, as follows:

"67. That by reason of the matters set out in paragraph 66 of this affidavit this honourable Court has jurisdiction in this matter to the limited extent only to which the first defendant/respondent has a right to institute proceedings in this jurisdiction."

The reason why we have set out the respondents' objections, on the issue of jurisdiction of the superior court to hear the application as well as the suit, is that the objections were taken as such, amongst others, which the respondents were entitled to, in opposition to the application. The practice of taking objections,'*in limine,* by letters or by issuance of a notice to that effect, is often not encouraged or ought not to be encouraged as was pointed out by the Court of Appeal for East African in the case of *Mukisa Biscuit Co v West End Distributors* [1969] EA 696. In his judgment Sir Charles Newbold, P at page 701 said:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of

what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any act has to be ascertained or what is sought is the exercise of judicial discretion ..."

Without all facts including the contents of the contract being before the Court it could not have gone into the issue of jurisdiction, and hence the respondent's in the case in the court below, quite properly raised the issue of jurisdiction as one of the objections to the application. It must also be remembered that any issue as regards jurisdiction ought to be considered first so that in the event of the Court coming to the conclusion that it had no jurisdiction, the intellectual exercise of going into the merits of the application would have been futile. However, it so happened here, that the Court decided it had jurisdiction to hear the matter but it did not go further as the respondents wished to appeal against that ruling.

So that the situation as at the time of the delivery of the ruling was that the issue of jurisdiction having been disposed of the application still remained. It had to be heard on merits, subject to what this Court may have had to say on the issue of jurisdiction. How then should the respondents have drawn the order? The only way, in the circumstances, would have been to refer to the application within which the objection was heard for which purposes the order would have to refer to the application.

Mr Ahmednasir argued that the order should have been drawn as if it emanated out of a preliminary point of law, simpliciter. We are afraid such an order would have been totally out of place. It would not have reflected what actually took place in the court below and would have offended the requirement of order 20 rule 7 (b) of the Civil Procedure Rules as read with rule 6(1) thereof.

During the course of the hearing of this application Mr Ahmednasir was asked if he had approved the order as drawn by Mr Muigai's office and as it appears in the record of appeal. Mr Ahmednsir confirmed that he did approve the same as drawn. This information was sought from Mr Ahmednsair prior to Mr Muigai's reference to the case of *Sonko & another vs Patel & another* (1955) 22 EACA 23. Mr Ahmednasir's comment on the fact that he approved the order as drawn was that his approval could not have validated an irregular order. But he is an advocate of the High Court of Kenya and therefore an officer of the court. He should not approve a wrongly drawn order, and then wait until an appeal against that order comes up for hearing and challenge the validity thereof. That is not being honest and amounts to a radical departure from the conduct expected of counsel. The conduct and etiquate at the Bar demands that a counsel ought not to approbate and reprobate. In the *Sonko vs Patel* case (*supra*) the Court of Appeal for Eastern African said at page 26:

"This is an interesting, if technical, point on which no authority was cited and on which we find it unnecessary to express an opinion, for we hold that the first respondent is estopped by his conduct from now questioning the form or substance of the decree which is annexed to the memorandum of appeal. It was, as we have said, submitted to his advocate and approved without any reservation. That was an express representation that he accepted the decree as being correct in form and substance and the appellants have acted upon that representation by grounding their appeals on that decree. In these circumstances it would be unjust to allow the first respondent to approbate and reprobate and this objection also fails..."

Mr Ahmednasir, as expected, disagreed with the reasoning of the Court in *Sonko* case saying that that Court was wrong. He did not point out in what respect the Court was wrong. We would treat a pronouncement by that Court with utmost respect and we find no error that pronouncement.

Mr Ahmednasir relied on the case of *Kenya Breweries Limited vs Kiambu General Transport Agency Limited* (Civil Appeal No 18 of 1999) (unreported) to say that his argument was correct. Quite obviously he has totally misunderstood the *ratio decidendi* in that case. What that case decided is that if one omits to include in the order all the orders made by the superior court the order is incorrect as it is not explicit and definite in relation to the decision of the superior court from which it arises. It did not express or embody in full the decision of the superior court. The instant case is a far cry from the Kenya Breweries case. Here the two orders made by the learned judge are properly set out. The other case relied upon by Mr Ahmednasir was that of *Kenya Commercial Bank Limited vs Tony Maneseh Esipeya* (Civil Appeal No

105 of 1998) (unreported) in which it was held that if a preliminary objection as regards limitation is raised at the trial and that objection is dismissed it amounts to an order appealable with leave and not a preliminary decree appealable as of right. This Court went on further to say that if that point was taken by an application under order 6 rule 13 of the Civil Procedure Rules the order would have been appealablae as of right but as that point was taken by way of a preliminqry objection under no particular order under the Civil Procedure Rules, an appeal lay to this Court only with leave of the superior court. That case is totally irrelevant to the issue raised here. In fact, as Mr Muigai pointed out, it supports his contentions.

Mr Muigai pointed out that this application is a classic example of the unhappy practice that has developed amongst advocates, of taking technical points on the narrowest basis and without any substance whatsoever. We entirely agree that this is so and we deprecate it. The time and energy expended in the hearing of this application, which *per se* is an abuse of the process of the court could have been put to more productive use. Mr Ahmednasir must know that despite his deep contempt for the majority of the judges of this court he will always be accorded a fair hearing in this Court because our duty is to do justice to the parties that come before us.

We think Mr Ahmednasir was being frivolous when he said that it would be a distinction without a difference to say that an order which sets out what the Court exactly ordered is no order when it refers to the application during the hearing of which the point at issue arose, when the application was not, in substance, argued. That is how we understood him. In other words, said Mr Ahmednasir, the inclusion in the body of the order, the particulars of the application, makes the order bad as the application itself was not argued. That cannot be right. What was argued was one of the objections to the application.

We dismiss this application with costs which we assess at Shs 20,000/= and we order that the same be paid within the next 30 days failing which execution may issue. The appeal itself may now proceed to hearing.

Dated and delivered at Nairobi this 21st day of December, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR