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Air East Africa v Kenya Airports Authority

[2001] 2 EA 323 (HCK)

Division: High Court of Kenya at Nairobi

Date of Ruling: 18 June 2001

Case Number: 1312/00

Before: Visram J

Sourced by: LawAfrica

Summarised by: C Kanjama

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[1] Arbitration – Award – Reconsidered final award – Setting aside – Ruling on notice period uncertain – Interest awarded at less than commercial rates – Whether court should look at whole award including documents referred to in determining whether there is ambiguity in award – Grounds for interfering with arbitral award – Whether arbitrator erred in awarding interest at less than commercial rates.

[2] Civil procedure – Costs – Parties had agreed that each party to bear its own costs – General principle that costs to follow event – Whether reasons not to apply general principle must be reflected in order.

[3] Civil procedure – Interest – Interest awarded at less than commercial rates – Whether there was a wrong exercise of discretion to justify setting aside.

Editor's Summary

Pursuant to the provisions of the Kenya Airports Authority Act (Chapter 395), Air East Africa ("AEA") and the Kenya Airports Authority ("KAA") agreed to refer a dispute between them to an arbitrator, who was duly appointed by the Chief Justice. In November 2000 an arbitral award was made. AEA applied to court for adoption and enforcement of the award. KAA in response applied to have the arbitral award set aside. By consent, the award was set aside and remitted to the same arbitrator for reconsideration. After the reconsidered award was made in February 2001, AEA – being aggrieved by the award – applied to have specified parts of the award set aside.

AEA argued that the arbitration award was unclear as it reflected two findings on the required notice period in the subject agreement, namely "at least six months" and "six months". AEA argued further that in such contracts, the accepted notice period was one and a half years. The arbitrator's decision that interest was to be payable at 10% was also faulted for failing to take into account commercial rates of interest. The costs, it was also argued, should have followed the event unless specific reasons has been found to justify departing from the general rule.

KAA responded that there was no uncertainty in the notice period referred to, and that the court had properly exercised its discretion on the matter of costs and interest.

Held – An arbitration award may be set aside under section 35 of the Arbitration Act 4 of 1995. An uncertain arbitral award will be set aside on the ground that it is outside the terms of reference and contrary to public policy. *Margulies Bros Ltd v Dafnis Thomaides and Co (UK) Ltd* [1958] I Lloyds Rep 250 adopted.

In determining whether the award is certain, the court has to look at the whole award, including documents referred to in arbitration, and not a single word or sentence. *Fabrica Lombarda Di Acido Tartarico v Fuerst Bros Ltd* [1921]

Lloyds LR 57 adopted. The finding that a sufficient notice was six months was merely a clarification of the previous finding that a reasonable notice was at least six months.

The court cannot interfere with the arbitrator's finding on the reasonable notice period unless it is shown that the arbitrator erred in a point of law. *Pioneer Shipping Co Limited and others v BTQ Tioxide Ltd* [1982] AC 724 adopted. In this case, the arbitrator had reached a logical conclusion based on the material before him.

Once the arbitrator had decided that interest should be awarded, he was duty bound to follow sound principles of law. His failure to apply commercial rates of interest indicated a failure to apply his mind to sound principles of law in resolving this issue. The court, at the request of the parties (in the interests of saving time and expense) did not remit the issue to the arbitator but invited the parties to make submissions to it in this regard. *Myron (Owners) v Tradax Export SA Panama City RP* [1969] 2 All ER 1263 adopted; *Rashid Moleduria and Co (Mombasa) Limited and Others v Hoima Ginners Limited* [1967] EA 645 distinguished.

Since the parties had made an agreement on costs, the arbitrator had not needed to give reasons for the order that each party was to bear its own costs. Even in the absence of such an agreement, an order that the parties were to bear their own costs is sound, where a matter has been referred to arbitration by consent.

Application allowed in part.

Cases referred to in the ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Rashid Moleduria and Co (Mombasa) Limited and Others v Hoima Ginners Limited [1967] EA 645 – **D**

United Kingdom

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696

Duke of Beaufort v Welch [1839] 10 Ad and EL 527

Edwards v Bairsow [1956] AC 14 36

Fabrica Lombarda Di Acido Tartarico v Fuerst Bros Ltd [1921] Lloyds LR 57 – **A**

Margulies Bros Ltd v Dafnis Thomaides and Co (UK) Ltd [1958] I Lloyds Rep 250 – **A**

Miller v De Burgh [1850] 4 Ex 809

Myron (Owners) v Tradax Export SA Panama City RP [1969] 2 All ER 1263 – **A**

Pagnan v Tradax Export SA (5)

Pioneer Shipping Co Ltd and others v BTQ Tioxide Ltd [1982] AC 724 – **A**

Plummer v Lee [1837] 2 M and W 495

Re Arbitration between Marshall and Dresser [1843] 3 QB 8 78

River Plate Products Netherlands BV v Etablissment Coarglain [1982] I Lloyd's Rep 628

Trade and Transport Inc v Lino Kaiun Kaisha Ltd (The Angelia) [1973]1 WLR 210

Wohlenberg v Lagenman [1815] 6 Taunt 251

Ruling

VISRAM J: In this application the Claimant, Air East Africa, seeks the following orders:

"A Time be extended for the filing of the Reconsidered final award dated 9 February, 2001, made by the Arbitrator Lee G Muthoga Esquire in this matter, to such time as this Honourable Court deems just and proper.

B The Reconsidered Final Award dated 9 February 2001, be adopted and be enforceable as a judgment of this Court.

C The Reconsidered Final Award dated 9 February, 2001 be set aside to the extent of its considerations and/or findings and/or awards in respect of the following matters:

1) The period of the notice that the Respondent was bound to give to the Claimant (Issue No. 3.)

2) The period of loss of profit (Part of Issue No. 3)

3) The appropriate rate of interest on the sums awarded (Part of Issue No. 8)

4) The award of costs.

D The costs of this application and all thrown away costs be provided for".

Although in its grounds of opposition and in the Replying Affidavit sworn by Janet Ong'era the Respondent raised issue with the whole of the Claimant's application, its counsel at the hearing, Mr Keriako *Tobiko*, limited himself to prayer C only. I, therefore, take it that the other matters in the application have been conceded and I will deal only with prayer C which I believe represents the real issues in dispute.

The matters leading to this application can be summarized as follows. Pursuant to the provisions of the Kenya Airport Authority Act (Chapter 395) the Claimant and the Respondent agreed to refer a dispute that had arisen between them to an arbitrator. An arbitrator was duly appointed by the Honourable the Chief Justice by an instrument dated 25 May 2000 as provided for by section 33 (1) of Chapter 395. The arbitrator made the award on 17 November 2000, and published it to the parties on 21 November 2000. The Claimant then applied to have the arbitral award adopted and enforced as a judgment of this Court. The Respondent on the other hand, applied to set aside that award. The parties consented to have the award set aside and the same was remitted to the same arbitrator for reconsideration.

The arbitrator made his reconsidered award on 9 February 2001. The Claimant is aggrieved by this later award (hereinafter referred to as "the Award") and seeks that it be set aside in limited part as outlined earlier.

Before I consider the arguments by counsel, I would like to set out briefly the findings of the arbitrator on the three issues in dispute in this application. These issues, as stayed in prayer C, relate to (1) the notice period, (2) loss of profit and (3) interest.
At page 13 of the Award, the arbitrator said as follows in relation to the question as to whether the Respondent was bound to give the Claimant any

notice in terminating the Agreement between them, and if so, the period of the notice (this was issue No. 3 before the arbitrator):

> "On issue No. 2, I have examined the Agreement and find that it does not have a breach clause. The letter of 16 November, 1993 (page 38–39) does not provide a period for notice of termination. It can, therefore, only be terminated by a reasonable notice. Upon consideration of all the relevant issues in this relationship, I consider that a reasonable notice, taking into account the extent of the investment and the conduct of the parties, would be at least six calendar months. This goes to answer issue No. 3 also".

At page 28 of the Award, the arbitrator said as follows in his consideration of the period of loss of profit:

> "The Claimant has claimed loss of anticipated profit, at the average rate of US$ 2,1 million per year, for a period of 5 years. This translates to KShs 168 million per year using a conversion rate of KShs 80 per US Dollar which works out at KShs 840 million for five years. The Claimant argued that it would be entitled to this suit on the basis that, if the relationship had not been wrongfully terminated, it would have traded and earned this sum. I cannot agree. The relationship could, as I have found above, be terminated on giving a reasonable notice. The Claimant's entitlement to loss of profits must therefore, be restricted to profits it might have made during the notice period. I find that six months' notice would have been sufficient to terminate the relationship between the parties. It would have provided the Claimant sufficient time to reorganize its operations and to remove such facility as could be removed from the demised premises. The sudden termination deprived the Claimant of the opportunity to earn profits during that notice period and disrupted its operations. It is, in my judgment entitled to compensation in respect of this".

As to the issue of interest on the sums awarded, the arbitrator said as follows at page 29 of the Award:

> "Lastly I have to deal with the issue of interest. I received learned submissions on this issue from the advocates representing the parties. I have carefully considered them as I am duty hound to do. I remain, however, conscious of the fact that I am not assessing damages for breach of contract or tort. I have not, therefore, applied the rules on application of interest on judgment sums as would apply in case of an award in damages. I have considered the factors that would make the compensation payable, just and fair. I am of the view that in order that the compensation be just and fair, it is necessary to apply interest on the sums ordered. With regards to the manner of applying interest, the rates of interest that might be appropriate and the duration of the payment of that interest, are all issues that I have had to consider in coming to the decision on interest that I have come to. I have considered vulgarities (*sic* – read vagaries) of business, the fluctuation in the interest rates during this time. Having considered all these matters, I have decided that the appropriate rate of interest should be 10% p. a. I have also found that the appropriate date for applying for the interest, both on the replacement value of the facility and on the loss of profits, should be 2 February, 1997, which is the date next following the date on which a proper notice might have expired".

As to cost, the arbitrator ordered each party to bear its own costs.

Mr *Nowrojee* who led Mr *Kihara* for the Claimant challenged the Arbitrator's fittings on these matters. He argued that the finding on the notice period was uncertain, and therefore defective. It was "uncertain" because, in his view, the arbitrator had ruled that the notice period should be at least six months. He argued that once the arbitrator had made such a finding on the notice period in the manner already alluded to earlier, he could not do so again when he determined that the notice period was 6 months in dealing with the issue of loss of

profit. This means the arbitrator made two findings on the issue of notice period – these being "at least six months" and "six months". According to Mr *Nowrojee*, this second finding on the issue of the notice period was not within the reference to him. He submitted that a reasonable notice period in the circumstances of this case, and which would be consistent with practice in the industry, would be one and a half years.

As to the issue of interest, Mr *Nowrojee* argued that the arbitrator's finding was contrary to recognized principles. The arbitrator had failed to take into account normal commercial rates of interest.

Finally, regarding the issue of costs, Mr *Nowrojee* argued that although the arbitrator had discretion in the matter, it was well-established that costs follow the event and if there is a departure from that, reasons for doing so must be given, he argued that the arbitrator did not follow any principles of law in determining the issue of costs when he ordered each party to bear its own costs.

Mr *Tobiko* for the Respondent on the other hand, started by challenging the Claimant's application on the ground that it did not comply with rule 7 of the Arbitration Rules in that the application and the Affidavit accompanying it did not show uncertainty as a ground relied upon in this application. I do not agree with that proposition. It is clear from ground number 6 of the application that it was based on uncertainty as argued by the Claimant's advocate. He also argued that since grounds 4 and 5 of the application stated that the arbitrator had omitted to determine the issue of the notice period, this application could not be maintained on the ground of "uncertainty". This argument is quite attractive because if that issue had not been determined, it cannot be challenged on the ground of uncertainty. But again this is a side issue which should not distract the court from looking at the substance of the application as a whole. The issue relating to uncertainty is more important and requires the court's meritorious consideration. So, going to the merit of that point, Mr *Tobiko* argued that there was no uncertainty in the arbitrator's finding on the issue of the relevant notice period. He argued that the court cannot rely on a simple word in determining whether the arbitrator's finding was certain or not. In his view, the court must look at the entire award including documents referred to by the arbitrator to form an opinion on the issue. In his view, the arbitrator did not make a "second finding" on the notice period when he said six months' notice would have been sufficient notice to terminate the relationship between the parties, but only removed any uncertainty that may have been created by his earlier finding that a reasonable notice would have been "at least six calendar months". He argued that the arbitrator was justified in using that period in assessing the loss of profits.

As to the question of interest Mr *Tobiko* argued that this was a matter entirely within the arbitrator's discretion and that he took into consideration all the relevant factors in making his finding on the issue. In his view, the fact that the court might have reached a different conclusion is not sufficient ground to warrant it to interfere with the arbitrator's award.

Finally, as to the issue of costs, Mr *Tobiko* agreed that generally costs must follow the event except with good reason but argued that there was no point for the arbitrator to give reasons in this case since that matter had been agreed between the parties.

Having looked at the application in this matter, the grounds of opposition and the affidavits in support of and in opposition to the application and having heard counsel for the parties, I consider the following issues to have been raised for determination:

(a) Whether the arbitrator's finding on the issue of the applicable notice period is uncertain;

(b) Whether the arbitrator was justified in applying the period of notice as the period for loss of profit;

(c) Whether the arbitrator applied sound principles in determining the rate of interest applicable to the sums awarded; and

(d) Whether the arbitrator was justified in making the order of costs as he did.

Before I attempt to answer these questions, I would like to discuss the principles to be applied in an application to set aside an arbitral award.

The power of this Court to set aside an arbitral award is provided for by section 35 of the Arbitration Act (Act 4 of 1995). Section 35(2) of that Act provides as follows:

> "35(2) An arbitral award may be set aside by the High Court only if–
>
> (*a*) the party making the application furnishes proof–
>
> (i) that a party to the arbitration agreement was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of Kenya; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or wasotherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can he separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement was not in accordance with this Act; or
>
> (*b*) the High Court finds that–
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya;
>
> (ii) the award is in conflict with the public policy of Kenya".

For an arbitral award to be worth its name, it must be certain. It must be in a form that it can be enforced as a judgment of this Court. If it was otherwise it would, in my view, be outside what is contemplated by the reference to arbitration: It would be outside the terms of the reference and it would be contrary to public policy. The learned author of *Russel On Arbitration* (16 ed) has tried to discuss the need for an arbitral award being certain and, said as follows at 232:

> "An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties. If the arbitrator directs one party to pay, money, or to execute a release to the other, the award is sufficiently certain, though it mentions no time for if

> a request to do the act is necessary, it must be done in convenient time after the request; if no request is necessary, it must be performed in a reasonable time. If it is doubtful whether the award has decided the question referred to it will be set aside for uncertainty. The award wl be equally invalid if it is uncertain how it has decided the matters referred".

Although Act 4 of 1995 specifically deals with situations in which this Court may set aside an award, I have no doubt whatsoever in my mind that an award that is uncertain falls outside the reference and is contrary to public policy and will be set aside. The learned authors of *A Practical Approach to Arbitration Law* (Andrew Tweeddale and Karen Tweeddale, Blackstone Press Ltd 1999) on their part said as follows at paragraph 12.2.6:

> "The requirement that the award be certain and free from ambiguity derives from common law. At common law an award which was uncertain was invalid. *Re Arbitration between Marshall and Dresser* (1843) 3 QB 8 78, *Margulies Bros Ltd v Dafnis Thomaides and Co (UK) Ltd* (1958) I Lloyds Rep 250, *River Plate Products Netherlands BV v Etablissment Coarglain* (1982) I Lloyd's Rep 628. The test of whether an award is uncertain is whether the award is uncertain to the parties. The award may be uncertain to a third party but clear to the parties. In *Plummer v Lee (1837) 2 M and W 495* an award which stated that interest should run from the date of the last settlement was held to be valid as the parties were not in disagreement about that date. Equally, in *Wohlenberg v Lagenman* (1815) 6 Taunt 251, an award that the parties should pay a debt in proportion to the percentage of shares that they held in a ship was held to be certain as there was no dispute about the percentages held by the parties. An award that is ambiguous renders the award uncertain: *Duke of Beaufort v Welch* (1839) 10 Ad and EL 527. Where only part of the award is uncertain the courts may enforce part of the award and remit the remainder if this is possible*: Miller v De Burgh* (1850) 4 Ex 809; section 68(3)(*b*) of the A4 1996. In addition to challenging the award under section 68 of the AA 1996 a party may also seek to challenge the enforcement of any award under section 66 of the A4 1996 for uncertainty and ambiguity".

In *Margulies*' case (*supra*) Diplock J held that the court was not limited by authority to the four grounds in the Act for remitting awards. In the Learned Judge's view, it was an implied term of an arbitration agreement that an award for the payment of money should be a form which was capable of being enforced in the same manner as a judgment. Failure by the arbitrator to comply with the express or implied terms of the arbitration agreement would amount to misconduct on his part a matter that does not fall within his reference. Now, can it be said that the award in this case is uncertain? As has already been seen, an award will only be considered uncertain if it is not clear to the parties. An award will not be uncertain only because one of the parties says so. The court must apply its mind to the question and determine whether there is some reasonable doubt as to what the arbitrator meant and what a reasonable person would understand by the award if he was one of the parties to the arbitration. In this regard, I agree with Mr *Tobiko* that in determining whether the award is certain or not, the court has to look at the whole award and not a single word or sentence. This includes documents referred to in arbitration. In *Fabrica Lombarda Di Acido Tartarico v Fuerst Bros Ltd* (1921) Lloyds LR 57 Lush J said as follows:

> "With regard to the second point, Mr Schwabe has said that the arbitrators have left the amount at large, because they said the Applicants must pay the necessary expenses incurred in insurance, & C and because to say 'expenses, & C' is not an award at all. I do not think that is the necessary construction or the true construction. It is impossible

> for the arbitrators to fix a sum that would cover all these amounts. These are the warehousing charges going on, and one or two other expenses which the arbitrators could not ascertain, but there was evidence and other things giving all the necessary material to enable the Applicants to find out what they have to pay and I think it is because they do not want to pay that there is any difficulty in the matter. In these circumstances I think the award is good on the face of it and the motion must he dismissed with costs".

In my view, an award will not be uncertain if its meaning can be ascertained from the award read as a whole. Assuming for a moment that the arbitrator's finding that a reasonable notice in the circumstances "would be at least six calendar months" was uncertain, this was obviously cleared when he later said that six months' notice would have been sufficient to terminate the relationship between the parties. To argue that this was a second finding on the same issue is to stretch the point in a manner that is not only pedantic but also unhelpful. For my part, I do not understand what Mr *Nowrojee* meant by a second finding on the same issue. There really is no second finding only a clarification of the finding.

Now, coming to the issue of the period to be applied in calculating the loss of profit, I agree with Mr *Tobiko* that the period of notice was the one to be applied in the matter. There should have been no argument on this. This is quite clear and the arbitrator cannot be faulted on this account.

As to Mr *Nowrojee*'s argument that if the arbitrator had determined the notice period correctly, he would have found it to be one and a half years, simply does not hold water. The fact that this Court would have reached a different conclusion is not sufficient to warrant an interference with the arbitrator's finding. It has not been shown at all that the arbitrator erred in law or that he arrived at that conclusion on wrong principles and that he in any event, reached a wrong conclusion in law. In *Pioneer Shipping Co Limited and Others v BTQ Tioxide Limited* (1982) AC 724 Lord Roskill said as follows at 752:

> "My Lords, in *Edwards v Bairsow* (1956) AC 14, 36, Lord Radcliffe made it plain that the Court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the Court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the Court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be to usurp what is the sole function of the tribunal of fact. My, Lords, there have been suggestions in some of the decided cases that because questions of frustration are ultimately, questions of law, it is always open to the Court to impose its own view rather than adopt that of the arbitral tribunal. My Lords, I think, with respect, that this is what Kerr J did in *Trade and Transport Inc. v Lino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210, and what Robert Goff J has done in the present case, and I think they were each wrong to do so. I respectfully question whether the Angelia was rightly decided in the fight of the findings of fact by the very experienced arbitrators there concerned. For the future I think that in those cases which are otherwise suitable for appeal the Court should only interfere with the conclusion on issues such as those which arise in cases of frustration expressed by arbitrators in reasoned awards, either if they are shown to have gone wrong in law and not to have applied the right legal

> test, or if, whilst purporting to apply the right legal test, they have reached a conclusion which no reasonable person could, on the facts which they have found, have reached. On this matter too I find myself in entire agreement with what was said by Templeman LJ (1980) QB 547, 572F. The learned Lord Justice pointed out that the arbitrator had correctly directed himself in appearance with *Davis Contractors Ltd v Fareham Urban District* Council (1956) AC 696, had made a large number of findings of fact and had reached the conclusion that the 1979 adventure had been frustrated. The Learned Lord Justice went on to say that in those circumstances he was not prepared to substitute the decision of the Court for that of the arbitrator. I respectfully and entirely agree with him".

In my judgment, the arbitrator reached a logical conclusion based on the material before him and this Court has no quarrel with his finding on the matter.

Going to the issue of the rate of interest to be applied to the sums awarded, Mr *Nowrojee* argued that the arbitrator's award of interest at 10% pa was contrary to known principles, He was of the view that the arbitrator should have taken into account commercial rates as it was the appropriate law. In this contention, he relied on the decision of Donaldson J in *Myron (Owners) v Tradax Export SA Panama City RP* [1969] 2 All ER 1263 in which the Learned Judge said as follows at 1268:

> "All matters of costs in the arbitration and interest on any moneys found due are for the arbitrators or umpire. However, it may assist if I expressed my views on the principles which are applicable. It is of paramount importance to the speedy settlement of disputes that a Respondent who is found to be under a liability to a Claimant should gain no advantage and that the Claimant should suffer no corresponding detriment as a result of delay in reaching a decision. Accordingly, awards should in general include an order that the Respondent pay interest on the sum due from the date when the money should have been paid. The rate of interest is entirely in the diversion of the arbitrators, but personally take the view that in an era of high and fluctuating interest rates the principles which I have expressed is best implemented by an award of interest at a rate one cent, in excess of the Bank of England discount rate for the time being in force".

When interest is awarded, arbitrators commonly award it for a period ending with the date of the award. Section 20 of the Arbitration Act of 1950 provides that: "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt". The consequence is that the award carries interest at the rate of four per cent per annum from the date of the award until payment (see Judgments Act of 1838, section 17). With bank rate at its present level, this is a positive disincentive to payment. In *Pagnan v Tradax Export* SA (5) I expressed the hope that those concerned with law reform might give consideration to amending the Judgments Act 1838 to provide that judgments and, by the operation of section 20 of the Arbitration Act 1950, awards should bear interest at such a rate as may from time to time be specified by subordinate legislation. Whether such subordinate legislation would specify a rate or involve a formula such as I have indicated would be a matter for those charged with the duty of legislating, but I would hope that the result would be to provide judgment debtors with a positive incentive to settle their obligation with dispatch. It would seem from the terms of section 20 of the Arbitration Act of 1950 that arbitrators, unlike a judge, can in addition to awarding interest, direct that the award itself carry interest at a specified rate in excess of that

prescribed for judgments and this is a power which if it exists, might well be used generally.

On this matter, Mr *Nowrojee* made impressive arguments that a proper rate was "one that would not be detrimental to the party". In his award, the arbitrator said as follows on this point at 29 and 30 of the award:

> "Lastly, I have to deal with the issue of the interest I received learned submissions on this issue from the advocates representing the parties. I have carefully considered them as I am duty bound to do. I remain, however, conscious of the fact that I am not assessing damages for breach of contract or tort. I have not, therefore, applied the rules on application of interest on judgment sums as would apply in case of an award in damages, I have considered the factors that would make the compensation payable just and fair. I am of the view that in order that the compensation be just and fair, it is necessary to apply interest on the sums ordered. With regard to the manner of applying the interest, the rates of interest that might be appropriate and the duration of payment of that interest, are all issues that I have had to consider in coming to the decision on interest that I have come to. I have considered the vulgarities (*sic* – read vagaries) of business, the fluctuation in the interest rates during the period and the return on investment on monies during this time. Having considered all these matters, I have decided that the appropriate rate of interest should be 10% pa".

In view of the fact that the arbitrator agrees that the application of interest on the sums awarded is necessary to make the compensation just and fair and in view of the fact this interest ought to be determined by commercial factors which he alluded to, it is difficult to reconcile these facts with the conclusion he reached on the point as the interest he applied is totally out of touch with the present-day realities of commercial life. Whereas I agree that excessive interest would discourage settlement, applying interest without regard to commercial realities would be unfair and avail advantage to a Respondent found liable and yet leave the Applicant to suffer as a result of the delay in reaching a decision. Mr *Tobiko* relied on the decision of Lord Roskill in *Pioneer Shipping* (*supra*) as quoted above to argue that the fact that this Court would arrive at a different conclusion was not sufficient to warrant an interference with the arbitrator's finding. In my judgment that decision also says that a finding which has no foundation in law and which is arrived at on wrong principles may be called to question by this Court. The case of *Rashid Molederia and Co (Mombasa) Limited Others v Hoima Ginners Limited* [1967] EA 645 cited by Mr *Tobiko* is also distinguishable on that point. For me the arbitrator has not applied his mind to any sound principles known in law in determining the relevant interest rate to be applied on the sums awarded. Although it is agreed that this matter falls within the arbitrator's discretion, he was enjoined in law to exercise that discretion on sound principles and not arbitrarily. In my view, therefore, I do not understand why the arbitrator found it difficult to apply commercial rates on his award. Ordinarily, I would have remitted this matter to the arbitrator for re-determination. However, both counsels have asked that in the interest of saving time and expense, this matter should be determined by this Court. I am willing to do so, and would invite submissions from both parties on a date to be mutually agreed.

As to the issue of costs, Mr *Tobiko* said, and Mr *Nowrojee* did not controvert this, that this matter had been agreed between the parties and I do not see the necessity of the arbitrator giving reasons for this. In any event, the order made

by him is based on sound principles considering that the matter was remitted to the arbitrator by consent.

In the whole, this application is partially allowed as stated in the body of this ruling. I do not propose to make any orders as to costs. Before I sign off, I would like to express my gratitude to both counsels for their excellent preparation, research and submissions.

For the Applicant:
Mr Nowrojee and Mr Kihara

For the Respondent:
Mr Tobiko

Amira (K) Ltd v National Irrigation Board
[2001] 2 EA 333 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	3 October 2001
Case Number:	1196/00
Before:	Mwera J
Sourced by:	LawAfrica
Summarised by:	W Amoko

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[1] Practice and procedure – Suit against a state corporation – Government – Definition of government – Whether a state corporation falls within the definition of government – Whether it was proper to sue a state corporation in its own name as opposed to in name of Attorney-General.

[2] Practice and procedure – Verifying affidavits – Whether a suit in which the verifying affidavit was defective had to be struck out – Whether the court had discretion as to whether to strike out a suit where the verifying affidavit was defective – How such discretion is to be exercised – Order VII, rules 1(2) and (3) – Civil Procedure Rules.

Editor's Summary

On the hearing of the Plaintiff's application for the entry of summary judgment against it, the Defendant raised two preliminary points of law for determination by the court, namely (i) whether, as the Defendant was an instrument of the government, the reliefs sought against it by the Plaintiff could be granted and (ii) (though the issue was not raised to strike out the suit) whether the verifying affidavit was incompetent and whether the Plaintiff had to take steps to cure the defect.

Held – The Defendant was a body corporate, set up by statute, which could sue and be sued and enter into contracts, and though it discharged public function was not "the government" in the larger sense, and therefore did not fall within the provisions of the Government Proceedings Act (Chapter 40). It had been sued in accordance with the law and the Plaintiff was not precluded from seeking the relief

prayed.

The verifying affidavit did not state the place at which it was sworn. However, that was not a fundamental defect and it could be overlooked. As the Defendant was not raising the objection to have the suit struck out, in the

interests of justice the Plaintiff was ordered to apply to rectify the verifying affidavit within 14 days. *Microsoft Corporation v Mitsumi Computer Garage Ltd* [2001] 2 EA 460 (CCK) adopted. *The Eastern and Southern Africa Development Bank v African Greenfields and others* (ur) HCCC number 1189 of 2000 and *Kariuki and another v United Insurance Co Ltd* (ur) HCCC number 1450 of 2000 considered.

Preliminary points of law dismissed.

Cases referred to ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Kariuki v United Insurance Co Ltd [2000] LLR 989 (CCK) – **C**

Microsoft Corporation v Mitsumi Computer Garage Ltd [2001] 2 EA 460 (CCK) – **A**

The Eastern and Southern Africa Develpoment Bank v African Greenfields Ltd [2000] LLR 663 (CCK) – **C**

Ruling

MWERA J: When this Court was about to hear an application dated 6 November 2000 by the Plaintiff seeking judgment under Order XXXV, rule 1(*a*) and Order L, rule 3, Civil Procedure Rules, Mr *Okello* for the Defendant rose on a preliminary point of law.

The court heard that the Defendant being an instrumentality or agency of the government performing a public function as set out in its incorporating provisions of law, the Irrigation Act (Chapter 347) Laws of Kenya, it is not open to approaches for relief as one intended by the Plaintiff. Mr *Okello* referred to dictionary definitions from Longman Dictionary of the English Language to *Webster's Third New International Dictionary* with a punch thrown in from *Halsbury's Laws of England* (3 ed) Volume 7 on the meaning and understanding of the word "government". *Halsbury's* said:

> "401 Government: From the legal point of view, government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers together with certain private persons or corporations exercising public functions".

After going over provisions of the Irrigation Act under which the Defendant herein was incorporated, sections of the State Corporation Act (Chapter 446) and stressing that the Defendant is financed by monies voted by Parliament through government ministries, Mr *Okello* concluded that the Defendant was the government and thus the Plaintiff s move as adopted here was invalid as against it. He also drew the court's attention to an aspect of the Plaintiff's verifying affidavit sworn on 27 June 2000 and filed along with the plaint as defective. The court was told that although the Defendant did not desire for the dismissal or striking out of the entire suit as being invalid because of this alleged defective verifying affidavit nonetheless, the Plaintiff was obliged to make an application, oral or by chamber summons, to rectify the irregularity. That before doing so, the suit could not be a basis for the application for summary judgment as said above.

The cases of *The Eastern and Southern Africa Development Bank v African Greenfields Ltd* NBI HCCC 1189/2000, *Kariuki v United Insurance Co Ltd* NRI HCCC 1450/2000 and *Microsoft Corporation v Mitsumi Computer Garage Ltd* [2001] 2 EA 460 (CCK), were cited on various aspects put forth in support of the preliminary point. Mr *Ndungi* on his part had a contrary view in this matter and what he said as well as Mr Okello's submission appears in the decision that follows.

After appreciating the foregoing this Court is not in doubt that the Defendant is a creature of statute – the Irrigation Act (Chapter 347). It says:

> "3(1) There is hereby established a Board to be known as the National Irrigation Board, which shall be a body corporate having perpetual succession and a common seal with power to sue and be sued, and capable of purchasing or otherwise acquiring, holding managing and disposing of any property movable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties, and discharge of its functions under the Act and any subsidiary legislation made thereunder".

It was not in dispute that the Defendant performed public duties and functions (section 15). And that it got its finances from the government and government ministers have a part to play in the activities of the Defendant board (for example section 16).

Further it is not doubted that as a parastatal the Defendant was set up by a presidential order (section 3(1) State Corporation Act which states *inter alia*:

> "3(2) A state corporation established under this section shall:
>
> …
>
> (*b*) in its corporate name be capable of suing and being sued").

Mr *Okello* urged the court to see the suing of the Defendant in the light of section 12 Government Proceedings Act in that subject to the provisions of any other written law, civil proceedings by or against the government shall be instituted by or against the Attorney-General as the case may be.

The argument, persuasively as it was put, does not commend itself to this Court. In its view the Defendant board is a body corporate and as it discharges public functions of government it is not the government in the larger context (rather vague) that gives definition or description of government. It is a specific entity clearly set out and able to sue or be sued. It can enter into contracts and hold property etc. It did just that here and in the mind of this Court, properly so. It was sued in accordance with the law and again properly so. Accordingly the Plaintiff is entitled to seek the relief it purposes to pursue in the application dated 6 November 2000.

Mr *Okello* though not desiring that this suit be struck out or dismissed, posited that the verifying affidavit which accompanied it was defective and totally bad because it did not accord with sections 4, 5 of the Oaths of Statutory Declarations Act (Chapter 15). In essence these two sections require that an affidavit should be attested before a Commissioner of Oaths who should also state as per the jurat, the place where the affidavit was sworn. It is not doubted that the verifying affidavit in question did not comply with that part of jurat and in the *Kariuki* case (*supra*) as well as the *Eastern and Southern Development Bank* case (*supra*) the suits were thrown out on the basis that the jurat did not state where the attestation/commissioning of the verifying affidavit took place. But in the *Microsoft Corporation* case (*supra*) Ringera J had a different view. All

the three cases are known to the parties as to the facts which do not need to be repeated here. However on the whole, this Court is inclined to Ringera J's position. Particularly that the Defendant was not keen on seeing the suit struck off on account of the verifying affidavit not stating where it was sworn, a pointer to what this Court sees as a sense of justice in the matter, it thus decrees that the Plaintiff apply duly to rectify the verifying affidavit in accord with Order XVIII, rule 8, Civil Procedure Rules in 14 days. After the rectification, parties to go on to be heard.

The preliminary point is dismissed. No orders as to costs. Parties to set down the application dated 6 November 2001 for hearing.

Orders accordingly.

For the Plaintiff:
Information not available

For the Defendant:
Information not available

Asea Brown Boveri Ltd v Bawazir Glass Works Ltd
[2001] 2 EA 336 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	10 May 2001
Case Number:	1619/00
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	W Amoko

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[1] Practice and procedure – Application to strike out defence made while appeal striking out summary judgment application pending – Whether application properly brought – Whether application constituted abuse of process –Whether the court under its inherent jurisdiction could strike out application suo moto *as an abuse of process – Order VI, rule 13(1) – Civil Procedure Rules.*

Editor's Summary

After pleadings had closed, the Plaintiff made an application for the entry of summary judgment against the Defendant which was rejected by Khamoni J on the ground that it was incompetent, as a defence had been filed. The Plaintiff filed an appeal against that decision. Without taking any action on the appeal, the Plaintiff then applied to have the defence struck out. On the hearing of the said application.

Held – The striking out application was not *res judicata* as contemplated by section 7 of the Civil Procedure Act (Chapter 21), as the application for summary judgment had not been determined on the

merits.

The court can on its own motion under its inherent jurisdiction make such orders as may be necessary for the ends of justice, or to prevent an abuse of its process.

The Plaintiff's appeal against Khamoni J's order had not been determined and if the appeal was successful the summary judgment application would be

remitted back to the High Court for adjudication on its merits. If the appeal was unsuccessful, the order of Khamoni J would be upheld, and until and unless that happened, the summary judgment application was still alive. To file an application for striking out a pleading in those circumstances was tantamount to playing judicial lottery and amounted to an abuse of process.

The appropriate order to make to correct the abuse would be to expunge the striking out application from the record as merely staying the delivery of the ruling would to some extent condone the Plaintiff's mischief by recognising the legitimacy of the application.

Application expunged from the record.

No cases referred to in ruling

Ruling

RINGERA J: This is an application by the Plaintiff to strike out the Defendant's written statement of defence. The application is expressed to be brought under Order VI, rule 13(1)(*b*), (*c*) and (*d*) of the Civil Procedure Rules on the grounds that the defence is scandalous, frivolous and vexatious and/or likely to prejudice, embarrass or delay the fair trial of the action and, in the alternative, that the said defence is an abuse of the process of the court.

The application follows an earlier one by the Plaintiff for summary judgment against the Defendant, which was rejected by Khamoni J on 19 December 2000 on the grounds that it was incompetent as the Defendant had filed a defence. An appeal has been preferred against that ruling. Instead of prosecuting that appeal and taking such further or no further action as may be appropriate in light of whatever decision the Court of Appeal may hand down, the Plaintiff has filed the present application in order, in his advocates words, he "may skin the cat in another way". One of the grounds on which the Defendant opposes the present application is that the same is constructively *res judicata* in that the Plaintiff is trying to bring back to court the same issues in the summary judgment application in another way. Counsel for the Plaintiff submits that the matter is not *res judicata* as the application for summary judgment was not determined on its own merit as the facts in support of the application were not adjudicated upon. I agree. This is not a case of *res judicata* constructive or otherwise, as contemplated by section 7 of the Civil Procedure Act. But that is not an end to the matter. I have no doubt whatsoever that this Court can of its own motion make such orders as may be necessary for the ends of justice or to prevent abuse of its process. That is the essence of section 3A of the Civil Procedure Act which saves the inherent powers of the court. In the matter at hand, there is still subsisting undetermined the Plaintiff's application for summary judgment. Until the Court of Appeal Rules on the appeal lodged I cannot see that the matter would cease to be outside the purview of a court of competent jurisdiction. Should the Court of Appeal hold that an application for summary judgment can lie even though a written statement of defence has been filed, it will remit the application to this Court for determination on the usual basis of whether or not the Defendants' have demonstrated there are *bona fide* triable issues raised in the defence which would entitle them leave to defend or, in the converse, whether or not the Plaintiff has demonstrated that the defence on record is no real defence to its claim and the same is a sham intended to delay it from obtaining expeditious justice. If it upholds Khamoni J that will be the end of the application for summary judgment. Until and unless the latter

comes to pass, the Plaintiff's application for summary judgment filed in court on 15 November 2000 is still alive.

Now, while the said application is pending thus, the Plaintiff who evidently strongly feels (rightly or wrongly) that as soon as its case is submitted to judicial consideration the same will be decided in its favour, has opened yet another window for the summary consideration of that case by invoking the court's jurisdiction to strike out pleadings which are either frivolous, scandalous, or vexious, or which are calculated to delay the fair trial of the action, or which are otherwise an abuse of the process of the court. The Plaintiff has done that knowing that it is elementary procedural law that should the court find the defence on record to be other than an unarguable one incapable of being put right by an amendment the same will not be struck out. To my mind, to file an application for striking out a pleading while an application for summary judgment pends undetermined is tantamount to playing lottery with the judicial process. It is an abuse of the court process. I shall not brook it. So what order should I make to check such an abuse of the process of the court? I have considered whether I should in view of the fact that I have heard the application stay delivery of the ruling pending the determination of the application for summary judgment or I should invalidate the entire proceedings by striking out the application. I think if I stay delivery of the ruling it will appear as if I have to some extent condoned the Plaintiff's mischief by recognising the legitimacy of the steps taken so far. In the circumstances, I think the just order to make is the more draconian one of expunging from the record the striking out proceedings. Being of that persuasion, the order of this Court is that the application filed in court on 16 January 2001 and the subsequent proceedings thereon should be and are hereby struck out of the record. As this step has been taken by the court *suo motu* there will be no order as to costs.

For the Plaintiff:
Information not available

For the Defendant:
Information not available

Friendship Container Manufacturers Ltd v Mitchell Cotts (K) Ltd
[2001] 2 EA 338 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	23 November 2001
Case Number:	2966/95
Before:	Mbaluto J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Agency – Disclosed agent – Whether disclosed agent liable for principal's breach of contract.

[2] Conflict of Laws – Exclusive jurisdiction clause – Whether the clause will bind the parties and

oust the jurisdiction of the courts.

[3] Shipping – Liability of carrier – Article III 6 – Hague-Visby Rules – Period of limitation.

Editor's Summary

The Plaintiff, F, contracted with a carrier, U, whose local agent was M, the Defendant, to ship some machinery to the Port of Mombasa. F alleged that in breach of the agreement M failed to properly handle and release the machinery, as a result of which the machinery was misdirected and subsequently damaged. F claimed damages arising from negligence for loss of profits and damage to the machinery.

The Defendant responded that the suit was time barred under the Hague-Visby Rules which applied as per the bill of lading, that the suit was bad in law for having been instituted against a disclosed agent, and that the bill of lading had an exclusive jurisdiction clause vesting jurisdiction in the courts of the Republic of South Africa.

Held – A person who acts as a disclosed agent is not liable to a plaintiff in respect of the particular transaction. *Ram v Singh* 1933 5 ULR 76 followed.

In any case under the Hague-Visby Rules which applied to the transaction, the carrier and the ship are discharged from any liability whatsoever in respect of the goods unless the suit is brought within one year of their delivery or of the date when they should have been delivered. Article III 6 of Hague-Visby Rules considered.

Parties should be held to their agreement as regards a jurisdiction clause and the party wishing to depart from this clause must discharge "a heavy burden of showing strong cause". *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1982–88] 1 KAR followed.

Suit dismissed.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Ram v Singh [1933] 5 ULR 76 – **F**

United India Insurance Co Ltd and v East African Underwriters (K) Ltd [1982–88] 1 KLR – **F**

Ruling

MBALUTO J: The Plaintiff is a limited liability company engaged in the manufacture of containers and cans. In December 1992, it purchased in India one New "AMBA" Hydraulic Cylindrical Grinding Machine, model number U/127/500 with parts and accessories. For the purposes of shipping the machinery to the Port of Mombasa it contracted with a carrier known as UNICORN/CMBT Line whose local agents at Mombasa are the Defendants.

According to the averments in the plaint, it was an express and/or implied term of the agreement between the Plaintiff and the Defendant that the Defendant would deliver and release the machinery from the port of Mombasa to the Plaintiff's appointed agent namely Mechanised Clearing and Forwarding Company Limited. The Plaintiff claims that the Defendant in breach of the

agreement and/or its duty thereunder failed to properly and carefully handle, carry, keep and/or care for and discharge the machinery or to deliver and/or release it to the said clearing and forwarding company but instead permitted and/or allowed the machinery to be wrongly and illegally transported and delivered by Transami (K) Ltd to a company in Kampala called Casement Africa Ltd. The Plaintiff further alleges that while at Uganda, the machinery was unpacked into an old container number 268198-3 and when eventually returned to Kenya it was found to be in poor shape and condition with parts and accessories pilfered and/or missing. The Plaintiff further claims that due to negligence on the part of the Defendant, it failed to deliver the said machinery to the appointed destination within the agreed and/or reasonable time.

By reason of that alleged negligence the Plaintiff says that it suffered loss and damage by being deprived of the use and enjoyment of the machinery. It therefore claims the sum of KShs 3 940 000 against the Defendant for loss of production and profit and another sum of KShs 525 722-75 being damage to the machinery through rusting and pilferage. General damages for breach of contract and what the Plaintiff refers to as goodwill are also claimed.

In an amended defence dated 18 Decenber 1996, the Defendant denied having been the carrier of the subject cargo. It also avers that, even if it was the carrier, the suit would be time barred under the provisions of article 3 paragraph 6 of the Hague-Visby Rules as provided in the Bills of Lading, the suit not having been filed within 1 year from the date of delivery of the cargo to the Plaintiff.

On the basis of the pleadings as briefly summarised above, the Defendant has lodged an application for the dismissal of the suit on the grounds that:

> "(1) the suit, having been instituted against a disclosed agent does not disclose any cause of action and is therefore bad in law;
>
> (2) the suit is time barred under article III paragraph 6 of the International Convention for the Unification of Certain Rules relating to Bills of Landing 1924, as amended by the Brussels Protocol of 1968 (the Hague-Visby Rules) the suit having been brought more than a year after the consignment was delivered on 22 April 1994; and
>
> (3) this Court does not have jurisdiction to entertain the suit as the Bill of Lading provides that all disputes are to be exclusively determined by the law and jurisdiction of the court where the carrier has its registered offices which, in the instant case, is the Republic of South Africa".

A perusal of the plaint reveals that the Plaintiff recognises that at the material time the Defendant acted as an agent of UNICORN/CMBT which is a shipping line registered in the Republic of South Africa, according to the affidavit sworn in support of the application by Mr Andrew Ndegwa, a director of the Defendant. That fact is not denied. It is common ground that the machinery was shipped on board vessel MV Sondershausen. The relevant Bill of Lading which is annexed to Mr Ndegwa's affidavit as exhibit 1 shows UNICORN/CMBT service as the shipper and the Plaintiff as the consignee. No document has been availed to this Court in this matter which discloses how and in what manner the Defendant would be liable to the Plaintiff other than as an agent of the Defendant. That being the case, the question arises whether the Defendant, being not only a disclosed but also acknowledged agent of UNICORN/CMBT is liable for the alleged negligence in the delivery of the machinery.

In the case of *Ram v Singh* [1933] 5 ULR 76, it was held that "a person who acts as another's agents in a transaction with the knowledge of the Plaintiff is not liable to the Plaintiff in respect of that particular transaction". Accordingly, there is no basis for finding the Defendant liable to the Plaintiff.

Moreover, the Hague-Visby Rules to which the contract giving rise to the claim clearly applies requires in article III 6 that:

> "Subject to paragraph 6 the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

Although in his replying affidavit, the Plaintiff's production and factory manager depones that the Hague-Visby Rules do not apply to the contract, he does not explain why given the explicit statement in the Bill of Lading (see clause 5 of Terms and Conditions) unequivocally applying the Rules, he takes that position. In my view, the Rules apply and Mr Patel's contention is untenable. According to the Defendant the consignment was delivered to the Plaintiff on 22 April 1994. That position is not controverted by the Plaintiff and I accept it as a fact. That being the case, I find that the Plaintiffs suit is time barred.

The final point regards jurisdiction. The Applicant claims that this Court has no jurisdiction to entertain the matter. That contention springs from a provision in the Bill of Lading that all disputes relating to the contract are to be exclusively determined by the law and the jurisdiction of the court where the carrier has its registered office that is the Republic of South Africa. By virtue of that provision, the Applicant submits that the suit should have been filed in the courts of South Africa and not in Kenya. A similar position arose in the case of *United India Insurance Co Ltd v East African Underwriters Kenya* Ltd [1982–88] 1 KLR in which there was an exclusive jurisdiction clause, just like we have in this suit in the following terms:

> "All suits and other legal proceedings and all arbitration in connection with this agreement and touching the rights of the parties herein shall be governed by the law prevailing in the Domain of India to the exclusion of all other laws and courts of Bombay alone shall have the jurisdiction to entertain any disputes between the parties".

The Court of Appeal held that "all the decided authorities showed that the parties should be held to their agreement as regards a jurisdiction clause" and that "a heavy burden of showing strong cause for departing from the exclusive jurisdiction clause lay on the party wishing to do so". In my opinion, the Plaintiff has not established any case for departing from the exclusive jurisdiction clause.

The upshot of the matter is that on the three legal points raised by the Defendant namely (*a*) non-liability of a disclosed agent, (*b*) limitation under the Hague-Visby Rules and (*c*) the exclusive jurisdiction clause, I agree with the Defendant. Accordingly, my finding is that the Plaintiff's suit cannot be maintained and consequently it must be dismissed with costs. It is so ordered.

For the Plaintiff:
S Adere instructed by *Adere and Co*

For the Defendant:
IT Inamdar instructed by *Inamdar and Inamdar*

Gathiba v Gathiba
[2001] 2 EA 342 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	15 January 2001
Case Number:	1647/84
Before:	Khamoni J
Sourced by:	LawAfrica
Summarised by:	M Kibanga

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[1] Customary laws – Land – Whether customary law rights in land are extinguished upon registration of land under Registration of Lands Act.

[2] Judicial notice – Sections 48 and 51 – Evidence Act (Chapter 80) – Whether courts may take judicial notice of existence of customary laws in Kenya – Whether courts may take judicial notice of existence of concept of trust in land in customary laws in Kenya.

[3] Pleading – Failure to specifically plead trust – Whether failure to specifically plead trust an incurable omission.

[4] Trust in land – Whether the concept of trust in land exists in customary law – whether customary rights constitute trust or overriding interests – Section 30 – Registered Land Act (Chapter 300) – Whether trust can result where the words "as a trustee" have not been entered in the register – Section 143(1) – Registered Land Act (Chapter 300).

Editor's Summary

The Plaintiff filed suit praying that the Defendant, his agents and his servants be restrained from trespassing on land parcel number Thegenge/Kihora/1. The Plaintiff claimed that the land belonged to him because he had bought the same between 1949 and 1956 and that the land was registered in his name at the first registration in 1958. The Plaintiff called witnesses to support his case but he produced no note or agreement to evidence a sale transaction. The persons from whom the Plaintiff claimed to have bought the land were deceased at the time of the hearing.

The Defendant argued that he was the youngest of four sons and that the suit land had belonged to their deceased father and was registered in the name of the Plaintiff, the second oldest brother. The Defendant explained that he could not have been registered as the proprietor of the land because he had not been married at the time of registration, and Kikuyu customary law did not permit unmarried men to own land.

The Defendant explained that the suit land was registered in the name of the Plaintiff in trust for the Defendant like the other family land, Thegenge/Unjiru/251, which was registered in the name of the the eldest brother in trust for the third eldest brother. The Defendant asked that the suit land be divided between the Plaintiff and the Defendant. The Defendant called witnesses who supported his contention.

Counsel for the Plaintiff argued that the Defendant had not pleaded trust specifically and that therefore no evidence on trust should be allowed. In any event, it was argued, there was no indication of a trust in the instrument because words to that effect were not used in the land register.

Counsel for the Defendant replied that the understanding of the members of the family and the custom of the Kikuyu constituted a trust.

Held – Although the Defendant did not specifically plead trust, the issue of the Defendant's counterclaim based on a trust had been fully canvassed, evidence having been adduced and tested. The Defendant's pleadings about the land being family land must have made the Plaintiff aware all along that the Defendant was referring to a trust. In any event the situation was one where section 3A of the Civil Procedure Act (Chapter 21) could be properly invoked so that technicalities did not defeat justice.

The concept of trust exists in many customary laws including Kikuyu customary law. The right of occupation and cultivation under customary law is not an overriding interest under section 30 of the Registered Land Act (Chapter 300) ("the RLA") but a trust; *Wanjohi and others v Official Receiver and Interim Liquidator (Continental Credit Finance Ltd)* civil application number 140 of 1988 followed, *Obiero v Opiyo and others* [1972] EA 227 explained and followed, *Esiroyo v Esiroyo* [1973] EA 388 explained and followed, *Kiama v Mathunya and others* CA number 42 of 1978 (ur) doubted.

Customary law rights in land are extinguished once the land is registered under the RLA; *Esiroyo v Esiroyo* (*supra*) followed.

Courts are entitled to take judicial notice of the fact that there exists Kikuyu customary law as well as other customary laws in Kenya and that generally African customary laws in Kenya have the concept of a trust within their jurisprudence, as demanded by section 48 and 51 of the Evidence Act; *Kimani v Gikanga and another* [1965] EA 753 considered; *Nthiga v Nthiga and another* High Court civil case number 1949 of 1976 (Ur), *Mugutha v Mugutha* [1971] KH CD 16, *Wamathai v Mugweru* High Court civil case number 56 of 1972 (Nyeri), *Muguthu v Muguthu* High Court civil case number 377 of 1968, *Hosae v Njiru* [1974] EA 526, *In the matter of the Estate of Njuguna Kibuthu* High Court civil case number 1014 of 1993 (ur), *Madede and another v Arneafita and another* CA number 4 of 1986 (ur) and *Wekesa v Muchwenge* CA number 107 of 1985 (Kisumu) (unreported) all followed; *Kinguru v Gathangi* [1976] KLR 253 explained and followed.

The entry of the words "as a trustee" in the land register is only a mandatory requirement where there is an instrument of acquisition showing that the proprietor acquired the land in a fiduciary capacity. The registration of land under the RLA does not extinguish a trust originating from customary law simply because the words "as a trustee" were not entered on the register. *Kinguru v Gathangi* (*supra*) followed.

Ordering a transfer of the whole parcel or a subdivision of the suit land is not rectification of the register and section 143(1) of the RLA does not prevent it; *Limuli v Sabayi* High Court civil case number 222 of 1978 (ur) followed.

There was a resulting trust in favour of the Defendant. It was ordered that the suit land be subdivided equally between the Plaintiff and the Defendant.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Esiroyo v Esiroyo [1973] EA 388 – **E** & **F**

Hosae v Njiru [1974] EA 526 – **F**

Karanja v Muhia (Ur)

Kiama v Mathunya and nine others civil appeal number 42/1978 – **DT**

Kimani v Gikanga and another [1965] EA 753 – **C** & **F**

Kinguru v Gathangi [1976] KLR 253 – **E** & **F**

Limuli v Sabayi HCCC number 222/1978 (Nairobi) – **F**

Madede and another v Arneafita and another civil appeal number 4/1986 (Ur) – **F**

Mugutha v Mugutha [1971] KHCD 16 – **F**

Muguthu v Muguthu HCCC number 3/1968 – **F**

Nthiga v Nthiga and another HCCC number 1949/1976 (Ur) – **F**

Obiero v Opiyo and others [1972] EA 227 – **E** and **F**

Re Njuguna Kibuthu Estate HCCC number 1014/1993 (Ur) – **F**

Wamathai v Mugweru HCCC number 66/1972 (Nyeri) – **F**

Wanjohi and others v Official Receiver and Interim Liquidator (Continental Credit Finance Ltd) civil application number 140/1988 – **F**

Wekesa v Muchwenge civil appeal number 107/1985 Kisumu – **F**

United Kingdom

Commonwealth Shipping Representative v P and O Branch Service [1923] AC 191

Other

Angu v Attah (PC) 1874 1928, 43

Issues

Whether rights under customary law are not overriding interest under section 30 of the Registered Land Act.

Whether Customary Law Rights in land are extinguished upon registration of that land under the Registered Land Act.

Under section 30 of the Registered Land Act, not only are overriding interests the last but are also the least in degree out of the five categories of the interests protected by the Act. Whether the overriding interests can therefore entitle the beneficiary to share in or take over the ownership of the affected parcel of land.

Whether the concept or notion of a trust is inherent in African Customary Law including Kikuyu Customary Law in Kenya.

Unless the instruments of acquisition show that the land was acquired in a fiduciary capacity, it is not mandatory under the Registered Land Act, to enter the words “as trustee” in the register of every

parcel of land where the proprietor acquired the land in a fiduciary capacity.

Whether the Land Consolidation Act and the Land Adjudication Act are in a technical default as to the registration of trusts. A legal mistake or omission to the detriment of innocent beneficiaries.

Whether a declaration of trust can be made even in respect of a first registration and the registered and the registration proprietor ordered to effect a transfer under the Registered Land Act.

Judgment

KHAMONI J: The Plaintiff, Joseph Githinji Gathiba, filed this suit against his younger brother, Charles Kingori Gathiba praying for an "order restraining the Defendant, his employee, servant or agents from trespassing or and doing any act towards the land number Thegenge/Kihora/1". He also prays for damages, interest thereof, and any other relief that this Court may deem just and fit to grant.

The Defendant does not accept the Plaintiff's claim and therefore prays that the court dismisses the Plaintiff's suit and enter a declaration that the suit parcel of land number Thegenge/Kiora/1 belongs to both the Plaintiff and Defendant and that the same be subdivided into two equal portions between the Plaintiff and the Defendant with separate titles.

The suit parcel of land is adjacent to another parcel of land registration no Thegenge/Unjiru/251 belonging to the family of both parties. In other words, there is no dispute that Thengenge/Unjiru/251 is family land. It is in a different adjudication section but there is no problem about that.

Concerning the suit parcel of land Thegenge/Kihora/1 while the Plaintiff claims that it is not family land because he personally bought it alone using his own money and that that is why it is registered in his name alone under the Registered Land Act, it is the Defendant's case that the suit parcel of land, like parcel number Thegenge/Unjiru/251 is family land. The Defendant contends that the land was bought by their father before their father died and that after their father had died it was decided by clan elder during land adjudication and consolidation that parcel number Thegenge/Unjiru/251 be registered in the name of their eldest brother named Mugendi Gathiba to hold it on his own behalf and on behalf of Kariuki Gathiba, the third brother, while the suit parcel of land was to be registered in the name of the Plaintiff to hold it on his behalf and on behalf of the Defendant.

To support his case, the Plaintiff called two witnesses. He told the court that he is the sole owner of the suit parcel of land having bought the same, between 1949 and 1956, a transaction which he claimed to have taken place before land demarcation. The date of first registration under the Registered Land Act was 14 August, 1958, The suit parcel of land in 2,8 acres, according to a copy of the land register produced in this Court. The Plaintiff told the court that he had bought one portion from Kigai Mugo Muicuia and another portion from Nyaitanga Mureithi and that the two portions were at the time of demarcation consolidated together to form Thegenge/Kihora/1 which was registered in his name. He produced exhibit 1 being the title deed for the said land and also exhibit number 2 being a certified copy of the green card or land register for the same parcel of land both in his name.

The Plaintiff claimed he solely paid for the purchase price for the said parcel of land and that neither the Defendant nor any other member of the Plaintiff's family assisted him to acquire the land. He told the court that he allowed the Defendant to use a small portion to plant some cabbages in 1979 and that that was the first time the Defendant went to utilise the said parcel of land. He did not accept the Defendant's claim that the Defendant started utilising the parcel of land in 1956.

The Plaintiff said that when he briefly went to a place called Mwega in 1984, he came back and found the Defendant had buried one of his children in the

suit parcel of land. He added that in total, the Defendant has buried three members of his family in the suit parcel of land being two children and the Defendant's wife whom the Defendant buried in June, 1999. In all cases the Plaintiff protested.

There is no dispute that the Plaintiff is the only one living in the suit parcel of land as the Defendant continues to live on parcel of land number Thegenge/Unjiru/251 registered in the name of their eldest brother Mugendi Gathiba who gave evidence as DW2 Before he moved to live in the suit parcel of land in 1964, the Plaintiff used to live in Thegenge/Unjiru/251.

The Plaintiff claimed that the Defendant cultivates only a small portion of the suit parcel of land. However, there is no dispute that the Plaintiff cultivates the bigger portion of the suit parcel or land. The Defendant also cultivates parcel of land Thegenge/Unjiru/251 where he lives and which the Plaintiff claims is the only family land as it is the home of all his three brothers – plus the two widows of their father. One of the two widows called Agata Wambui is said to have died and was buried in parcel number Thegenge/Unjiru/251.

The Plaintiff did not therefore, accept that he is holding the suit parcel of land Thengenge/Kihora/1 in trust for the Defendant or for any other member of the family as he does not accept that this parcel of land is family land.

The two witnesses brought by the Plaintiff told the court that he bought land from their paternal uncle called Kigai Mugo Muicuia (Kigai Mugo) who died in 1954. But these appear to be witnesses who may have come into this land sale transaction because there was still some money payable to the seller who had died. They did not impress me as having been involved in the sale prior to their uncle's death.

Mugo Muburia, who gave evidence as PW2 and claimed to be 90 years old, told the court that he was present when the Plaintiff purchased land from his uncle who was unmarried and had no child and therefore treated PW2 and PW3 as his children. He said he witnessed payment of KShs 180 by the Plaintiff to the deceased seller before the deceased died. After the uncle had died, PW2 received KShs 200 while PW3 Simon Muthomi received KShs 300 making a total of KShs 680 which they claim was the purchase price. The two last instalments were made between 1956 and 1958.

I have said PW2 and PW3 did not impress me as people who were involved in the land sale transaction by their uncle right from the start but both said in their evidence that it was the Plaintiff, and not the Plaintiff's father, who was buying land from their uncle. PW2 claimed there was a written agreement made between his uncle and the Plaintiff at the time of starting the transaction but his uncle's copy was destroyed by fire when the house of his uncle was burned. Later another agreement had to be prepared after the Plaintiff paid the balance of the purchase price.

The Plaintiff never produced his copy of the agreement although the seller's copy is said to have been burned in the house of the uncle of PW2 and PW3. Otherwise Plaintiff exhibit number 3 appears to have been a much later document for the purpose of this suit. It has no date. It is the agreement said to have been written later and it was between the Plaintiff on the one hand and PW2 and PW3 on the other. The Plaintiff and the Defendant said their father died in 1950. PW3 told the court that the purpose of the re-written agreement in 1985 (after this suit had been filed) was to harmonize the whole transaction and

consolidate the purchase price paid by the Plaintiff to Kigai Mugo before he died and the later payment made by the Plaintiff to PW2 and PW3 of KShs 500 being the balance of the purchase price.

The Defendant on the other hand told the court he is the youngest of the four sons of his father. He claimed his father's family, the family of Gathiba had two parcels of land being Thegenge/Unjiru/251 registered in the name of Mugendi Gathiba, the eldest brother, and Thegenge/Kihora/1 registered in the name of the Plaintiff, their second eldest brother.

The Defendant therefore maintained that the suit parcel of land had been acquired by their father and that it was originally made up of eight small portions acquired from about six persons. He gave some names which included Kigai Mugo and added that his father died in 1950 leaving the scattered pieces of land being cultivated by his mother, step-mother who had no son, his eldest brother and the Plaintiff. The Defendant was young when these portions were acquired, but he saw them being cultivated by members of his family including his now 70-year-old Joseph Githinji Gathiba, the Plaintiff. The Defendant was about 14 years when his father died and grew up knowing those pieces of land belonged to the family so that during the land demarcation, adjudication and consolidation later, he played an important role in seeing that the pieces of land were consolidated into Thegenge/Kihora/1 which was finally registered under the Registered Land Act on 14 August, 1958. It is 2,8 acres as compared to Thegenge/Unjiru/251 which is 2.6 acres and is to be shared between the Defendant's eldest brother, in whose name it is registered, and the Defendant's third brother called Kariuki Gathiba. The Defendant explained he could not be registered as a proprietor of land because he was not married and Kikuyu Customary Law did not permit unmarried men to own land. That was why the Plaintiff was registered alone but was so registered as a trustee for himself and for the Defendant just as his eldest brother had been registered owner of Thegenge/Unjiru/251 in trust for himself and for their third brother Kariuki Gathiba who was not registered. That was a decision of the family and clan elders.

The Defendant's contention that it was only himself, his mother, his step-mother and paternal uncle that were involved in the collection of portions of land that formed parcel number Thegenge/Kihora/1 and that the Plaintiff was not involved because he was working at Nyeri Town is hotly opposed by the Plaintiff who said that Nyeri was not very far and that as a married man with family he would not have been keeping away during all that time the land demarcation, adjudication, consolidation and registration was taking place. I think the Plaintiff has a point there as he must have been going to his home to attend to problems which may have included problems related to the demarcation, adjudication, consolidation and registration of the suit parcel of land although he may have been leaving most of the land problems to be attended to by the Defendant and other adult members of Gathiba family at home. As to the various payments during the whole process, they cannot be ruled out and they can be of various types even if the payer is not paying the price for the land. Collection, adjudication, consolidation and registration involves moving from place to place dealing with various people and requiring various people some of whom may not accompany you unless you meet all their traveling expenses. No doubt there would be some expenditure. Some sellers would even become stubborn and some money would have to be coughed up to appease them.

As to why the Defendant did not build a residential house on the suit parcel of land, he said he may not have found it urgent since where he lived was hospitable and the suit parcel of land was adjacent. But he also told the court that the Plaintiff was not welcoming and the manifestation of that fact are these litigations.

The Defendant said and it appears so from the evidence, that during the land demarcation, adjudication, consolidation and registration his elder brothers were employed away from home and he took over the duty of collecting the various parcels of land assisted by his mothers'. The court was told that the Defendant's third eldest brother is dumb.

The Defendant went on to say that although Mugendi Gathiba (DW2) the eldest brother has agreed to sell the land, Thegenge/Unjiru/251, registered in his name with their third brother Kariuki Gathiba, the Plaintiff herein has refused to share the suit parcel of land with him (the Defendant).

Their eldest brother, Mugendi Gathiba supported the Defendant's case thereby corroborating the Defendant's evidence as to the origin and ownership of the suit parcel of land and how the family and clan elders decided that Mugendi Gathiba and the Plaintiff be registered as owners of the two family parcels of land for themselves and on trust for the other members of the family.

Then there was the evidence of Solomon Mwangi Njau (DW3) who told the court that he participated in the cases between the Plaintiff and the Defendant when the cases were before elders and the District Officer. He was writing minutes when the case was before elders. Before the District Officer, Tetu, DW3 went as a witness to produce copy of the minutes of the proceedings before elders. Before this Court he produced same.

After land demarcation and adjudication, consolidation and registration, each one of the four brothers could cultivate anywhere on the two parcels of land the family now owned. The Defendant says he started cultivating the land immediately after land registration.

He told the court that this dispute with the Plaintiff has been before clan elders starting with clan elders, subchief, chief and ending up with Elders under the chairmanship of the District Officer, Tetu Division, whose decision allowed decisions of earlier groups of elders that the suit parcel of land be shared equally between the Plaintiff and the Defendant and that the Defendant pays KShs 1 150 to the Plaintiff so that they share the land equally PW3. Simon Muthomi was one of the DO's elders and the decision is said to have been unanimous.

The decision of the District Officer and his elders was filed in magistrate's court at Nyeri and I had to insist on the proceedings in that court respecting the matter being made known to me, to know whether these proceedings before me are proper or not.

The result is that the decision of Clan Elders dated 5 April 1984 was produced as Defendant's exhibit 4.

The proceedings before elders under the chairmanship of the District Officer, Tetu Division, Mr TK Sirma, was produced as Defendant's exhibit 2. The Defendant's exhibit 4, the clan elder's decision, had been produced before the Tetu Division District Officer's arbitration panel as an exhibit and was therefore

taken into consideration in what they termed “Arbitrator’s Award” dated 23 November 1984. It stated

> “The land in dispute Thegenge/Kihora/1 should be subdivided into two portions between the following people Joseph Githinji Gathiba (Defendant) and Charles Kingori Gathiba (First Plaintiff). Both parties should maintain the Second Plaintiff Mrs Malata Wanjiru Gathiba who is their mother.
>
> The elders further decided that the First Plaintiff Mr Charles Kingori Gathiba should refund the Defendant Mr Joseph Githinji Gathiba one thousand and one hundred fifty Shillings only (1 150) so that they share the land equally”.

That award was signed by the two members of the arbitration on the side of the Plaintiff and the two members of the arbitration on the side of the Defendant plus the chairman of the arbitration who was also the District Officer.

It is apparent that when the Plaintiff before me in this suit, Joseph Githinji Gathiba, saw that things were not working well for him before Clan Elders and could remain the same before the arbitrators under the chairmanship of the District Officer, Tetu Division, he came to this Court and filed this suit on 14 June 1984. The plaint was filed together with a chamber summons under Order XXXIX, rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for a temporary injunction granting prayers similar to the prayers for an injunction in the plaint.

Although it is claimed the chamber summons were served upon the Defendant for hearing on the 19 October 1984 on that date the Plaintiff’s advocate appeared in court alone and obtained an interim injunction to stand until 19 December 1984.

Thereafter nothing happened as the Plaintiff appears to have been satisfied with that interim order and did not even bother to serve the Defendant with summons to enter appearance until 28 February 1991 when the summons was issued and I presume the plaint was served subsequent to that date resulting in the filing of the memorandum of appearance by the Defendant’s advocate on 8 August 1991 and the defence on 19 August 1991.

This is a case which parties are prosecuting in two different courts and I get the impression that the parties do not want any of these courts to know that the case is also in the other court. On my side, it was only unintentional that information came out through evidence, that the dispute between the parties had reached the court at Nyeri. No party was ready to disclose more and I had to insist that I be given more evidence on that before exhibit number 3 was subsequently produced by the Defendant with the consent of the Plaintiff.

That exhibit shows the arbitration award by the elders under the chairmanship of the District Officer, Tetu Division was filed in the Senior Resident Magistrate’s Court at Nyeri as award civil case number 5 of 1985 and the award was read to the parties on 17 June 1985 after which it was set down for mention 30 days from the date of reading.

The 30 days must have been given to allow a party who was dissatisfied with the award to file an application to set aside the award – which, as I said earlier, had been made by the arbitrating elders on 23 November 1984. A year had expired. Both parties were fully participating in the proceedings, Joseph Githinji Gathiba the Plaintiff also banking on this High Court case before me now.

As can be seen from the Defendant's exhibit number 3, the impression given is that proceedings in the case in the Senior Resident Magistrate's court at Nyeri never went further than what took place on 17 June 1985 the day the award was read to the parties. That is what the parties want me to believe after I had told them that I wanted to know the exact stage at which the Nyeri case stands today. They only add that the case is still pending.

Going through papers filed in this case file, however, I discover that Joseph Githinji Gathiba on 17 July 1985 filed a Notice of Motion, under Order XLIX, rule 5 and Order L, rules (1) and (3) of the Civil Procedure Rules, and section 9(3) of the Magistrate's Court's Act as amended by the Magistrates Jurisdiction (Amendment) Act number 14 of 1961, to set aside the arbitration award.

It is about 15 years now. The parties have not allowed me to know the fate of that application as they did not even want me to know the application was there parties who do not want to lay everything on the table for justice to take its course. Maybe parties who would like to obtain inconsistent, if not contradictory, court orders to make the administration of justice difficult, if not impossible. Maybe they do not care about the principle of *res judicata.* Otherwise why do they do what they are doing?

In any case, I have heard evidence in this matter and should decide the case before me assuming that the information the parties have given me that the *Nyeri* case is still pending is correct. They have not bothered to have it consolidated with this case or to have it terminated. They know what to do with it.

The clan elders were clear in their decision that parcel of land Thegenge/Kihora/1 belonged to Gathiba the father of the parties in this suit. The panel of elders arbitrating under the District Officer, Tetu Division, was not so categorical as to whether that parcel of land belonged to the father of the parties, but like the clan elders decided that the parcel of land be shared between the Plaintiff and the Defendant. Although clan elders had added the name of Marata (Malata) Wanjiru, ex step-mother, it was known she was only going to have a life interest and the panel of elders under the District Officer, Tetu Division, came out to say that the Plaintiff and the Defendant should maintain her.

Briefly those are the facts on both sides in this suit. Mr *Ndurumo*, counsel for the Plaintiff, has submitted that the Defendant has made no formal counterclaim in his defence and that a trust is not pleaded and that therefore, the evidence of a trust which has been adduced by the Defendant should not be accepted. Mr *Ndurumo* has gone further to say that since there is no evidence that the trust claimed is contained in an instrument declaring the trust and was therefore not entered in the relevant land register with the words "as trustee", the evidence on record is not sufficient for the court to accept the claim for a trust. He has submitted that the court should not follow the case of *Alan Kiama v Ndia Mathunya and Nine others* civil appeal number 42 of 1978 (ur) and the case of *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 because the Defendant did not put formal pleadings in the defence for a counterclaim based on a trust.

Since both counsel in this matter elected, with the approval of the court, to file written submissions, Mr *Gichachi*, counsel for the Defendant, has not specifically replied what Mr *Ndurumo* said as recorded above. However, Mr *Gichachi* said:

> "In the instant case we have no instrument of trust *per se* out we are saying the Plaintiff was registered as the proprietor of the suit land through an understanding between the members of the family and in concert with the custom that being the second eldest son in the family he was to be registered as the caretaker of the suit premises on his behalf and on behalf of the Defendant. This family understanding and the tradition in itself can be inferred to be the instrument of trust in this case and therefore the Plaintiff holds the land subject to the conditions of that mutual understanding between the family that he will release a half of the portion of land in question to the Defendant".

While, with due respect, I do not subscribe to the statement that the family understanding and the tradition can be inferred to be the instrument of trust, if that is meant to be the instrument of acquisition in section 126(1) of the Registered Land Act, the position as I see it is that the issue of the Defendant's counterclaim based on a trust has been fully canvassed in this suit, evidence having been adduced and tested and I doubt whether the parties would have done better had the Defendant's defence been framed in a more formal way setting out the counterclaim of a trust.

The defence filed clearly brings out the Defendant's case, the Defendant denying the allegation of trespass on the basis that the suit parcel of land is family land shared between him and the Plaintiff since the time of demarcation and that the Defendant had been in occupation since 1956 sharing the land in equal proportion with the Plaintiff. The Defendant therefore pays for a declaration that the land belongs to both parties in equal shares and for an order for subdivision and equal sharing.

The word "trust" or other related terms may not have been used in that defence but if it has been used in the evidence and in written submissions, then it is a correct term describing what the Defendant is saying in his filed defence and causes no prejudice to the Plaintiff who must all along have known that the Defendant means to claim that there is a trust in his favour and has therefore vigorously cross-examined the Defendant and his witnesses on that issue and fully canvassed the issue in the Plaintiff's written submissions.

Otherwise, this is one issue or situation where section 3A of the Civil Procedure Act can be properly invoked so that mere technicalities do not defeat the cause of justice.

Having dealt with the question of pleadings in relation to a trust, I now turn to the question of the origin of that trust as claimed by the Defendant. The parties before me are Kikuyus and the origin of the trust they are talking about is Kikuyu customary law whereby a member of a family can hold a piece of land on his own behalf and on behalf of the family or on behalf of himself and on behalf of one or more members of the family.

Before me in this case there has been no dispute that Kikuyu customary law contains the concept of a trust or a resulting trust within its jurisprudence as demanded by sections 48 and 51 of the Evidence Act. Both parties accept that the concept exists and that all that is needed for the party alleging the existence of a trust to give evidence of the existence of such a trust in the facts of that particular case.

Apparently, however, the decision of the Court of Appeal in the case of *Alan Kiama v Mathunya and nine others* has created some confusion so that in this matter, while Mr *Ndurumo* tears that decision on the ground that it was based on a resulting trust, Mr *Gichachi* is relying on that decision rightly, pointing out

that the decision was based on that overriding interest under election 30(*g*) of the Registered Land Act but it does not show how that overriding interest turns out to be a trust to assist his client, the Defendant before me in the counterclaim for a declaration of a trust. In that case Madan JA, as he then was, actually overruled Muli J as he then was, on the question of a resulting trust, although the end result was that both judgments, the High Court's and the Court of Appeal ordered a rectification of the relevant land register in favour of the Defendants/Respondents. I will show this below.

The position was that one, Karura Kiragu had transferred the land to the Appellant, Alan Kiama who subsequently filed a suit to eject the Respondents, Ndia Muthenya and nine others on the ground that the Respondents were trespassers. The Respondents counterclaimed the land on the ground that the land belonged to their clan called Agaciku/Kabareki and therefore they prayed for a declaration that the Appellant held the land in trust for the Respondents and alternatively, the Respondents wanted a declaration that the Appellant hold the land subject to rights of possession, occupation and cultivation of the land under section 30(*g*) of the Registered Lands Act.

The Court of Appeal refused to grant a declaration of trust, which had been granted by the High Court, Muli J and this was despite the fact that there was evidence that during land adjudication and registration, the suit parcel of land was registered in the name of Karura Kiragu so that he could later transfer the land to the rightful owners after the rightful owners had been released from detention. Some of their relatives were apparently on the land during land adjudication and registration. Karura Kiragu, who had been registered as an absolute owner on first registration without the words "as trustee" having been entered on the relevant land register, had secretly transferred the land to the Appellant.

In refusing a declaration of trust, the Court of Appeal stated that it had not been proved by expert evidence that Kikuyu Customary Law contains the concept of a resulting trust within the jurisprudence as demanded by sections 48 and 51 of the Evidence Act.

The Court of Appeal therefore went ahead to order rectification of the land register in favour of the Respondents on the basis of overriding interest under section 30(*g*) of the Registered Land Act. The High Court, on the other hand, had ordered a rectification of the land register in favour of the Respondents on the basis of a resulting trust. This High Court order was set aside by the Court of Appeal because the Court of Appeal did not accept there was a resulting trust. But the end result was that the Appellant's appeal was dismissed and the Respondents retained the land they had obtained through the set aside High Court order.

In my humble opinion, looking at the leading judgment as delivered by Madan JA on 20 January 1981, the Court of Appeal judgment did four important things.

Firstly, the Court of Appeal, at the end, ordered rectification of the register which the court seems to have said that should not have been ordered by the High Court because the Appellant was a purchaser for valuable consideration without notice. This is in the last paragraph on page 7 of the judgment where it is stated:

> "Secondly, because of the provisions of sections 126 and 143 of the Act the register could not be rectified so as to effect the title of the Appellant as he acquired the land for valuable consideration from Karura Kiragu who held it under a first registration and who, for the purpose of a registered dealing, was deemed to be the absolute proprietor thereof …".

Since the parcel of land in question had been transferred from Karura Kiragu to the Appellant Alan Kiama the registration in the name of Alan Kiama was not a first registration and therefore section 143(1) of the Registered Land Act did not apply and a rectification could be made. Otherwise, a first registration should not and cannot be rectified as section 143(1) preventing such a rectification is mandatory and absolute. Number rectification under any circumstances, and I do not accept the view that section 3A of the Registered Land Act is authority for interfering with a first registration. On the contrary, that section safeguards not only the rights of a proprietor who acquired title on a first registration but also the rights of a proprietor who acquired title subsequent to a first registration. The registered proprietor is either an absolute owner or, where he is registered in a fiduciary capacity, he is a trustee.

Secondly, the judgment tried to overturn what was said in the case of *Obiero v Opiyo and others* [1972] EA 227, and the case of *Esiroyo v Esiroyo* [1973] EA 388, that "Rights under customary law are not overriding interests under section 30 of the Registered Land Act," and what was said in the case of *Esiroyo v Esiroyo* (*ibid*) that "Customary law rights in land are extinguished upon registration of that land under the Registered Land Act".

Those two are, in my view, good and correct statements of the law. Perhaps it will be better to look at the facts, of the two cases. But let me first bring out what the Court of Appeal said.

On the issue of extinguishing rights under customary law, the judgment does not entirely agree that customary law rights are extinguished once a piece of land is registered under the Registered Land Act. This is seen from page 10 of the judgment last paragraph where the case of *Esiroyo v Esiroyo* is mentioned in relation to the meaning of section 30(*g*) of the Registered Land Act. The court was of the view that the overriding interests which existed under section 30(*g*) were equitable rights entitled to protection even if "they have a customary law flavour".

That court was not therefore accepting that rights under customary law are not overriding interests and as the possession and actual occupation of the suit piece of land by the Respondents had been done under customary law before registration of the land under the Registered Land Act, the Court held that that possession and actual occupation was under section 30(*g*) and went on to order rectification of the land register in favour of the Respondents because the overriding interests of the Respondents had amounted to equitable rights.

That actually meant that the Court of Appeal ordered rectification of the land register in favour of the Respondents because of their customary law rights which the court baptized "customary law flavour". If that were not so, the court could not have found the Respondents entitled to ownership until, perhaps, the Respondents would have instituted fresh proceedings under section 30(*f*) claiming adverse possession after qualifying to do so under the law of limitation of actions.

The Court of Appeal having proceeded in the way I have outlined above therefore, rejected the finding of the High Court, by Mathew Muli J as he then was, that it was a resulting trust which existed and that that trust entitled the Respondents to share of the suit parcel of land. In rejecting the High Court's finding, the Court of Appeal, as already stated elsewhere, gave the reason that it had not been established by expert evidence that the concept of a resulting trust was known in Kikuyu customary law.

Following that statement, the Court of Appeal elevated or enhanced overriding interests under section 30(*g*) of the Registered Land Act to the level of proprietorship of the suit parcel of land.

I now go back to the case of *Obiero* (*supra*) and the case of *Esiroyo* (*supra*). In *Obiero*'s case, the Plaintiff was a widow of someone called Opiyo who died in 1938–39 and the Defendants were sons of her co-wives. She was the registered proprietor of a parcel of land in Gem Location. She also claimed damages for trespass against the four Defendants and an injunction to restrain them from continuing or repeating the acts of trespass. The Defendants admitted in their defence that they were in possession of the land in dispute and had cultivated it for a long time past. But they claimed to be the owner of the land in dispute under customary law and denied the Plaintiff's title to the land. These claims had been heard and determined in the Plaintiff's favour by a Land Adjudication Committee and the Defendant were having no appeal against the decision from the land adjudication process.

Bennett J as he then was, was not satisfied on the evidence that the Defendants ever had any right to the land under customary law. Holding that rights under customary law are not overriding interests under section 30 of the Registered Land Act, he added "Had the Legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so".

The widow was therefore able to eject the four Defendants, sons of her deceased husband by her co-wife from the disputed land although they had been in possession and actual occupation and cultivated the land and claimed title under customary law as sons of the deceased. Their claim under customary law was rejected.

In *Esiroyo v Esiroyo* (*supra*), the Plaintiff was the registered proprietor of the land in dispute under the Registered Land Act. He wanted the court's order for the ejectment of the Defendants from the land. He also wanted damages for their trespass on the land for the past two years and an injunction to restrain them, their wives and children or servants from continuing or repeating any acts of trespass.

The Defendants, being natural sons of the Plaintiff in East Bunyore Location of present Vihiga District, claimed they are entitled to certain portions of the Plaintiff's land and to occupy and cultivate those portions because it is land which came to their father from his father and grandfather and so forth. They claimed their rights were well founded under Luyha customary law.

It was held that rights under customary law are not overriding interests under section 30 of the Registered Land Act. The court seems to have gone on to say that although rights under customary law are not overriding interests under section 30, the Defendants had had the rights under customary law as natural sons of the Plaintiff and that the disputed piece of land having been registered

under the Registered Land Act, the Plaintiff was no longer bound by that customary law as the provisions of the Act had taken the matter in dispute out of the purview of customary law. Sections 28 and 30 of the Registered Land Act were referred to. That has been interpreted to mean that customary law rights are extinguished upon registration of land under the Registered Land Act. As the Learned Judge was at that time talking about succession. I think that statement of the law at that time, needed to be qualified to state that "Customary law rights (other than rights under section 120) are extinguished upon registration of land under the Registered Land Act". I say "at that time" because at the moment the need to have the words in bracket is no longer there and the position has turned out to be exactly what the Judge in that case is interpreted to have said stating: "Customary law rights are extinguished upon registration of land under the Registered Land Act".

I say so because at the time the case of *Esiroyo* was decided, the present Law of Succession Act, Chapter 160, had not come into effect. Succession matters affecting land registered under the Registered Land Act were being governed by section 120 of the Registered Land Act which clearly and specifically stipulated that customary law was to apply. The Learned Judge in *Esiroyo*'s case was not concerned with section 120 and therefore said nothing about it. But the position at that time was that customary rights under section 120 were not extinguished. However, those rights were only exercisable by patent like the Defendants in that case, after the death of their father. The Defendants, in that case were not, therefore, entitled to making their claim the way they were doing *inter vivos* in that suit and their father was not, in the circumstances bound by customary law to give them the land they demanded as section 120 was not yet available to them and the dispute was therefore out of the purview of customary law.

Section 120 of the Registered Land Act was repealed when the present Law of Succession Act came into operation in 1978 and I am not aware of any present provisions of the Registered Land Act allowing the application of customary law to defeat the absolute ownership of a registered proprietor of a piece of land or even to be an encumbrance to the absolute ownership of a registered proprietor of land.

The Court of Appeal, in a latter case, *Wanjohi and others v Official Receiver and Interim Liquidator (Continental Credit Finance Ltd)* civil application number 140 of 1988, endorsed and affirmed the statement of law as stated in the case of *Obiero* and the case of *Esiroyo* with regard to rights under customary law not being overriding interests under section 30 of the Registered Land Act and also with regard to the extinguishing of customary law by the registration of land under the provisions of the Registered Land Act.

In that case, the Applicants were the widows of two brothers by name, Samuel Wanjohi Ngatha and Thomas Wanjohi. The two departed brothers were the registered proprietors of two parcels, of land in Nyeri, namely Tetu/Unjiru 808 and 809. They had charged the two parcels of land and obtained a loan from Continental Credit Finance Company. The chargors remained in occupation of the parcels of land cultivated the parcels with their families including the Applicants. There was default in the repayment of the loan and the company, which was then in liquidation, acted by its interim liquidator to realize the security by threatening to exercise its statutory power

of sale under section 74 of the Registered Land Act. The Applicants were not in funds to make repayment.

But to stave off the exercise of the chargee's statutory power of sale, the Applicants mounted an action in the High Court and sought a declaration that they were in actual occupation of the two parcels of land within the meaning of section 30(*g*) of the Registered Land Act and that the charge in favor of the Respondent company was subject to their overriding rights. They also prayed for perpetual injunction restraining the Liquidator from selling or otherwise dealing with the suit land prejudicial to their interests.

While that suit was pending in the High Court, the Applicants, by chamber summons, sought a temporary injunction restraining the Respondents from selling, disposing of or otherwise interfering with their peaceful possession and enjoyment pending the determination of the suit. That application was dismissed.

The Applicants having filed a notice of appeal to the Court of Appeal, proceeded to pray for an interim injunction pending the final determination of the intended appeal.

During the hearing of the prayer for an interim injunction, the Court of Appeal, Gachuhi JA, Apaloo JA, and Kwach Acting JA as he then was, went on to examine the legal concept of overriding interest upon which the Applicants were relying and section 28 and section 30(*g*) of the Registered Land Act were considered. It was held, among other, "that customary rights as to the occupancy of the suit lands as the Applicants had were not overriding interests within the meaning of section 30(*g*) of the Registered Land Act" and that "rights under customary law are extinguished upon registration of land under the Registered Land Act".

On the proper interpretation of the provisions of the Registered Land Act, therefore, and on the basis of the authorities above cited, *Obiero*, *Esiroyo* and *Elizabeth Wangari Wanjohi*, which are by no means the only authorities, the correct position today, after the repeal of section 120 of the Registered Land Act is that "Rights under customary law are not overriding interests under section 30 of the Registered Land Act". And that "Customary law rights in land are extinguished upon registration of that land under the Registered Land Act".

The case of *Kiama v Mathunya and others* (*supra*) is not therefore with all due respect, a good authority on those two issues.

Consequently, the position under the Registered Land Act is different from the position under the Land Consolidation Act or the Land Adjudication Act where the application of customary law is prominent. Customary law has to apply when rights and interests of persons in land are being ascertained and adjudicated during the land adjudication process. That is what sections 20 and 23 of the Land Adjudication Act, for example, are about. That having been done exhaustively, it would appear the legislature, reasonably, felt it undesirable to allow the same trend continue after land adjudication work had been declared final under section 27 of the Land Adjudication Act and the relevant records subsequently registered under the Registered Land Act. There must be an end to litigation based on customary law rights after the Land Adjudication process, under the Land Consolidation Act and the Land Adjudication Act, had granted Kenyans all the indulgences as has been done. In my humble view, that

rule is reasonable and should be maintained if this country is to have certainty as to the place and application of customary law, where land is registered under the Registered Land Act, so as not to be an obstacle to the social and economic development of the country aimed at benefiting the people, unless the government has forgotten that it was the intention of the government not only to bring all land under the Registered Land Act, but also to simplify land transactions including conveyancing to the extent that the ordinary man in the street could convey and deal with his own land without much ado. While at the same time registered land is readily accepted as good security in the business and commercial world, alas! That was noble government policy which should never be abandoned or forgotten.

With that conclusion, I now move to the third important thing done by the Court of Appeal judgment in the case of *Alan Kiama* (*supra*). That judgment rejected what the High Court had said that "a resulting trust existed under customary law when the members of the clan allowed Karura Kiragu to hold the land" and that that resulting or implied trust "was not defeated by a subsequent registration of the suit land in the name of Karura Kiragu" who therefore transferred that land to the Appellant, *Alan Kiama*, with the resulting trust. I have said that the Court of Appeal decided that suit on the basis of overriding interests under section 30(*g*) of the Registered Land Act.

As the next part of this judgment is going to focus on trusts (including a resulting trust), and overriding interests in relation to customary law which I have started discussing, I do not think there is need to say more here with regard to a resulting trust. Instead, I will move on to the next stage.

The fourth important thing in the Court of Appeal judgment in the case of *Alan Kiama* (*supra*) is that the judgment elevated or enhanced overriding interests under section 30(*g*), to ownership or proprietorship of the affected parcel of land. Overriding interests were enhanced from mere non-registrable and therefore unregistered "rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation" to the substantial rights of ownership or proprietorship which are registrable. The court refused to follow Judge Muli's finding of a resulting trust which I think was better founded, than the basis of overriding interest. The court said that overriding interests of possession and actual occupation which arise "in right only of such possession and occupation" without legal title are equitable rights which are binding on the land and therefore on the registered owner of that land. It said:

> "Under section 30(*g*), they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed".

The court went on to say:

> "In this case the Respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the Appellant. He made no inquiry and inquiry by him would have been superfluous; he had himself lived on the land together with the Respondents for a time and knew that they cultivated it.
>
> Overriding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour for the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being

> perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an overriding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for".

Having made the above remarks, the Learned Judge concluded by deciding the case on the basis that the land had been transferred to the Appellant subject to the Respondent's existing rights under section 30(*g*) rather than subject to a resulting trust under section 28 and section 126.

That is beautifully put and I admire it. But with all due respect, it raises a few questions in my humble mind. I do not see, for example, why the same cannot be said of other people enjoying overriding interests under other paragraphs of section 30 if the qualification is that the interests are overriding. We have paragraphs (*a*) to (*h*) in section 30. If paragraph (*g*) can give the beneficiary ownership of the affected parcel of land, then each one of the paragraphs should also entitle the beneficiaries to the acquisition of ownership of the affected parcels of land which I do not think is proper.

There is need to look at the paragraphs of section 30 to see the calibre or the nature of the interests the section is intended to protect. The rights of way or water or air under paragraph (*a*). The natural rights of light or air or water under paragraph (*b*). Leases or agreements for leases for a term not exceedng two years, periodic tenancies under paragraph (*d*). These are leases which do not qualify to be in section 28(*a*). Even rights of compulsory acquisition, resumption, entry, search and user conferred by written law under paragraph (*c*) are not in a better position. I do not need to mention all the paragraphs. Do any of those interests qualify the beneficiary to instant equitable rights of ownership, without consideration, in the affected parcel of land, as was accorded to Mathunya and others in that case, thereby entitling them to an instant court order for rectification of the land register in their favour?

A look at the ladder upon which the interests protected under the provisions of the Registered Land Act are arranged will show the proper position of the interests in section 30. Start with absolute proprietorship of absolute ownership under section 27(*a*). These stand at the top.

Next come proprietors or owners registered in fiduciary capacities. These are trustees and therefore not absolute proprietors or absolute owners. They are found in the proviso to section 28.

The group standing third on the ladder is that of leaseholders identified in section 27(*b*). Their leases are registrable and must be registered.

The fourth group consists of interests described as charges and other encumbrances and conditions as well as restrictions shown in the register. These are in section 28(*a*) and I do not include leases here because they are also in section 27(*b*) which has given them a higher place than the place given to the other interests mention in section 28(*a*). This category of interests must be shown or entered or registered in the register.

The fifth and, not only the last, but also the least in degree, are the overriding interests as spelled out in section 28(*b*) read together with section 30 of the Registered Land Act. These are the only interests which are not registered or entered in relevant land registers. If any have to be noted in the land register, a land registrar must first direct such entry. The fact that this is the position in a statute which emphasizes the importance of the registration or noting in the

register of transactions or dealings with registered land is a clear manifestation of the very low rating these fights, interests and liabilities have been given.

A question therefore arises that if beneficiaries in higher degrees like lease-holders, chargees or other encumbrancers or restrictors in section 27(*b*) and section 28(*a*) cannot qualify and be entitled to instant equitable rights of proprietorship without consideration in the affected parcels of land as would enable them obtain instant court orders for rectification of relevant land registers in their favour; how is it that beneficiaries under section 30(*g*) with very inferior interests, are able to obtain all that?

If the reason is that *bona fides* under section 30(*g*) are in possession or in actual occupation and do cultivate the land, is that favour not including licensees, trespassers and others with similar rights or persons with rights under paragraph (*f*) of section 30, namely "rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions"?

Indeed, there can be licensees and trespassers and people otherwise unqualified for equitable rights, under section 30(*g*) as that section has not specified and has no means of ensuring that only persons with equitable rights are covered. That is why the court encountered such people in the cases of *Obiero, Esiroyo* and *Elizabeth Wambui Wanjohi* (*supra*). There the Claimants were also in possession and/or in actual occupation and therefore cultivated the disputed pieces of land. Their respective claims failed even under section 30(*g*), in the case of *Elizabeth Wambui Wanjohi* (*supra*).

I submit that the meaning of the words "overriding interests" be taken from the context of the Registered Land Act, Chapter 300 Laws of Kenya. It should not be taken in the same way as the meaning of the words "overriding trust" which means "a trust which takes precedence of other trusts previously declared". Using the definition from *A Concise Law Dictionary* by PG Osborn, who relied on the English Land Registration Act 1925, I would say that overriding interests as found in the Registered Land Act sections 28(*b*) and 30, are simply "the encumbrances, interests, rights and powers not entered on the register, but subject to which registered dispositions take effect".

I would think of an example of natural rights of light. A purchaser of promises buys the property when it is subject to overriding rights known as natural rights to light. He would buy the property subject to those rights. But it does not mean that the beneficiary of the natural rights to light would be entitled to become the owner of the sold property or any part of the property.

A similar situation arises when a purchaser purchases property subject to a lease or subject to a tenancy in terms of section 28(*a*). The lessee or the tenant does not turn out to be the owner of the property on the mere basis of being a lessee or a tenant.

The same situation obtains in respect of a person enjoying overriding interests under section 30(*g*) of the Registered Land Act which, as is relevant, state:

> "30 Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:
>
> (*g*) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed".

There is a proviso at the end of the section stating: “Provided that the registrar may direct registration of any of the liabilities, rights and interests herein before defined in such manner as he thinks fit”.

My interpretation of those provisions, as supported by what I have been saying, is that section 30 of the Registered Land Act is talking about interests or rights which, as I have already shown elsewhere, are subordinate and inferior to the rights or interests of a registered proprietor of land whether the registered proprietor has an absolute proprietorship or is registered as a trustee. It should not be forgotten that registered proprietors are protected by section 27(*a*) and the opening paragraph of section 28. Their rights are “[r]ights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privilege and appurtenances belonging thereto, free from all other interests and claims whatsoever”.

If the registered proprietor acquired those rights on a first registration, section 143(1) adds weight to his protection. The title of a registered proprietor is therefore indefeasible and is only subject to (and not defeated by) the rights, interests and liabilities set out in section 28(*b*) as read with section 30 just as that same title is subject to (and not defeated by) the rights, interests and liabilities mentioned in section 28(*a*), the leases, charges and other encumbrances and to conditions and restrictions.

In other words, although the title is subject to those rights, interests and liabilities under paragraphs (*a*) and (*b*) of section 28, that title remains only subject thereto. Those rights, interests and liabilities do not take precedence over the proprietorship of the registered owner and do not, *per se,* entitle the beneficiary as the lessee or chargee or encumbrancer or restrictor or user of water or use of natural light or user of electricity or telephone or as possessor or occupier, to challenge the title of the registered proprietor. In other words further, a lessee cannot just stand up one fine morning and say: “because I am a lessee, I demand a share in the title or the whole title is mine”.

He will be in possession or occupation also, but in a better position than a person claiming rights under section 30(*g*) because in addition to possession or occupation, the lessee will also be entitled as a lessee. The person entitled under section 30(*g*) on the other hand will be “entitled in right only of such possession or occupation”. Nothing more. If therefore the lessee cannot, under such circumstances be entitled to ownership of the leased property yet he has a more superior interest than the interest of a person under section 30(*g*), how is it that the latter can claim and obtain proprietorship or a share in the proprietorship of the property? In other words, if beneficiaries under section 28(*a*) cannot, on the basis of their registered interests as lessees, chargees, encumbrancers, conditioners and restrictors obtain instant equitable rights of ownership, without consideration, in the affected parcels of land, thereby entitling them to instant court orders for rectification of land registers in their favour, how do beneficiaries under section 30(*g*), succeed?

In short, the position as I see it is that sections 27 and 28, and where applicable, section 143(1) of the Registered Land Act are protecting the rights of a registered proprietor “subject” to the interests mentioned in section 28(*a*), if any, and to the interests mentioned in section 28(*b*) as read together with section 30, if any.

Anything outside those two should not be allowed to interfere with the enjoyment, by the proprietor, of the rights of a registered proprietor of land. Furthermore, the existence of the interests, stated in section 28(*a*) and (*b*) as read with section 30 do not qualify the beneficiaries thereon to be registered as proprietors of the affected parcels of land. This is because the registered proprietors remain absolute owners in terms of section 27(*a*), their absolute ownership only being "subject" to the subordinate and inferior interests covered in section 28(*a*) and (*b*) as read with section 30.

True section 28 says that those rights "shall be rights not liable to be defeated except as provided in this Act," but those words do not refer or apply to any of the inferior interests covered in paragraphs (*a*) and (*b*) of section 28 as read with section 30 *per se* and those words constitute no authority for beneficiaries, under those provisions, to claim absolute proprietorship in the affected parcels of land. Those words only apply in situations where the absolute ownership of a registered proprietor can be defeated, for example, when a binding contract of sale by him to a Plaintiff is enforced, or where the absolute ownership of a registered proprietor can be defeated by a chargee exercising his statutory power of sale when the absolute registered proprietor, as a chargor, has defaulted in paying off a loan secured by the parcel of land the chargee is selling, or where a *cestui qua* trust wants an absolute proprietor who is a trustee transfer to him (the *cestui qua* trust) the trust parcel of land.

I am fully aware that I am looking at a decision of the Court of Appeal. It is a decision I am bound to follow. But what do I do when I strongly feel there are other decisions of the High Court and the Court of Appeal, not consistent with that decision, and better than that decision? The elevation or enhancement of overriding interests under section 30(*g*) to the level where the beneficiaries are, by virtue of that interest only, equated to the absolute registered proprietor of the affected parcel of land, is being too generous to the beneficiaries under section 30(*g*) and may open a way to a sea of injustice through courts. If a possessor or an occupier, and therefore a cultivator, under section 30(*g*) feels he must file suit because he is entitled to proprietorship of the affected parcel of land, let him wait until he qualifies under section 30(*f*) to file proceedings based on adverse possession. Otherwise a better approach in cases like *Kiama v Mathunya and others*, *Obiero v Opiyo and Wanjohi v Official Receiver and Interim Liquidator* (*ibid*) would be for the beneficiary claiming proprietorship to proceed on the basis of a trust and for the court to proceed the way Muli J approached *Alan Kiama*, also on the basis of a trust.

A trust so raised, and as has been raised in the case before me, is a trust emanating from customary law. Sometimes it has been doubted whether customary law exists, and where it exists, it has been doubted whether the concept or notion of a trust is found in that customary law.

At this stage, it may be useful to note what was said by the Court of Appeal in the case of *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 753.

From a general statement that customary law is a part of the law of Kenya, Duffus JA, as he then was, went on to say that customary law could be established as facts before the courts, in some cases by the court taking judicial notice of the customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where

the customary law is set out in a book or document of reference as provided in subsection (2) of section 60 of the Evidence Act where it is provided that the court may resort for its aid to appropriate books or documents of reference. He said that usually in the High Court or in a magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on that particular customary law in support of his case.

The Learned Judge noted that under section 87(1) of the Civil Procedure Act, the court has a discretionary power to summon to its assistance one or more competent assessors but added that this did not cast the burden of proof in establishing customary law on the court and not on the litigant himself.

Subsections (1), (2) and (3) of section 60 of the Evidence Act and section 87(1) of the Civil Procedure Act should be read together with section 13(*a*), (*b*) and section 51(1), (2) of the Evidence Act.

Crabbe JA as he then was, stated in the same case in his dissenting judgment that since customary law is part of the laws of Kenya, and under section 59 of the Evidence Act, the court is bound to take judicial notice of it, a person relying on it need not prove it, except when the custom relied upon is a peculiar one. He said:

> "The legislature, having recognized the existence of African Customary law, enjoins that in all cases, civil and criminal, to which Africans are parties, every court should be guided by the relevant customary law, unless it is repugnant to justice and morality or inconsistent with any written law. To enable the courts give effect to this provision the legislature has again, in its wisdom, provided for the assistance of assessors.
>
> The function of the assessors is to assist the court in forming an opinion of the customary law which is applicable to the case before it, and which the court is required to take judicial notice of".

The court must possess itself of whatever information is necessary for the purpose.

> "Some judges may have it already because of their previous experience. Others may have to acquire it for the first time, but in either case the information they glean is not evidence strictly so called. When an assessor explain the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work property".

The emphasis is on the court taking judicial notice of the customary law.

On the general observations made by Duffus JA that in civil claims native law and custom must be proved in a magistrate's court or in the High Court, Crabbe JA was again of a different view. He pointed out that the rule that the customary law must be proved was stated by the Privy Council in the Ghana Case of *Angu v Attah* (PC) 1874 1928, 43 where it was stated as follows: "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular customs have by frequent proof in the courts, become so notorious that the courts take judicial notice of them".

The Learned Judge went on to make remarks which I think are quite pertinent. He said:

> "Proof of a particular customary law in one previous decision only was not considered to be *frequent proof in the courts* so that the courts could take judicial notice of the alleged customary law rule. But this rule which was applied only in the *British Courts* originated from the fact that most of the early judges in the British Colonial territories in West Africa were Europeans, who were unacquainted with the various rules of the customary law. The courts therefore insisted on the proof of rules of the customary law. The rule was not however always followed, for in deciding questions of native law and custom, the existence or content of a rule of customary law was in some cases determined by reference to any book or manuscript recognized as a legal authority, and the court could also call to as assistance chiefs or other persons who the court considered to have special knowledge of native law and custom. The rule in itself is fast becoming out of date and I think it is too late in the day to extend its application to East Africa. It may be a convenient rule in the present circumstances of Kenya [the judgment was delivered towards the end of 1965] but I do not think that sections 59 and 60(1)(*a*) and (2) justify a rigid adherence to the rule in *Angu v Attah.* The position in Kenya, it seems to me, is well explained in *Stephen's Digest of the Law of Evidence* (12 ed) article 62 as follows:
>
> 'No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference'".

The Learned Judge proceeded to conclude:

> "I am satisfied that if it were the intention of the Kenya Parliament that the customary law should be proved several times before the courts could take judicial notice of it, it would have said so in plain language. In my view the fact that Parliament has made provisions, such as the summoning of assessors and resorting to appropriate books or documents of reference for the purpose of ascertaining the customary law militates against an inference that the customary law must necessarily be proved. No evidence need be given of facts, which according to sections 69 and 60(1), judicial notice is taken, for when a court takes judicial notice of a fact it declares that that fact exists, even though the existence of the fact has not been established by evidence".

The Learned Judge quoted a passage from a judgment in an English case *Commonwealth Shipping Representative v P and O Branch Service* [1923] AC 191, at 212 where Lord Summer, distinguished evidence in the ordinary sense from information on which judicial notice is based saying: "Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquires to be made by himself for his own information from sources to which it is proper for him to refer".

So that when a judge hears evidence on matters which attract section 59, he is not taking evidence in the strict sense; the witnesses are simply assisting him to form a view of matters of which he is supposed to have complete knowledge.

All that was being said in 1965. Here we are in the High Court in the year 2001, the new millenium, still taking evidence to establish customary law, It may be because what Crabbe JA said, though in my opinion very reasonable and appropriate, was in a dissenting judgment and therefore what Duffus JA said prevails. But I think, with all due respect, that Madan JA was pushing the clock very much behind insofar as he demanded expert evidence in the case of *Alan Kiama v Ndia Mathunya and nine others* (*supra*).

I have heard evidence on the issue of a trust in this suit from both sides and as I pointed out elsewhere, there is no dispute between the parties that there is Kikuyu customary law which contains the concept of a trust. The dispute is whether such a trust was created in the matter in this suit.

However, from that evidence and from my own experience as a "native" judge in this country, I think I am entitled to take judicial notice of the fact, not only of the existence of Kikuyu customary law, but also of the existence of other African customary laws in Kenya and of the fact that generally African customary laws in Kenya have the "concept of a trust within the jurisprudence as demanded by sections 48 and 51 of the Evidence Act" which should be read together with section 13(*a*)(*b*) section 59 and section 60 of the same Act as well as section 87(1) of the Civil Procedure Act – if we have to put the law in its proper perspective. In case that statement of mine is not acceptable or in case I am doubted, I add the following authorities which are by no means exhaustive.

Eugene Cotran, a former judge of the High Court of Kenya, in his book *Restatement of African Law 2: The Law of Succession* shows that the concept of a trust is found in customary law of many tribes in this country. They include the Kikuyu, the Kamba, the Meru, the Luhya, the Kisii, the Kuria, the Giriama, the Digo, the Duruma, the Taita, the Taveta, the Nandi-Kipsigis, the Elgeyo-Marakwet-Tugen, the Pokot or Suk, the Teso, the Masai and the Luo.

Of the Kikuyu, the book says that a person with the title "muramati" in Kikuyu language is what is known in probate and administration as an "administrator". He is either nominated by will or appointed by the family and clan elders where there is intestacy. Although the deceased's eldest son in age (not the eldest son of the senior wife) is normally appointed muramati, it is possible for some other relative to be nominated either by the testator, or by the elders in the case of intestacy.

The muramati has three principal functions:

(i) to be the head of the family and, as such, to represent the family for all legal purposes.

(ii) to be the guardian of the widow and children of the deceased in certain cases.

(iii) to act as administrator of the deceased's estate.

On the rights, duties, powers and liabilities of administrator, the book says, among other things, that the primary duty of an administrator is to assume control over the property to be distributed. He is responsible for the payment and recovery of the deceased's debts, pays funeral expenses and has the duty to distribute the shares to the heirs, either in the way stipulated by the deceased's will or according to rules of intestacy as directed by the "Muhiriga" elders. He is not entitled to vary this. In particular, he exercises overall supervision in the distribution in each house (when the deceased was a polygamist), and ensures that the eldest son in each house does not exploit his younger brothers.

About the property of minor heirs, the book says:

> "The muramati acts as trustee of the property of minor heirs, until they attain majority, when their shares are distributed to them. Majority, for the purpose of inheritance, is the attainment of marriageable age. As trustee of the property of the minor heirs, the muramati may sell, lease, pledge, invest or otherwise deal with the land, livestock or other movable property of the minor. Those powers may, however, be exercised only if they are necessary or beneficial to the minor, e.g. for payment of hospital fees or for his education".

The book says further that the muramati is not personally liable for any debts of other claims against the estate. He is not entitled to any remuneration for his services as administrator. He may, however, get a slightly larger share of the inheritance if the elders consider that he is a good muramati.

For each tribe the book gives similar information about a trustee or administrator, the title "muramati" assuming different tribal names: "muungamii wa musyi" by the Kamba; "mukuru mwene njaa" by the Meru; "omulindi" by the Lugha; "omogaka bwomochie" by the Kisii; "umurindi" by the Kuria. The Giriama, the Digo the Duruma, the Tada and the Masai each do not seem to have a specialized word for an administrator but each has a person who acts as an administrator. The Taveta have "muhoja"; the Nandi and Kipsigis have "ribindet"; the Elgeyo Marakwet and Tugen have "ribindet" also, while the Pokot have "mlin"; the Teso have "lokedarani" and the Luo have "jatelo".

As a result there is a cross-section of cases which have been decided both by the High Court and the Court of Appeal on the basis that the notion of a trust is inherent in the relevant customary law. The cases include the following. *Limuli v Sabayi* High Court civil case number 222/1978 (Nairobi) where Cotran J, as he then was, held that there was a trust under Maragoli customary law because the suit parcel of land was family land held by two brothers, Samuel and Marko, and that when the former died leaving two minor sons Marko held their interests as a trustee under Maragoli Customary law, and when the parcel of land was subsequently registered during land adjudication and registration in the name of Marko, he was so registered as a trustee with regard to the interests of the two minors, though the registration under the Registered Land Act, indicated Marko was registered as an absolute owner in respect of the whole parcel of land. The Learned Judge stated:

> "It is now generally acted by the Courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of Registered land, even if it is a first registration, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents".

He then referred to similar cases: *Nthiga v Nthiga and another* High Court civil case number 1949/1976 (Ur); *Mugutha v Mugutha* [1971] KHCD 16, and *Wamathai v Mugweru* High Court civil case number 66/1972 (Nyeri).

In the first case, Marko had been registered on a first registration which therefore could not be rectified or cancelled by the court pursuant, to the provisions of section 143 of the Registered Land Act. The Plaintiff, Edward, did not seek rectification. He wanted a declaration that Marko held part of the parcel of land on trust for him (Edward) and an order that Marko transfers to him half the parcel of land. Another case is *Muguthu v Muguthu* High Court civil case number 3/1968 at Nairobi which was repeated by the same Learned Judge Madan J, as he then was, in yet another case: *Kinguru v Gathangi* [1976] KLR 253.

In *Kingaru*'s case (*supra*), he was the registered proprietor under a first registration of a parcel of land known as Githunguri/Ikinu/58. He claimed that the Defendant, *Muyu Gathangi*, had, without his consent since 1965, persistently trespassed on the land, erected a temporary dwelling-house thereon, and also cultivated a portion of it. The Plaintiff wanted the court to order the Defendant to move out from the land, together with an order for a perpetual injunction restraining the Defendant from trespassing, damages and costs.

The Defendant admitted that the Plaintiff was the registered owner of the suit parcel of land. But the Defendant's case was that the land was inherited by him and the Plaintiff, who was his real brother, from their father Kinguru Kibuu, to be held by them as tenants in common in equal shares; that the Plaintiff become the registered owner of the land half in trust for the Defendant while the Defendant was away in detention during the emergency. Trespass was therefore denied by the Defendant, who claimed that he had been in lawful possession of a half portion of the land since 1959 marked by a boundary separating it from the Plaintiff s portion and on which the Defendant had built his home, developed a coffee plantation and effected other development. In his counterclaim therefore, the Defendant prayed, first, for a declaration that he was the owner of half of the land and, secondly prayed that an order for rectification of the register, to include his name as owner of half of the parcel of land, be made.

In that case the Defendant's counterclaim was based on two grounds, first, he relied on adverse possession. Secondly, he relied on a trust. He succeeded on both grounds. But for the purpose of this suit, I will confine myself to the ground of a trust.

Repeating the case of *Mwangi Muguthu v Maina Muguthu* which he had decided, the Learned Judge recalled what he had said:

> "As regards section 126, there was no need to register the Defendant '*as trustee*'. He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu Custom he would have transferred a half share in '*marango*' (land) to the Plaintiff. In any event this section does not make registration '*as trustee*' obligatory. It states a person may be described by that capacity".

The Learned Judge went on to state in relation to the case of *Gatimu Kinguru*:

> "Under section 143(1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold".

I said I am confining myself to the ground of a trust but I think I must point out the fact that in the case of *Gatimu Kinguru* the arguments about section 6 of the Land Control Act (Chapter 302) as against section 143 of the Registered Land Act was, with all due respect, unfortunately precipitated by the fact that a rectification of a first registration was intended and was ordered. I do not see how section 6(3) of the Land Control Act overrides section 143(1) of the Registered Land Act which is clearly mandatory that a first registration cannot be rectified under any circumstances. This is disturbing because similar restrictions must have been obtained in other cam on the basis of the High Court judgment in that case.

Another disturbing feature of that judgment is that it unnecessarily made two inconsistent orders both to be executed simultaneously. Under the prayer for adverse possession the Plaintiff was ordered to subdivide the suit parcel of land and transfer the portion which was in the Defendant's possession and occupation to the Defendant while under the prayer based on a trust, the court

ordered a rectification of the register, meaning there was going to be no subdivision to produce two titles.

Otherwise the case is a good authority for saying that the concept of a trust is in Kikuyu customary law. Interestingly, it comes from the very Learned Judge, who subsequently in 1981 as a Court of Appeal Judge, questioned the existence of that concept in the same Kikuyu Customary law in the case of *Alan Kiama v Ndia Mathuya and nine others* and went on to reject the resulting trust Muli J had, in my humble opinion, correctly found.

Other cases where a trust was found under customary law include *Karanja v Kamara Muhia* (ur); *Hosae v Njiru* [1974] EA 526; *In the Matter of the Estate of Njuguna Kibuthu* High Court civil case number 1014 of 1993 (ur); *Zabedee Madede and another v Arneafita and another* civil appeal number 4 of 1986 (ur); and *Wamalwa Wekesa v Patrick Muchwenge* civil appeal number 107 of 1985 Kisumu.

There are more authorities which can be cited. But for the purpose of this judgment, I think what I have referred to is sufficient for me to conclude that the court is justified to take judicial notice of the fact that the concept or notion of a trust is inherent in African customary law, including Kikuyu customary law in Kenya.

Trust, according to *The Illustrated Oxford Dictionary*, is confidence placed in a person by making him the nominal owner of property to be used for another's benefit.

According to *A Concise Law Dictionary* by PG Osborn, trust is:

> "A relation or association between one person (or persons) on the one hand and another person (or persons) on the other, based on confidence, by which property is vested in or held by the one person, on behalf of and for the benefit of another. The holder of the property is the trustee, and the beneficial owner is the *cestui que trust.* The trustee has a right *in rem* in the property, the *cestui que trust* has a right *in personam* against the trustee or those who take from the trustee with notice of the trust.
>
> No special form of words is necessary to create a trust, if that intention is shown or can be inferred, but the words must be so used that they are imperative; and the subject matter of the trust and the objects or persons intended to have the benefit of the trust must be certain. Trusts may be express, that is, created by clear words, or implied by law".

An implied trust is defined as: "A trust implied by law as founded upon the unexpressed but presumed intention of the party. It includes resulting trusts (q.v) and constructive trusts (q.v)".

Those are the characteristics of a trust whether that trust exists in the English, American or Indian law, or in African customary laws in Kenya or in Kikuyu customary law in particular. The concept of a resulting trust is therefore present as there is nothing to show that that concept cannot be there simply because the trust in question is found in Kikuyu customary law.

A resulting trust is defined as

> "An implied trust where the beneficial interest in property comes back, or results, to the person (or his representative) who transferred the property to the trustee or provided the means of obtaining it. The Chief kinds are (1) where the expressed trusts do not exhaust the whole beneficial interest: but a resulting trust in the case of a voluntary conveyance is not implied for the grantor merely because the property is not expressed to be conveyed for the use or benefit of the grantee. (2) Where on a purchase property is conveyed into the name of someone other than the purchaser, there

> is a resulting trust in favour of her who advances the purchase money: but not where it would defeat the policy of the law, or where there is a presumption of advancement. (3) In cases of joint purchases or mortgages, on the death of one of the persons advancing a part of the money, there is always a resulting trust in favour of his representatives. (4) In case of mutual wills".

In that respect, it may be of interest also to give the definition of a constructive trust. It is:

> "A trust which is raised by construction of equity in order to satisfy the demands of justice and good conscience without reference to any presumed intention of the parties, as in the following cases: (1) Vendor's lien for unpaid purchase money, (2) purchaser's lien for prematurely paid purchase money; (3) where a person makes a profit in a fiduciary position or out of trust property; (4) where a stranger intermeddles in a trust; (5) where a mortgagee sells under his power of sale, he is a trustee of any surplus realized".

A constructive trustee is the person deemed to be a trustee in the case of a constructive trust.

The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interests under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them, where a person holding a piece of land in a fiduciary capacity under any of the customary laws has that piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by that fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee".

That trust is therefore *express* if it is backed by the relevant instrument of a trust and has the words "as trustee" entered in the relevant land register to describe the registered proprietor. The trust is however an implied *trust* it is not backed by the relevant instrument of a trust and the words "as trustee" are not entered in the relevant land register to describe the registered proprietor. The implied trust may either be a resulting trust or a constructive trust.

That is the position despite what is stated in section 27(*a*) and the first part of section 28 because the proviso to section 28 comes last. Perhaps it is better to remind ourselves what those two sections say starting with section 27(*a*)

> "Subject to the provisions of this Act–
>
> (*a*) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; …".

Section 28:

> "The rights of a proprietor, whether acquired on first registration, or whether acquired subsequently for valuable consideration or by an order of Court; shall be rights not liable to be defeated except as provided in this Act and shall be held by the

proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject–

(*a*) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

(*b*) unless the contrary is expressed in the register, to such liabilities, rights and interest as affect the same and are declared by section 30 of this Act not to require noting on the register: provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee".

It is also appropriate to quote section 143(1) here in relation to section 27(*a*) and section 28 quoted above. Section 143(1) states: "Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake".

Subsection (2) is about the effect of rectification upon the title of a proprietor who is in possession and acquired the land for valuable consideration. As I am not going to order rectification, I am not concerned with subsection (2).

But the point I am trying to make is that despite the safeguards the Registered Land Act has given to the registered proprietor of land in sections 27(*a*), 28 and, in relation to a first registration, section 143(1), the same Act in the proviso to section 28 says, and I repeat that those safeguards shall not "relieve a proprietor from any duty or obligation to which he is subject as a trustee". Further, section 28 tells us that the rights of registered proprietor can only be defeated in accordance with the provisions of the Registered Land Act – that is "as provided in this Act".

Section 126 has therefore taken a step further by providing how a trust should be registered. It means a trust is registrable under the Registered Land Act. It is not therefore like the inferior Overriding Interests under section 30 of the Act which are declared not to require noting on the register. They do not deserve registration.

Subsection (3) of section 126 adds that where the proprietor of land is a trustee, he shall hold the same subject to any unregistered, liabilities, fights or interests to which it is subject by virtue of the instrument creating the trust.

I have said that the trust will be express if backed with the instrument of acquisition showing the proprietor acquired the land in a fiduciary capacity and as a result the words "as trustee" are entered on the register. I have also said that the trust will be an implied trust if not backed by such an instrument and as a result the words "as trustee" have not been entered on the register.

It is regrettable that due to previous inconsistent judgments, the position with regard to section 126(1) of the Registered Land Act has not been clear and in many cases it has been intimated that the section made an entry of the words "as trustee" on the land register, mandatory in all cases of trusts.

In my humble view, the correct position is that the entry of the words "as trustee" is only mandatory where there is an instrument of acquisition showing that the proprietor acquired the land in a fiduciary capacity and describing the proprietor as such. Where such a person is not so described in the, instrument of acquisition, even though he acquired the land in a fiduciary capacity, the entry of the words, "as trustee" on the land register is not mandatory, although

that situation creates an implied trust. This is because under section 126(1) it is not mandatory that a person acquiring land in a fiduciary capacity be described by that capacity in the instrument of acquisition. The section uses the word "may". It says:

> "A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words 'as trustee', but the registrar shall not enter particulars of any trust in the register".

That being the position the registration of land under the Registered Land Act should and does not extinguish, a trust originating from customary law simply because, due to a "technical default" during the registration, the words "as trustee" were not entered on the land register.

As it was said in the case of *Gatimu Kinguru* (*supra*):

> "the absence of any reference to the trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Lands Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive".

And as Muli J properly said in *Alan Kiama v Ndia Mathunya* this was a technicality many people did not understand. I add that these people included, not only land consolidation and land adjudication officials, but mainly the drafters (executive) and approvers (Parliament) of those two statutes, and as a result it is the law that is in default.

That law is not the Registered Land Act. It is the Land Consolidation Act Chapter 283, and the Land Adjudication Act Chapter 283, Laws of Kenya. It is not the Registered Land Act because there land is merely registered, on first registrations, from records already prepared and as prepared under the Land Consolidation Act and Land Adjudication Act. The problem is with first registration and there is no way a land registrar, administering the Registration of Land Act is going to enter the words "as trustee" on a land register from Land Consolidation or Land Adjudication records which do not show him that the proprietor of that particular parcel of land acquired it in a fiduciary capacity and is therefore described by that fiduciary capacity.

Problems arising from subsequent registrations are few and easily manageable. It is from first registrations that the majority of cases came and even in the case of *Alan Kiama v Ndia Mathunya* the problem had been created through a first registration in the name of Karura Kiragu as the absolute owner and without the words "as trustee".

There are no specific provisions under the Land Consolidation Act and the Land Adjudication Act to adjudicate and/or consolidate land in names of persons indicated as trustees or holders in fiduciary capacities. In that respect let me look at those two Acts of Parliament a little more closely.

Under the Land Consolidation Act, section 15 of the Act deals with record of existing rights. The particulars outlined under section 15(2)(*a*), (*b*) and (*c*) are to be entered in part 1 of the Record of Existing Rights. Section 15(2)(*d*) states that, "in the case of any landowner or of any such person who is under a disability, whether by reason of age, unsoundness of mind or otherwise the name of his guardian". Similar provisions are found under section 24 which deals with adjudication register. Under section 24(2), the form shall contain in respect of land which has been allocated to landowners:

> "(*a*) the name and description of the landowner … under paragraph (*d*), in the case of any landowner or of any such person who is under a disability, whether by reason of age, unsoundness of mind or otherwise, the name of his guardian".

That is all the section says, so that once the name of the person is entered, there is no requirement that the capacity in which he is acquiring the land be shown. The words "fiduciary capacity" or "trustee" or "as trustee" are not used under this Act. There is no requirement that the words "as guardian" be included.

Under the Land Adjudication Act, section 23 of the Act deals with preparation of adjudication record. Section 23(3) states the information to be contained in the adjudication record, and section 23(3)(*b*)(i) requires a record of the name and description of the owner of land with particulars of any restriction on his power of dealing with it. Under paragraph (*d*), "if any owner or other person is under a disability, the name of his guardian, the nature of his disability and (if he is a minor) his age".

The words "fiduciary capacity" or "trustee" or "as trustee" are not used under this Act. Here again there is no requirement that the words "as guardian" be added to describe the proprietor. "Guardian" under the Land Consolidation Act means any person responsible (whether under recognised customary law or otherwise) for protecting the interests of a person who is under a disability.

"Disability" means disability arising from minority or other incapacity.

The nearest those two statutes have moved to the trustee is the use of the term "Guardian". According to *A Concise Law Dictionary* by PG Osborn, "Guardian" is: "A person having the right and duty of protecting the person, property or rights of one who is without full legal capacity otherwise incapable of managing his own affairs". The term "Fiduciary" on the other hand means: "The relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefit of the latter; for example, as between trustee and beneficiary".

I have already given the definition of a trust and shown who a trustee is. The definition of the term "Guardian" has just been given above.

That being the position, I do not think the use of the term "Guardian" in the two statutes meets the requirement in section 126(1) of the Registered Land Act.

Land Adjudication and Consolidation officials in the Department of Land Adjudication were and are under legal obligation to compile adjudication and consolidation records in accordance with the provisions of the Land Adjudication and Land Consolidation Act. In turn land registrars, in the Department of Lands, a different department, are under legal obligation to make first registrations under the Registered Land Act in accordance with the records received from the Department of Land Adjudication. Records showing land proprietors registered, on a first registration, as trustees are therefore hardly seen and this is the area where courts are getting many litigation on trusts in land.

When adjudication registers are declared final under section 27 of the Land Adjudication Act (section 27 of the Land Consolidation Act) and therefore handed over to the chief land registrar in the Department of Lands, land registrars are required by law to open land registers, during first registrations, in accordance with particulars in the adjudication registered received from the Director of Land Adjudication in the Department of Land Adjudication under section 27(3)(*c*) of the Land Adjudication Act. It follows that where no trust is

recorded in records from the Department of Land Adjudication, no trust is recorded by the land registrar in the resulting land register, on a first registration, under the Registered Land Act although under that Act there are provisions in sections 28 and 126 recognizing trusts and therefore allowing trust to be registered.

In other words, the Registered Land Act is expecting registration of trustee proprietors whom the Land consolidation Act and the Land Adjudication Act have completely ignored to the detriment of beneficiaries in first registrations.

The problem here, therefore, is more than a mere technicality. It is a legal mistake. A legal omission or default in the Land Consolidation Act and the Land Adjudication Act which need amendment to avoid future similar problems where land is yet to be registered under the Registered Land Act unless the mistake or omission or default found in the Land Consolidation Act and the Land Adjudication Act were done intentionally to enable untrustworthy registered trustee proprietors, without the words "as trustee" against their names, swindle innocent and unsuspecting beneficiaries on the basis that there is no evidence that the said proprietors were registered as trustees and that therefore, they are absolute proprietors with no duty as trustees.

Courts, in their exercise of equitable jurisdiction, have been doing their best to assist genuine beneficiaries but it has in many cases been a difficult task because of a number of reasons including not only the fact that some of the claims are not from genuine beneficiaries, but also, and this is more important, the fact that some doubt has existed in our courts as to whether the concept or notion of a trust exists in customary law.

I have endeavored in this judgment to show and I am satisfied that the concept or notion of a trust exists. Where a party in a case before the court has succeeded in proving a trust in his favour, the court will grant a declaration of a trust if prayed for. For the declaration to finally settle the dispute and benefit the successful party, there has to be a further order to enable the successful party be registered as proprietor of the piece of land about which he has obtained the declaration of a trust.

In some cases parties will ask for rectification of the relevant land register. There is no problem if the relevant land register is not a first registration. As in the case of *Alan Kiama* there was no problem because the land registered in the name of Alan Kiama was a second registration. Rectification of the register could be ordered without infringement to section 143(1) of the Registered Land Act which prevents rectification of a first registration.

If on the other hand the register is a first registration, section 143(1) does not allow rectification in any circumstances. The words in brackets in that section make the prohibition mandatory and absolute. But what is rectification? A Concise Law Dictionary by P.G. Osborn gives the meaning of rectification as "The correction of an error in a register or instrument … on the ground of mutual mistake". When permitted, section 143(1) allows rectification on the ground of fraud or mistake. It is done on the same register. It is amending the register.

Ordering a transfer of the whole parcel to the Claimant is not therefore rectification and section 143(1) does not prevent it. Ordering a subdivision of the suit parcel of land and a transfer of a portion thereof to the Claimant is not rectification and section 143(1) does not prevent it. Accordingly Cotran, J has said in the case of *Limuli vs Marko Sabayi* (*ibid*) that: "There is nothing in the

Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents". In the case before me, the Plaintiff was registered on a first registration. It is a first registration which is in question. The Plaintiff was registered as an absolute proprietor with nothing showing on the register and/or in the documents of acquisition that he acquired the land in a fiduciary capacity. The words "as trustee" are not seen on the land register.

But it has been shown and proved factually to my satisfaction through evidence, that he was registered in respect of the suit parcel of land, not for himself alone, but also on behalf of the Defendant. The Defendant and his eldest brother PW2 have told the Court the suit land belonged to their deceased father and is therefore family land. It was during land demarcation, adjudication and consolidation that the family and the clan elders chose to register the suit parcel of land in the name of the Plaintiff just as it was decided to register parcel number Thegenge/Unjiru/251 in the name of DW2. That registration was not meant to have both parcels of land vests solely into those, who were registered in exclusion of those who were not registered from the family. The usage of the two parcels of land, even after registration, is a good manifestation of the family and elder's intention. It is clear from the evidence of both sides that parcel of land Thegenge/Unjiru/251 although registered in the name of Mugendi Gathiba (DW2) has been used by all the other members of the family including the Plaintiff before he moved to the suit parcel of land. Similarly evidence has been adduced in court that the Plaintiff and the Defendant including their mother Martha Wanjiru have used parcel number Thegenge/Kihoto/1 since the time of demarcation without any complaint from the Plaintiff until 1984 when the Defendant demanded to be given half share of the land and be registered as the proprietor thereof. The usage no doubt shows that the two parcels of land were family land and those who have been registered are therefore trustees.

Perhaps I should add something to what I said. The Defendant started demanding half a share in 1994. According to the Plaintiff the dispute arose in 1984 when he asked the Defendant to move out of his land. But evidence has been adduced before me to the effect that on 5 April 1984 clan elders arbitrated between the parties on the issue of ownership of the land at the request of the Defendant and Malata. (Malata or Martha?) Wanjiru. The case was also heard on 21 November 1984 before the District Officer, Tetu Division over the same issue the Plaintiff once again being the Defendant. As I have said elsewhere therefore, the Plaintiff came to this Court to counter the decisions made by the clan and elders under the chairmanship of the area District Officer in order to appear to be the aggrieved. If the Defendant had not asked for his share of the suit parcel of land before clan elders and the Provincial Administration this suit may not have been brought.

From the totality of the evidence before me and on the balance of probabilities therefore I hold the view that it was the father of the parties in this suit who initiated the purchase of the suit parcel of land, then still scattered in the original plots. He died before he completed paying the purchase price, at least for the plot purchased from Kigai Mugo Mwicuia and the Plaintiff may have come in to clear the balance and whatever other charges that may have arisen. The Defendant also played his part to ensure that the plots were consolidated

into Thegenge/Kihora/1 in the absence of the Plaintiff and cleared some of the charges which apparently kept on coming up although he was clearing them from property left by their deceased father.

The Plaintiff may have taken advantage of the fact that he cleared the balance of the purchase price to say the land was his and he purchased it and therefore got registered without other members of the family knowing as has been suggested in some evidence or he may have been registered with the blessings of the entire family and clan elders as a trustee for the rest of the family as other evidence suggest and this second suggestion seems to be the most probable. But the fact remained that that piece of land belonged to the initial purchaser the father of the parties and what the Plaintiff and the Defendant were doing, were doing it on behalf of their father who left the land to the family and therefore in accordance with the wishes of the family as revealed from the evidence of members who have given evidence, that land should be shared equally between the Plaintiff and the Defendant. That is why the panel of elders under the District Officer, Tetu Division, ordered the Defendant to refund to the Plaintiff the sum of KShs 1 150 they found the Plaintiff had spent to get the land retained by the family. I note the fact that both Mugo Muburia (PW2) and Simon Muthomi from their respective evidence, came to be involved in this transaction only when the Plaintiff was paying them.

There may be no evidence in the land register or in the instrument of acquisition to show that the Plaintiff acquired the suit parcel of land in a fiduciary capacity, and that is why the Plaintiff is taking advantage of that fact. However, in the circumstances of this case, the absence of that documentary evidence does not mean there is no trust. I have pointed out elsewhere that section 28 of the Registered Land Act which makes the right of a registered proprietor indefeasible goes on to state in the proviso that same registered proprietor is not relieved from any duty or obligation to which he is subject as a trustee.

Section 126(3) comes in to add that where the proprietor of land is a trustee, he shall hold the same subject to any unregistered liabilities, right or interests to which it is subject by virtue of the instrument creating the trust.

The provisions of the Registered Land Act are saying all that and the same Act in section 28 says that the rights of a registered proprietor, are indefeasible only to the extent of being defeated in accordance with the provisions of the Registered Land Act that is: “as provided in this Act”.

In the instant case, their is no instrument of trust as such, but there is evidence that the Plaintiff was registered as the proprietor of the suit land through an undertaking between members of the family and in concert with the custom that being the second eldest son in the family, he was to be registered as the caretaker of the suit premises on his own behalf and on behalf of the Defendant. That family undertaking and tradition in itself was sufficient to result into an instrument of acquisition showing that the Plaintiff was acquiring the suit parcel of land in a fiduciary capacity. As it was from the family and elders and these were the people land demarcation officers, land adjudication officers and land consolidation officers, including recorders of existing rights, were dealing with; it can be assumed those officers were given the information by the family and clan elders of the parties in this case. But as I pointed out earlier, the Land Consolidation Act and the Land Adjudication Act and in default. They have no provisions for bush or persons acquiring land in fiduciary capacities. The officials

administering those two Acts of Parliament therefore failed to show this trust in the instrument of the Plaintiff's acquisition of the suit parcel of land. That is why there is no documentary evidence of this trust. However, the fact as evidence during the hearing of this suit has shown, is that there was a trust when the Plaintiff was being registered as the proprietor of the suit parcel of land.

The family, the clan and the elders had done all in their power and what remained was to be done by the officers who were administering the Land Adjudication Act and the Land Consolidation Act which were in default and the officers could not therefore put the trust into the instrument of acquisition. Yet the trust was there in fact at the time of land adjudication, land consolidation and land registration under the Land Consolidation and Adjudication Acts and the Registered Land Act respectively.

The Registered Land Act does recognize a trust whether evidence through an instrument of acquisition or not. That Act recognizes express as well as implied trusts. Since that is the position, why should the innocent beneficiary suffer loss when there was no blame on his side? Why should he suffer loss when the default which caused the problem is beyond his control and it was made by people who had the duty to see that that default does not occur, the drafter of the legislation; the enactors of the legislation and perhaps the administrators of the two statutes? And why should I allow the Plaintiff in this suit take advantage of that situation yet the law says he is not relieved from any duty or obligation to which he is subject as a trustee and holds the land subject to unregistered liabilities, rights or interests to which the land is subject?

I have said such a trust becomes an implied trust when the land is registered under the Registered Land Act which has provisions for trusts. His Lordship Justice Mathew Muli analyzed it into a resulting trust. I have no quarrel with that and in conclusion therefore, it be and is hereby declared:

(a) That the suit parcel of land registration number Thegenge/Kihoto/1 belongs to both the Plaintiff and the Defendant as tenants in common in equal shares;

(b) That the Plaintiff as a proprietor, holds the said suit parcel of land registration number Thegenge/Kihoto/1 in trust on his own behalf and on behalf of the Defendant; and

(c) That therefore the Defendant is not a trespasser on the said suit parcel of land.

Accordingly:

(a) The Plaintiff's claim be and is hereby dismissed.

(b) The Plaintiff be and is hereby ordered to subdivide the said parcel of land into two equal portions with two separate titles one of than containing the area, if any, occupied by the Defendant and thereafter transfer the portion containing the area, if any, occupied by the Defendant to the Defendant. In default the deputy registrar of this Court to execute all the relevant subdivisional, transfer and other necessary, documents, for and on behalf of the Plaintiff.

(c) The Defendant to refund to the Plaintiff the sum of Kenya Shillings one thousand, one hundred and fifty (KShs 1 150) only.

(d) The Plaintiff to pay costs of this suit.

For the Plaintiff:
Mr Ndurumo

For the Defendant:
Mr Gichachi

Geometra (EA) Ltd v Roadsea Link Ltd
[2001] 2 EA 376 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	19 October 2001
Case Number:	78/00
Before:	Gicheru, Kwach and Shah JJA
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Bills of exchange – Cheque – Unendorsed cheque issued as security for friendly loan – Loan not repaid – Cheque completed and presented for payment – Dishonoured – Whether cheque had been "altered" – Whether there was sufficient consideration.

Editor's Summary

Roadsea Link Ltd issued a friendly loan of KShs 215 000 to Geometra through its managing director. The security for the loan was an undated cheque for the same amount that had not been endorsed to any payee. When Geometra failed to pay, Roadsea Link Ltd completed the cheque, inserted its name as payee and presented it for payment. The cheque was dishonoured. Roadsea Link Ltd sued for money lent. After judgment was entered in Roadsea Link Ltd's favour, Geometra appealed. Geometra contended that the money was paid to the managing director and the cheque was not supported by consideration, and that the cheque had been "altered" before presentation.

Held – On the evidence, the managing director had acted as the agent of Geometra. The friendly loan was therefore sufficient consideration to back payment of the cheque.

By inserting the date and filling in its name as payee, Roadsea Link Ltd had not altered the cheque as per section 64 of the Bills of Exchange Act (Chapter 27), but had just completed it. *Fakhri Stores Limited v London Confirmers Limited* [1965] EA 159 distinguished.

Appeal failed.

Case referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Fakhri Stores Ltd v London Confirmers Ltd [1965] EA 159 – **D**

Judgment

GICHERU, KWACH AND SHAH JJA: This is an appeal from the judgment and decree of Aganyanya J given on 12 October 1999. Roadsea Link Limited (the Respondent) sued Geometra (EA) Limited (the Appellant) in the superior court claiming KShs 215 000 as money lent by the Respondent

to the Appellant or, in the alternative, on the face of a cheque for KShs 215 000 drawn on Pan African Bank Limited issued by the Appellant in favour of the Respondent

which when presented for payment was dishonoured with the remarks "Not Arranged For".

In its defence dated 28 February 1994 the Appellant denied borrowing or receiving KShs 215 000 from the Respondent. In paragraph four of the defence the Appellant averred:

> "(4) In answer to the allegations contained in paragraph four of the plaint, the Defendant states that the Defendant did issue a cheque for KShs 215 000 upon the request of one Alfred Lustenberger who undertook to remit an equal sum in the Defendant's account. Due to the failure of remittances aforesaid, the Defendant's cheque was dishonoured but absolutely no liability arises against the Defendant for want of, *inter alia*, due consideration".

Among the issues the Learned Judge had to determine was whether the Appellant requested a friendly loan in the sum of KShs 215 000 from the Respondent. The Respondent's case was that the Appellant ran short of money and through its managing director, one Alfred Lustenberger, approached Mr SR Shah, the Respondent's managing director, for assistance. Mr Shah obtained KShs 215 000 in cash from the Respondent's office manager, Joseph Kibe Mungai, and gave it to Lustenberger in exchange for a cheque issued by the Appellant for the same amount but with the date and payee's name left blank. It is to be noted that the money which Shah gave Lustenberger was not his own. It was taken from the Respondent and the cheque given as collateral was not Lustenberger's personal cheque; he gave the Appellant's cheque. When the Appellant failed to pay back the money as promised by Lustenberger, the Respondent had the cheque dated and the Respondent's name inserted as payee and then presented it for payment. It was dishonoured.

The Appellant's case notwithstanding, the averment in paragraph four of the defence was that this was a personal loan granted to Lustenberger by Mr Shah for his own purposes not for the benefit of the Appellant and that the Appellant did not receive the money. Lustenberger's explanation as to why he gave the Appellant's cheque as security for the debt came out in his evidence-in-chief when he said:

> "I have seen this cheque before. I am the one who issued this cheque as security. I left it open because it was to be retrieved on payment by me in cash. I did not put the name of the payee on the cheque as it was not supposed to be banked since mine was a private debt and not company debt".

Faced with these two conflicting versions, the Learned Judge rejected Lustenberger's account as far-fetched and held on the strength of the cheque and a clear acknowledgement of the indebtedness by the Appellant, that the money was lent to the Appellant and not to Lustenberger as a person. It is against that determination that the Appellant now appeals to this Court.

There are eight grounds of appeal but the only substantial ones are grounds three, five and eight and it is on the basis of these that we propose to dispose of this appeal. The complaint in ground three is that the Learned Judge erred in law and in fact in not appreciating sufficiently or at all the cheque produced in court had been tampered with. Mr *Ngatia*, for the Appellant, submitted that the Respondent tampered with the cheque by inserting the date and filling in the name of the Respondent as payee, and that what the Respondent did constituted alteration within the meaning of section 64 of the Bills of Exchange Act (Chapter 27) so as to afford a complete defence to the Respondent's claim. He said that by inserting the Appellant's name and dating the cheque without the

Appellant's authority, the Respondent had altered the cheque and could not therefore sue on it.

This submission must fail because we cannot see how what the Respondent did could possibly amount to alteration. It would be doing violence to the English language to say that it did. The Respondent did not change or alter anything. It merely completed the cheque. So the case of *Fakhri Stores Limited v London Confirmers Limited* [1965] EA 159 on which Mr *Ngatia* placed considerable reliance for this submission is of no assistance at all to the Appellant. This ground accordingly fails.

Ground five of appeal is that the Learned Judge erred in law and in fact in holding that the sum was borrowed on behalf of the Appellant in the absence of evidence to that effect. On 22 April 1993 the Respondent sent a fax to the Appellant demanding immediate payment of the principal sum plus interest. The reply sent by the Appellant on 27 April 1993 was addressed to the Respondent and signed by Lustenberger on behalf of the Appellant.

It was in the following terms:

> "Dear Mr Shah,
>
> Reference is made to your fax on 22 April 1993 regarding outstanding payment.
>
> We are still blocked to fulfil our obligations since not all effects are cleared with our bank.
>
> Empty promises from some of our debtors are the reason for the delays but we assure your good office to clear our outstanding account as soon as possible.
>
> Please bear with us for some more days.
>
> Yours faithfully
>
> Geometra (EA) Limited
>
> F Lunstenberger".
>
> (Emphasis added).

In that letter Mr Lustenberger used possessive pronouns "we" and "our" throughout in relation to the debt. Nowhere did he refer to it as his personal debt to Mr Shah. If that was indeed the case he would have said so. This letter together with the averment in paragraph four of the defence is in our judgment conclusive evidence that the money was lent, not to Lustenberger, but to the Appellant, and the claim by Lustenberger that it was a personal loan to him from Mr Shah was merely a ruse calculation to defeat the Respondent's claim. Consequently, this ground of appeal also fails.

In ground eight of appeal it is alleged that the Learned trial Judge erred in law in not appreciating sufficiently or at all that the Appellant did not receive the money and could not therefore be ordered to repay the debt for want of consideration. We have already found that the money was borrowed by the Appellant and it was collected by Lustenberger, the Appellant's managing director, who should have passed it on to the Appellant. If he did not pay over the money to the Appellant, and converted it to his own use, that can be no ground to deny the Respondent the right of recovery against the Appellant. That is a matter between the Appellant and Lustenberger. There was no evidence before the Learned Judge that in negotiation the loan and issuing the cheque Lustenberger acted in excess of his authority. If Lustenberger seriously believed this was a personal loan he would have issued his personal cheque and said as much in reply to the letter of demand to which we have already alluded. We reject this ground of appeal as well.

For these reasons, this appeal fails and it is dismissed with costs to the Respondent.

For the Appellant:
Mr Ngatia

For the Respondent:
Information not available

Gitu v Ndungu
[2001] 2 EA 379 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	13 July 2001
Case Number:	304/97
Before:	Gicheru, Omolo, Tunoi, Lakha and Bosire JJA
Sourced by:	LawAfrica
Summarised by:	HK Mutai

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[1] Limitation of actions – Settlement fund trustees – Adverse possession – Property registered in name of settlement fund trustees – Plaintiff claimed possession by way of adverse possession – Whether the Limitation of Actions Act (Chapter 22) applies to settlement fund trustees – Section 37 – Limitation of Actions Act (Chapter 22) – Section 175 – Agriculture Act (Chapter 318).

Editor's Summary

In 1988 the Plaintiff sued the Defendants over a dispute involving a parcel of land located in Bungoma. He alleged that he was the one who had been allocated the property in September 1965 even though the First Defendant had been registered as owner thereof, that he had been in exclusive possession of the property from the time of allocation and that the First Defendant's right to the property had been extinguished in December 1977. He therefore averred that he had acquired title to the suit property through adverse possession and sought a declaration that the transfer of the property from the First to the Second Defendant on 19 October 1987 and thereafter to the Third and Fourth Defendants on 28 December 1987 was fraudulent and unlawful. The Second Defendant argued that the transfer was lawful and that the settlement fund trustees, in whose name the suit property had originally been registered, were not subject to the Limitation of Actions Act (Chapter 22). The trial Judge found that though the Plaintiff had not been allocated the suit property originally, his claim to have been in exclusive possession thereof had not been challenged. He also found that the First Defendant had only become registered as the owner of the suit property on 3 July 1987 and that, before that date, it had been registered in the name of the settlement fund trustees. Relying on the 1994 Court of Appeal decision in *Eliud Nyongesa Lusenaka v Omocha* [1993] LLR 2834 (CAK) he then held that there could be adverse possession against the settlement fund trustees and that in this instance the Plaintiff had acquired title to the land by way of adverse possession. On appeal.

Held – While the Court of Appeal, as the final Court of Appeal for Kenya, would as a matter of judicial policy normally regard a previous decision of its own as binding, it would be free to depart from such a previous decision if it

appeared right to do so; *Trust Bank Ltd v Eros Chemists Ltd* [1999] LLR 1008 (CAK) applied.

The existence of two conflicting Court of Appeal decisions regarding the issue of whether the Limitation of Actions Act provisions giving rise to a claim for adverse possession over property applied in a case where the property was under the ownership of the settlement fund trustees raised difficult questions that could only be resolved by the application of first principles. The provisions of section 37(*a*) of the Limitation of Actions Act when read together with section 175 of the Agriculture Act (Chapter 318) showed that the interest of the settlement fund trustees in a property could not be extinguished under the Limitation of Actions Act. An examination of the judgment in *Lusenaka v Omocha* (*supra*) revealed that the court in that case had not considered the provisions of section 37 of the Limitation of Actions Act but had confined itself to a consideration of section 41 thus resulting in an error of judgment; *Boniface Oredo v Wabomba Mukile* civil appeal number 170 of 1989 followed, *Lusenaka v Omocha* (*supra*) disapproved. Accordingly, the trial Judge having relied on an erroneous judgment, his decision could not be supported and the appeal would be allowed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Boniface Oredo v Wabomba Mukile civil appeal number 170 of 1989 – **F**

Lusenaka and another v Omocha [1993] LLR 2834 (CAK) – **DA**

Trust Bank Ltd v Eros Chemists Ltd and another [1999] LLR 1008 (CAK) – **AP**

Judgment

GICHERU, OMOLO, TUNOI, LAKHA AND BOSIRE JJA: This appeal concerns the parcel of land number Bungoma/Kiminini/302 (the suit property) and is brought by the unsuccessful Second Defendant from the judgment of the superior court at Kakamega (Tanui J) given on 11 July 1997 whereby he declared the Plaintiff had acquired the title to the suit property by way of adverse possession and granted all incidental and other reliefs as prayed in the originating summons dated 14 March 1988.

The history and facts of the case may be briefly stated. The Plaintiff claimed that the suit property was allocated to him on 24 September 1965. He paid KShs 567 and the suit property was registered in the name of the First Defendant. The First Defendant's right to the suit property was extinguished on 15 December 1977 and thereafter he held the land in trust for him. He said that the transfer by the First Defendant to the Second Defendant on 19 October, 1987 by way of a gift was fraudulent and unlawful and the transfer by the Second Defendant to the Third and Fourth Defendants on 28 December, 1987 was also fraudulent and unlawful.

According to the Second Defendant, until 19 October 1987 the suit property was registered in the name of Settlement Fund Trustees, that in August, 1965 the suit property was allocated to him and as he had no approval to hold land,

he requested it to be in the name of the First Defendant, that the Plaintiff had not repaid the loan until he paid it in 1987, that the suit property was registered in the name of the First Defendant on 14 October 1987 and that the same was transferred to the Second Defendant on 19 October 1987, that the same was once again transferred to the Third and Fourth Defendants on 28 December 1987, that the SFT is not subject to Limitations of Actions Act, Chapter 22.

The hearing before the Learned Judge took place on 22 May 1996, 16 July 1996 and 24 September 1996 when five witnesses gave evidence including the Plaintiff and four witnesses for the Defendants including the three Defendants. He reserved judgment which he did not deliver until 11 July 1997. He held, *inter alia*, that:

> "I therefore do not believe that he (that is the Plaintiff) was allocated the plot (that is the suit property) as he claimed. The truth would appear to be that the Second Defendant was the one who was allocated the plot number 302 …
>
> It is true that the First Defendant was first registered as the owner of the plot (that is the suit property) on 3 July 1987. Until that date the land was in the name of the Settlement Fund Trustees".

Finally, the Learned Judge made a critical conclusion in his judgment when he said:

> "The Plaintiff's claim that he had been in exclusive possession of the said parcel of land was therefore not challenged. Earlier on it had been stated that there could not be adverse possession against SFT but the decision in the case of *Lusenaka and another v Omocha* [1993] LLR 2834 (CAK*)* the Court of Appeal decided otherwise. In the circumstances I would hold that the Plaintiff after 12 years of his exclusive possession of the suit property acquired title to it and the SFT thereafter became his trustee. I reject the claim by the Second Defendant that the Plaintiff was his licensee as he had no interest on the land in question".

In our judgment, the heart of this appeal lies in the central question as to whether the Limitations of Actions Chapter 22 which gives rise to a claim for adverse possession after expiry of the prescribed period in a case where the property is under the ownership of SFT. The consideration of this matter although difficult is not free from authority. In *Boniface Oredo v Wabomba Mukile* civil appeal number 170 of 1989 (ur) delivered in 1992, this Court held that the interest of SFT in the suit is not extinguishable under the Limitation of Actions Act Chapter 22 of the Laws of Kenya. This matter was explained in detail by Gicheru JA in his judgment when he stated:

> "Concerning the interest of the Settlement Fund Trustees in the suit plot, section 37 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya where relevant is in the following terms:
>
> '37 This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except: that:
>
> (*a*) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act' ".

Evidently, the Appellant was not the registered proprietor of the suit plot. That plot was and still is charged to the Settlement Fund Trustees on account of a 10-year development loan advanced to the Appellant on acceptance of the plot on 9 November 1965 which has not been repaid. Clearly they have an interest in this plot. That interest is taken care of by the provision of the section set out above since section 175 of the Agriculture Act, Chapter 318 of the Laws of Kenya provides that:

> "175 Notwithstanding anything to the contrary contained in any law relating to limitation, no suit, application or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law".

According to these provisions, the interest of the Settlement Fund Trustees in the suit plot is not extinguishable under the Limitations of Actions Act Chapter 22 of the Laws of Kenya. It was not therefore necessary to join them in the proceedings before the superior court.

On the other hand, in *Lusenaka and another v Omocha* [1993] LLR 2834 (CAK) delivered in 1994, the Court decided otherwise.

On this state of authorities, the existence of two conflicting decisions of the Court, in our judgment, raises questions of considerable difficulty which can only be resolved by application of first principles. As was said by this Court in *Trust Bank Ltd v Eros Chemists Ltd and another* [1999] LLR 1008 (CAK):

> "It is, we think, beyond dispute that since the establishment of this Court in 1977 it ceased to hold the position of an intermediate appellate court but became a final Court of Appeal for the sovereign State of Kenya. Its position is analogous to that of the House of Lords. The decisions of the House of Lords upon questions of law are normally considered by the House to be binding upon itself, but because too rigid adherence to precedence may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so. So should this Court. For these reasons we are satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so".

The next question is whether the decision of this Court in the *Eliud Nyongesa* case was a wrong decision. It is immaterial if the earlier decision had been by a majority (which it was as it was delivered under rule 32(3) of the Rules of this Court). We have carefully studied the decision and it appears to us that section 37 of the Limitations of Actions Act (Chapter 22) was not considered in this Court in the subsequent case of *Eliud Nyongesa*. Secondly, the *Nyongesa* case itself does not deal with section 37 of the Limitation of Actions Act itself but confines itself to a consideration of section 41 of the Limitations Act. In our judgment, therefore, without any hesitation, the decision in the *Nyongesa* case is wrong and we prefer the earlier decision in *Boniface Oredo* as containing a more comprehensive and full analysis of the legal position obtaining on this point.

The final consideration on this issue is whether, having come to the conclusion that this Court is free to depart from its own decision and that the Court's decision in the *Nyongesa* case was wrong, should this Court now give a decision contrary to that given by this Court in *Boniface Oredo*? We have found this matter of the greatest difficulty. The subsequent decision, with respect, is erroneous and surely this Court is not bound to perpetuate an error. It is a

recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the subsequent decision and indeed it is the duty of this Court to rectify an erroneous decision. With considerable hesitancy we have come to the conclusion that this Court should declare, as we hereby do, that the decision of this Court in the *Nyongesa* case is wrong.

That being so since the decision relied upon by the Learned Judge was erroneous, it follows that this appeal should be allowed, as it hereby is, with costs. The whole of the decree of the superior court given on 11 July 1997 is hereby set aside and substituted by a decree in the following terms:

(a) The Plaintiff's originating summons filed in the superior court dated 14 March 1988 is dismissed with costs.

The transfers of the suit property to and from the Defendants are valid and lawful. The Appellant shall have the costs of this appeal and in the Court below paid by the Plaintiff.

For the Appellant:
Information not available

For the Respondents:
Information not available

Impressa Ing Fortunato Federice v Nabwire
[2001] 2 EA 383 (SCU)

Division:	Supreme Court of Uganda at Mengo
Date of judgment:	2 September 2001
Case Number:	3/00
Before:	Oder, Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyogo JJSC
Sourced by:	B Tusasirwe
Summarised by:	HK Mutai

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[1] Practice – Costs – Award of costs a matter for the court's discretion – Appeal against quantum of general damages awarded by trial court – Quantum of damages reduced on appeal – Appeal partially successful – Award of costs – Appellant not awarded costs – Whether the appellate court exercised its discretion judiciously – Section 27 – Civil Procedure Act.

Editor's Summary

The Respondent, a seven-year-old girl, brought an action through her father as a next friend, against the Appellant seeking damages for personal injuries sustained in an accident involving the Appellant's motor vehicle. Before the hearing of the suit could be completed the Appellant admitted liability, leaving the assessment of the quantum of damages by the trial court as the sole issue

remaining for determination. The Respondent's claims were for special and general damages as well as the costs of the suit. The trial Judge awarded her UShs 25 million in general damages for pain, suffering and loss of amenities, and special damages of UShs 5 980 000. The Appellant appealed against the award of general damages on the grounds that the amount awarded was excessive.

The appeal was successful and the award of general damages was reduced to UShs 20 million. However, the Court of Appeal ordered each party to bear its own costs on the ground that the appeal had only been partially successful. The Appellant now appealed against that decision. The Appellant argued, *inter alia*, that it had succeeded in its main claim before the Court of Appeal and, relying on section 27 of the Civil Procedure Act (Chapter 65) claimed that the costs of the action should have followed the event. Accordingly, it contended that the Court of Appeal had erred in holding that the appeal had only been partially successful, in denying the Appellant costs of the appeal and in not assigning reasons for why it considered the Appellant not to be entitled to the costs.

Held – The effect of section 27 of the Civil Procedure Act was to leave the issue of costs to the court's absolute discretion to determine by whom and to what extent costs should be paid. Like all judicial discretions, this was a discretion to be exercised judiciously on the facts of each case. In this instance, the Court of Appeal had considered and re-evaluated the evidence before it and there was nothing to show that it had exercised its discretion wrongly when it denied the Appellant costs on the ground that the appeal had only been partially successful.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Bhogal v Burbidge and another [1975] EA 285 (CA)

Foods and Beverages Ltd v Israel Musisi Openya CA number 32/92 (SCU) (ur)

Imprestirling Imprest Federiki v Haji Abdu Karimu Lugemwa CA number 31/93 (SCU) (ur)

Interfreight Forwarders (U) Ltd v East African Development Bank CA number 33/99 (SCU) (ur)

Potgieter v Stumberg and another [1967] EA 1609 (CA)

Kanobolic Group of Companies (U) Ltd v Sugar Corporation of Uganda Ltd CA number 15/94 (SCU) (ur)

Kiska Ltd v De Angells [1969] EA 6

Uganda Development Bank v Muganga Construction Company [1981] HCB 35

Uganda Electricity Board v G M Musoke CA No 30/93 (CSU) (ur)

United Kingdom

Donald Campbell v Pollak [1927] AC 732

Judgment

ODER JSC: The Second Respondent, Irene Nabwire, was seven years old when she brought an action in the High Court at Mbale, through her father Dr Julius Wambette, as a next friend, against the Appellant company for damages for personal injuries due to negligence.

On 15 October 1995, the Appellant's motor vehicle, a pick-up, registration number KDA 248, knocked down the Second Respondent when she was lawfully walking along Cathedral Avenue in Mbale Municipality. The pick-up was being driven by one Ali Gumasi, an employee of the Appellant, acting in the course of his employment. As a result, the Second Respondent sustained a compound fracture of the left femur, a closed head injury, leading to aphasia, shock and pain. She was admitted in Mbale Hospital when she was unconscious and generally in a poor condition of health.

During her hospitalization, the Second Respondent was under the management of a team of doctors, one of whom was Dr Jaffa Balyejussa (PW2) who testified that the patient remained in the ward for about a month. Her father, Dr Julius Wambette (PW1) testified that she remained unconscious for three days. He also said that during the course of treatment, it was realized that she could not hear. She was also losing the ability to speak, which she had mastered before the age of seven. She was discharged from Mbale Hospital on 11 November 1995. When the Second Respondent was discharged Dr Balyejussa observed that the leg had healed. She had regained consciousness but she could neither communicate nor was she able to hear. Due to lack of facilities at Mbale Hospital, she was referred to an ENT specialist in Mulago Hospital Dr Edward Turitwenka.

Before completion of hearing of the suit in the High Court, the Appellant admitted liability, leaving only the assessment of quantum of damages by the trial court. The Second Respondent's claims were for special and general damages and costs of the suit. The Learned trial Judge awarded her UShs 25 million general damages for pain, suffering and loss of amenities with interest at court rate from the date of judgment until payment in full. Special damages of UShs 5 980 000 with interest and taxed cost of the suit were also awarded in her favour. The Appellant was aggrieved with the award of general damages as being too high and appealed to the Court of Appeal.

At the hearing of the appeal, Mr Geoffrey *Mutawe*, counsel for the Appellant informed the Court of Appeal that the appeal was against the Second Respondent only. There were six grounds of appeal as follows:

> "1. The Learned Judge erred in law and in fact when he awarded an exorbitant sum to the Plaintiff by way of general damages without evidence.
>
> 2. The Learned Judge erred in law and in fact when he admitted and based his findings on hearsay evidence.
>
> 3. The Learned Judge erred in law and in fact when he relied on a medical report which had not been annexed to plaint at the institution of the suit.
>
> 4. The Learned Judge erred in law and in fact when he relied on a document which had not been tendered in evidence.
>
> 5. The Learned Judge erred in law and in fact when he relied on a report compiled over a year ago after the accident and nearly a year after the suit was filed.
>
> 6. The Learned Judge erred in law and in fact when he misconstrued the hearing of Order XI, rule 6 of the Civil Procedure Rules".

In its decision, the Court of Appeal reduced the award of general damages of UShs 25 million, as being too high, to UShs 20 million. It also ordered that as the appeal was partially successful, each party should bear its own costs.

In the appeal to this Court five grounds are set out in the Appellant's memorandum of appeal. They are:

"1. The Learned Justices of the Court of Appeal erred in law and fact when they held that the appeal partly succeeded.

2. The Learned Justices of the Court of Appeal erred in law and in fact when after reducing the award or general damages made by the High Court and as prayed by the Appellant, ordered that the appeal partly succeeded.

3. The Learned Justices of the Court of Appeal erred in law and fact when they denied the Appellant who was successful in the Court or Appeal costs of the appeal.

4. The Learned Justices of the Court of Appeal erred in law and fact when they did not assign reasons as to why the Appellant who had succeeded in having the award of damages by the High Court reduced was not entitled to costs.

5. The Learned Justices of the Court of Appeal erred in law and fact when they failed to exercise their discretion regarding costs".

In essence, in my view, this appeal is only against the Court of Appeal's decision and order that each party should bear its own costs.

Both parties to this appeal filed written statements of their arguments in support of their respective cases, under rule 93 of the Rules of this Court.

The Appellant's learned counsel argued that in the Court of Appeal, the Appellant succeeded on the substantive issue and prayer of having the High Court award reduced. The learned counsel relied on *Uganda Electricity Board v GM Musoke* civil appeal number 30 of 1993 (CSU) (ur). *Imprestirling Imprest Federiki v Haji Abdu Karimu Lugemwa* civil appeal number 31/93 (SCU) (ur).

It is contended for the Appellant that in the instant case the Appellant's case succeeded in its entirety in the Court of Appeal. Consequently, the Appellant should have been awarded costs of the appeal. The learned counsel also referred to section 27(1) of the Evidence Act which gives to the trial judge a discretion on matters of costs, with a proviso that costs of any action shall follow the event unless the court or judge shall for good reason otherwise order. Learned counsel also relied on the definition of "Events" by *Stroud's Judicial Dictionary of Words and Phrases (*4 ed) Volume 1 at 948, in which the word "Event" is explained with reference to the phrase "Costs shall follow the event" as "the outcome or the result of the trial, and although there may be one verdict and one judgment, there still may be more than one event". The learned author also says that "the general costs of a trial or an inquiry would, as a rule, in the one case follow the judgment and in the other would follow the general result, or balance, of the findings".

It is also contended for the Appellant that the Learned Justices of Appeal did not give any reason why the Appellant did not get costs, and that there are no grounds why the Appellant as the successful party was not awarded costs.

The Appellant's learned counsel also relied on other authorities, including *Kanobolic Group of Companies (U) Ltd v Sugar Corporation of Uganda Ltd* civil appeal number 15/94 (SCU) (ur), *AIR Commentaries*, Civil Procedure Code Volume 1 at 630–638, *Interfreight Forwarders (U) Ltd v East African Development Bank* civil appeal number 33 of 1999 (SCU) (ur), *Potgieter v Stumberg and another* [1967] EA 1609 (CA), *Bhogal v Burbidge another* [1975] EA 285 (CA) and *Foods and Beverages Ltd v Israel Musisi Openya* civil appeal number 32 of 1992 (SCU) (ur).

The written submission by the Second Respondent's learned counsel contended that the Court of Appeal was entitled to hold that the Appellant had

partially succeeded in the appeal before it. In the circumstances, that court was faced with two options: either to dismiss the appeal by not reducing the award by the High Court or allow the appeal by reducing the award. On the question of costs, the Second Respondent's learned counsel agrees with the Appellant's statement of the law as contained in its written submission, but the learned counsel disagrees that the Court of Appeal erred to order that each party should bear its own costs after the award for damages was reduced.

The Second Respondent's learned counsel also contended that contrary to the Appellant's allegation that the Court of Appeal did not give reasons for not awarding costs to the Appellant, the Court of Appeal actually did so. The reason it gave was that the Appellant partially succeeded in the appeal.

It was further argued for the Second Respondent that this Court has no ground for interfering with the Court of Appeal's decision on costs, because the decision to award or not to award costs to a successful party is in the discretion of a court or judge. The Appellant has not shown that the Court of Appeal did not have facts on which to base its reason or that the reason was not a good one. For his submission, the learned counsel relied on *Foods and Beverages Ltd v Israel Musisi Opeya* (*supra*) *Kiska Ltd v De Angells* [1969] EA 6*;* and *Potgieter v Stumberg and another* (*supra*).

The law governing the issue of costs in litigation or suits is provided for in section 27 of the Civil Procedure Act (Chapter 65), which states:

> "27(1) Subject to such conditions as may be prescribed, and to the provisions of any law for the time being in force, the cost of any incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of such powers.
>
> Provided the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order".

In my view, the effect of the provisions of section 27 in question of the Civil Procedure Act is that the judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid. Of course, like all judicial discretions, the discretion, on costs must be exercised judiciously. How a court or a judge exercises such a discretion depends on the facts of each case. That is the basis on which in my view the discretions in the numerous cases to which the learned counsel on both sides have referred in this appeal were decided by the courts or judges concerned. The factors which determine the exercise of the discretion in favour of one party and against another in a case do not necessarily apply to any other case. If there were mathematical formula, it would no longer be discretion.

In the instant case the Court of Appeal as the first appellate court considered and revaluated the evidence before it and decided that the award of general damages should be reduced and held, rightly in my view, that the appeal was thereby partially successful. For that reason it ordered that each party should bear its own costs. This was an exercise of its discretion on the matter. It gave reasons for doing so.

In the circumstances, I am unable to say that the discretion was exercised on wrong principles or was not based on good reason. In the result, I would dismiss this appeal.

I have had the benefit of reading in draft the judgments of my learned brothers, Mulenga JSC, and Kanyeihamba JSC. They both considered the issue of damages and held that the Court of Appeal erred by reducing the award of general damages from UShs 25 million which the Learned trial Judge had awarded to UShs 20 million.

In his lead judgment, in the Court of Appeal, with which Kato and Mpagi-Bahigeine JJA, concurred Engwau JA, gave his reasons for reduction of the award of general damages. It is not necessary for me to delve into his reasons for doing so in view of what I am going to say hereinafter.

In my considered opinion the issue of award of general damages does not arise in this appeal. It was not brought before the court by either party.

The Appellant would have no reason to raise the issue, because the reduction of general damages was in its favour. Its appeal to this Court is only against the Court of Appeal's order on costs. Only the Respondent would have had a reason to be dissatisfied with the order for reduction of the general damages and therefore to cross-appeal against it, if it wished to do so. Rule 87(4) of this Court's Rules provides for the procedure for a cross-appeal by a Respondent who desires to contend that the decision of the Court of Appeal should be varied or reversed. The Respondent not having cross-appealed in the instant case, my view is that there is no basis for this Court to consider and reverse the Court of Appeal's decision and order reducing the award for general damages, however well intentioned the motive for wishing to do so; and however much the Court of Appeal may have erred in reducing the award of general damages. Justice to the Second Respondent, and criticism and correction of errors by the Court of Appeal would have been better properly done if the issue of general damages was made on issue before this Court. As it is, it is not.

My second reason for that view is that neither the Appellant nor the Respondent has been heard on the issue of whether or not the Court of Appeal erred to have reduced the award of general damages. If there was a cross-appeal by the Respondent in this Court, which there was not, I have no doubt that both parties would have wished to be heard on the matter. To reverse the Court of Appeal's reduction of the award of general damages, to the prejudice of the Appellant without giving him a hearing, in my view, is not very consistent with the principle of natural justice. A court decision in his favour is now being reversed without him having been heard before the reversal.

Thirdly a procedure by which this Court, on its own, takes up an issue on behalf of a party who should have cross-appealed, but did not do so, and makes a decision in such a party's favour, in my view, creates a precedent with unforeseeable consequences.

For the reasons I have given, I am not in a position to say whether the Court of Appeal's decision reducing the award of general damages for the Respondent from UShs 25 million to UShs 20 million was an error or not as the issue was not before this Court.

As all the members of the court agree on the result of the appeal, it is dismissed with costs to the Respondent here and in the court below.

In view of the position taken by Oder JSC, Karokora JSC and Mukasa-Kikonyogo JSC (as she then was) there will be no order regarding general damages.

MUKASA-KIKONYOGO JSC: I have had the benefit of reading the judgment in draft prepared by Kanyeihamba JSC. I agree with him that the Appellant's appeal for costs should fail. I do not have much to add except to comment on a few points which I feel deserve mention. Nabwire a small girl aged 7 years hereinafter to be called the Respondent through her father and next of friend, Dr Wambette sued Impressa Ing Fortunato Federice, hereinafter to be referred to as the Appellant in negligence.

The brief facts of the matter were that on 15 October 1995 the Respondent was lawfully walking along Cathedral Avenue in Mbale Municipality, when the Appellant's motor vehicle registration number KAD 248, pick-up, knocked her down. The accident was apparently due to the negligence of Ali Gumasi an employee of the Appellant. The Respondent sustained very severe injuries. She was admitted to Mbale Hospital where she was unconscious for three days. She was eventually discharged but she had lost the faculties of hearing and speech.

After hearing the evidence of Dr Wambette and another doctor called Balyegusa who treated the Respondent in hospital, the Appellant admitted liability and asked the court to set down the case for assessment of damages only.

Upon listening to the evidence adduced on behalf of the Respondent, the Learned trial Judge awarded her UShs 25 million as general damages for pain, suffering and loss of amenities. He also awarded her special damages in the sum of UShs 598 000.

Dissatisfied with the award of general damages the Appellant appealed to the Court of Appeal. The Learned Justices of Appeal allowed the appeal on the ground that UShs 25 million was excessive and the medical report partly relied on was inadmissible as it was hearsay. They reduced the general damages to UShs 20 million stating that since the appeal had partially succeeded each party should bear its costs.

Aggrieved by the decision of the Court of Appeal on costs, the Appellant appealed to this Court against it. Relying on the provisions of section 27(1) of the Civil Procedure Code, Mr *Mutawe*, counsel for Appellant contended that costs should have been awarded to the Appellant because its appeal to the Court of Appeal succeeded.

On the award of UShs 25 million with respect I disagree with the Court of Appeal that it was excessive. On the contrary it was on the lower side. In my view the Respondent suffered very severe injuries even without taking into account the Respondent's loss of faculties of hearing and speech. In my view on the evidence of the Respondent's father, Dr Wambette there is no doubt in my mind that the loss of hearing and speech was due to the injuries sustained by the Respondent during the accident. Before the accident the Respondent could hear and talk but she lost them after the accident. Although I consider the award of UShs 25 million inordinately low I do not think that this Court can interfere with it without a cross-appeal by the Respondent. All I can say is that the severe injuries sustained by the Respondent called for higher damages.

On the issue of costs I agree with Mr *Mutawe* that they should have followed the event as stipulated in section 27(1) of the Civil Procedure Act which reads as follows that:

> "Subject to such conditions and limitation as may be prescribed and to the provisions of any law for the time being in force the costs of an incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid and give all necessary directions for the purpose aforesaid. provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason other wise order".

However under the aforesaid provisions the Learned Justices of Appeal had a discretion to award costs to any deserving party or to deny them to any party who did not. In the instant case there is no evidence to show that the Learned Justices of Appeal wrongly exercised their discretion when they denied the Appellant costs of the appeal. *See Uganda Development Bank v Muganga Construction Company* 1981 HCB 35 *and Kanoblic Group of Companies (U) Ltd v Sugar Corporation of Uganda Ltd (Seoul)* civil appeal number 15 of 1994 SC (ur).

In agreement with Kanyeihamba JSC, the Appellant's appeal for costs must fail and that the costs in this Court and the court below be awarded to the Respondent. I, however, disagree with the restoration of USh s 25 million originally awarded by the High Court without a cross-appeal and giving opportunity to the Respondent to be heard on the matter.

KANYEIHAMBA JSC: The facts of this case are not material in this appeal except insofar as will be stated in this judgment. Suffice to say that, following a plaint in the High Court for general damages, the Appellant admitted liability and judgment was entered against it by the Learned trial Judge in the sum of USh s 25 million with costs. The Appellant appealed to the Court of Appeal against the quantum of damages on the basis that it was excessive and had been arrived at without sufficient evidence.

The Court of Appeal reduced the award to USh s 20 million and stated in its judgment that the High Court award of USh s 25 million was excessive and had been arrived at on the basis of hearsay evidence which was not admissible in the court. The court made an order that each party would bear its own costs. It is against the order on costs that the Appellant has appealed to this Court. There is only one ground of appeal, namely, that the Learned Justices of Appeal erred in law when they ordered that each party bear its own costs instead of awarding the costs to the Appellant who was the successful party in the appeal before them.

Counsel for both parties filed written submissions under rule 93 of the Rules of this Court. For the Appellant, Messrs Ssawa, Mutaawe and Company, Advocates, submitted that when the Appellant's appeal was allowed in the Court of Appeal and the award of general damages by the trial Judge was reduced from USh s 25 million to 20 million, the Appellant became a successful party who should have been awarded costs as a matter of law.

Counsel submitted that the law which has been reflected in a number of judicial decisions, is contained in the provisions of section 27(1) of the Civil Procedure Act Chapter 65, which stipulates that in any action, cause or other matter or issue, costs shall follow the event unless the court or judge, for good reason, otherwise orders. Counsel further submitted that the Learned Justices of

Appeal did not give any reason as to why the successful party was not to get costs. In support of the Appellant's arguments, counsel cited a number of authorities including *Uganda Development Bank v Muganga Construction Company* [1981] HCB 35, *Kanoblic Group of Companies (U) Ltd v Sugar Corporation of Uganda Ltd* civil appeal number 15 of 94 (CA) (ur) *Intefreight Forwarders (U) Ltd v East African Development Bank* civil appeal number 33 of 1999 (SC) (ur), *Potgieter v Stumberg and another* [1967] EA 609 *and Foods and Beverages Limited v Israel Musisi Openya* civil appeal number 32 of 1992 (SC) (ur).

For the Respondent, Messrs Dagira and Company, Advocates, opposed the appeal. They contended that the Appellant had not shown that the Court of Appeal erred either in its decision or reasoning. It was also their contention that the award of costs is in the discretion of the court, and the Appellant had not shown that the Court of Appeal failed to exercise its discretion judiciously when it ordered each party to bear its own costs. Counsel cited the case of *Donald Campbell v Pollak* [1927] AC 732, in support of their submissions.

In my view, it has not been shown that the court erred in the exercise of its discretionary powers to award costs. In the leading judgment of the court, Engwau JA, observed:

> "When the hearing of the suit commenced in the High Court, the Appellant company midway admitted liability. The Learned trial Judge at this stage, rightly, in my view, entered judgment against the Appellant *and set down* the suit for the assessment of damages on 25 August 1997 when both learned counsel addressed the court. The burden of proving quantum of damages was upon the Respondent who could only be compensated to the extent of what has been proved. Mr *Mutaawe* apparently conceded the injuries sustained by the Respondent to consist of a compound fracture of the femur, closed head injury, shock, pain and suffering. Clearly, even if Mr Mutaawe had not conceded to those injuries, proof of the same lies in the evidence of Dr Wambette, PW1, Dr Jaffa Balyejussa PW2 and the documentary, evidence ID1 itself. I am therefore, satisfied that the Respondent has proved these injuries on balance of probabilities".

He then gave two reasons for the reduction, namely, that the award was excessive and that proof of loss of faculties of speech and hearing had been based on hearsay evidence. The Justices of Appeal did not give reasons why they thought the award of UShs 25 million was excessive. The receipt of the hearsay evidence without extra evidence was pre-empted by the Appellant itself in admitting liability and therefore denying the Respondent opportunity to adduce extra evidence. Moreover, the success of the Appellant in the appeal before them was said by the Justices of Appeal to be only partial.

While it is trite that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles which Manyindo J, as he then was, applied in *Uganda Development Bank v Muganga Construction Company* [1981], HCB 35, represent sound law on the issue of costs. In that case, the Learned Judge said,

> "(1) Under section 27(1) of the Civil Procedure Act. (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially.
>
> (2) A successful party can only be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit".

It is clear that it was the conduct of the Appellant which led to the trial court acting on the Respondent's evidence including exhibit P2. Under the circumstances of this case, the Justices of Appeal were correct to order that each party pays its own costs. In my opinion, they properly exercised their discretionary powers. In the result, the one ground of this appeal fails and I would dismiss the appeal.

However, I am constrained to consider the manner in which the Court of Appeal treated the evidence on general damages. In the plaint, civil suit number 27 of 1995, the Respondent claimed that she was suing in negligence for personal injuries and for the recovery of special and general damages and costs in the suit.

The personal injuries were caused on the 15 October 1995, along Cathedral Avenue, Mbale, when the Respondent was knocked down by the Appellant's motor vehicle driven negligently by his driver. The particulars of injuries inflicted on the Respondent were listed as (*a*) compound fracture of the left femur, (*b*) closed head injury leading to aphasia and hearing loss in both cars, (*c*) shock, pain and suffering. The plaint and the evidence adduced at the trial disclosed that after sustaining the above serious bodily injuries, the Respondent was admitted to Mbale Hospital unconscious, in a state of shock and was bleeding through the ears and nose. She remained unconscious for three days. After she was discharged from hospital, she remained under treatment in the same hospital as an outpatient. During the course of her treatment, it was discovered that she could not hear. She was also losing the power of speech which she had mastered since the age of seven years.

Dr Jaffa Balyejusa, PW2, testified that he referred the Respondent to Mulago Hospital to an ear, nose and throat specialist. This was during the hearing on 16 July 1997. Then, the case was adjourned to 31 July 1997 and when it resumed, Mr *Mutaawe*, counsel for the Appellant, informed court that the Appellant had instructed him to admit liability and that the only aspect of the case to be still decided was the quantum of damages. Moreover, an expert doctor witness who was due to give evidence was not called because of the admission of liability made by counsel on behalf of the Appellant. It is trite that where judgment is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or as in this case, to admit liability. In my opinion, admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.

In his judgment, the Learned trial Judge, in my view, carefully and correctly assessed the evidence adduced on behalf of the parties. He then stated:

> "What then is the quantum of damages the Second Plaintiff is entitled to in order to place her in as good position in money terms as she could have been, had she not sustained the injuries at the hands of the Defendant or its agent or servant? In assessing damages in cases of this nature, besides taking into account the degree of injuries suffered by the Plaintiff and her disability assessed, the courts are guided by awards of cases of a similar nature".

The Learned Judge proceeded to review a number of authorities expounding the principles by which the quantum of damages is determined. In the result, the Learned trial Judge awarded the sum of UShs 25 million in general damages for pain, suffering and loss of amenities, with interest at court rate from the date of his judgment till payment in full.

I now turn to the judgment of the Court of Appeal. The Learned Justices of Appeal appear to have placed great emphasis on the loss of speech and hearing. In his leading judgment, Engwau JA said,

> "What appears to be most contentious issue here is the loss of the faculties of hearing and speech. Mr *Mutaawe* contended that it was not proved that the Respondent lost her speech or power of hearing as a result of the accident. He rightly submitted that the Respondent was under a duty to discharge the burden of proof. He said that the evidence of Respondent's father does not state categorically that she was hearing and talking before the accident. Dr Balyejusa who treated the Respondent never at any time heard her talk or hear because on admission to hospital she was unconscious and when she regained her consciousness, she failed to communicate with anyone. ID1 made by Dr Balyejusa has, therefore, no legal consequences on the point. The report of Dr Turitwenka, ID2, on this matter was also of no probative value as it was hearsay and inadmissible in evidence. This fact was conceded to by Mr Dagira and yet the Learned trial Judge relied on it when making the award".

However, it will be recalled that in the passage cited earlier from the same judgment, the Learned Justice also found that the evidence of Dr Wambette, PWI, Dr Jaffa Balyejussa, PW2 and documentary evidence ID1 had shown that the Appellant had satisfactorily proved her case. Therefore, with great respect, the Learned Justice's observation is not relevant to nor does it affect the Learned trial Judge's findings which were founded on admission by the Appellant of more facts and evidence than those relating merely to loss of hearing and speech. The Appellant's father gave evidence that his daughter had the faculties of hearing and speech before the accident and the Appellant did not contradict that evidence. On the contrary, he instructed his counsel to admit liability. Additionally, this is a civil action in which the standard of proof is based on a balance of probabilities, Once the father and an independent witness, Dr Jaffa, Balyejussa, testified that as a result of the accident, the Respondent could no longer talk or speak, it became necessary for the Appellant to show that the loss of these faculties was not attributable to the accident. In my opinion, it is not necessary to engage expert witnesses to show that a victim of an accident is deaf or dumb. Both can be detected and have often been detected by lay persons through the powers of hearing, observation and communication. I notice however that the Respondent did not cross-appeal on the reduction of quantum of damages and normally this Court will not deal with a matter which was not raised in an appeal save in circumstances of such exceptional nature that failure to do so would result in gross injustice. In my view, this is such a case. The Court of Appeal was in error to hold that the award of UShs 25 million was on the high side without giving reasons and in reopening the matter of the hearsay evidence which had been voluntarily admitted by the Appellant. In my opinion, this Court has the power to correct that error. Section 8 of the Judicature Statute 1966, gives this Court all the powers, authority and jurisdiction of the Court of Appeal when hearing and determining an appeal from that court. In consequence, and for the reasons I have given, I would therefore restore the sum of UShs 25 million awarded by the Learned trial Judge as general damages for injuries and pain suffered by the Respondent. I would order that that sum together with the special damages also awarded in the High Court be paid by the Appellant to the Respondent.

I would order that the costs in this Court and in the courts below be paid by the Appellant to the Respondent.

KAROKORA JSC: I have had the benefit of reading in draft the judgment of Kanyeihamba JSC and agree with him that the appeal should be dismissed with costs; because whereas under section 27(1) of the Civil Procedure Act, costs follow events, courts have discretion to award costs to any deserving party or to deny them to any party who does not deserve to be awarded the costs. In the instant case there was nothing to show that the Justices of Appeal exercised their discretion wrongly when they denied costs to the Appellant on the ground that the appeal had partially succeeded. On the issue of general damages, I feel a bit uneasy and uncomfortable about the proposed order by Kanyeihamba JSC that the general damages which the Court of Appeal had reduced to UShs 20 million should be restored to UShs 25 million originally awarded by the High Court. I am not feeling uncomfortable because the amount proposed is grossly excessive or inadequate, but because:

(1) The appeal before us was against denial of costs to the successful party, the Appellant. There was no cross-appeal under rule 87(4) of the Rules of this Court against reduction of general damages by the Justices of Appeal. The Respondent could have cross-appealed against the reduction of the general damages of UShs 25 million awarded by the trial Judge to UShs 20 million. The Respondent never cross-appealed. I think that taking it upon ourselves to increase or decrease the award of general damages without being moved by any of the parties to the case would render rule 87(4) of the Rules of this Court redundant and superfluous.

(2) The proposed enhancement of general damages from UShs 20 million to UShs 25 million when there was no cross-appeal and parties were not heard on that issue would offend one of the principles of rules of natural justice of *audi alteram partem* which enjoins courts not to condemn any party to litigation without first hearing from him or her on the issue.

(3) Therefore, as the issue of general damages was not raised and argued before us, I make no order regarding the same.

For the Appellant:
Mr Mutawe

For the Respondent:
Information not available

Kamithi v Kenindia Assurance Co
[2001] 2 EA 394 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of judgment:	22 June 2001
Case Number:	37/00
Before:	Mbaluto J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Evidence – Documentary evidence – Section 61 – Evidence Act (Chapter 80) – Documents

admitted after notice to admit – Whether such documents admissible without calling a witness – Whether such documents are proof of the contents – Order XII, rule 2 and 4 – Civil Procedure Rules.

[2] Insurance – Utmost good faith – Non-disclosure of material facts – Materiality of omissions – Whether policy voidable – Whether further acceptance of premiums affirms defective policy.

Editor's Summary

MK and her son S ("the Plaintiffs") sued Kenindia Assurance Co ("Kenindia") on account of a life insurance policy effected by the husband/father with Kenindia for the sum of KShs 4 million. The deceased died in April 1999 during the pendency of the policy. In August 1999 Kenindia wrote to MK repudiating their liability on account of non-disclosure pertaining to various medical conditions of the deceased (including diabetes, coronary artery disease and hypertension) and previous policies with other life insurance companies.

The Plaintiffs sued, claiming that Kenindia was estopped from repudiating its liability by its conduct. Kenindia had continued accepting premiums on the policy after the accident and even after June 1999 when they learnt from the Plaintiffs' admission that there had been some non-disclosure. The Defendant averred that the policy was void due to false declarations in the proposal form and that they were entitled to repudiate liability.

Held – The failure to disclose the existence of previous policies and the deceased's medical conditions were material non-disclosures that entitled the insurer to repudiate the policy. *March Cabaret Club and Casino Ltd v The London Assurance I Lloyds Law Reports* [1975], *London Assurance v Mansel* [1879] 11 Ch D 363 adopted.

The insurer lost the right to avoid the policy when it continued to accept the premiums after having discovered the non-disclosure by the insured.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

United Kingdom

London Assurance v Mansel [1879] 11 Ch D 363 **– A**

March Cabaret Club and Casino Ltd v The London Assurance I Lloyds Law Reports [1975] **– A**

March Cabaret Club and Casino Ltd v Thompson and Bryan Ltd

Judgment

MBALUTO J: The Plaintiffs are mother and son respectively. They are also the administrators of the estate of the late Stephen Kamithi who died at the Nairobi Hospital on 11 April 1999. Before his death the deceased together with his wife the First Plaintiff had effected a joint Life Insurance Policy with the Defendant under which the Defendant agreed, in consideration of the premiums paid by the two insured to insure their lives in the sum of Shs 4 million.

Upon the death of the deceased which I think the Defendant accepts as having occurred while the policy was still in force, the First Plaintiff made a claim for the sum assured but the Defendant in its letter to her dated 8 August 1999 repudiated the claim. The reason for repudiation of liability was said to be gross non-disclosure of material facts by the deceased which were listed in the said letter as follows:

"1. Maturity onset diabetes – previously diagnosed
2. Coronary artery disease since 1990 resulting in CABG in 1996
3. Hypertension
4. Intermittent bronchospasm
5. Hospitalisation in 1995 for pneumonia
6. Particulars of previous policies with other Insurance Companies viz Alico and Mercantile
7. Particulars of proposal submitted to Alico in December 1998 which was declined by them".

With regard to the alleged non-disclosure the Defendant stated in the letter (mentioned above) that had the undisclosed facts been disclosed in the proposal form, the Defendant would have offered insurance "as per the reinsurers underwriting rules". I read that statement to mean that the Defendant would not necessarily have declined to issue the policy but that the policy would have been loaded to cover the additional risk arising from the undisclosed facts.

Be that what it may, the First Plaintiff did not accept that the Defendant were entitled to repudiate the claim and she together with the Second Plaintiff have accordingly instituted this suit to recover the sum assured. In the plaint, they aver that by failing to pay the sum assured, the Defendant acted wrongfully and in breach of the joint policy of insurance.

In its defence, the Defendant avers that in the proposal form for life assurance (exhibit 2) (hereinafter referred to as the proposal form), the deceased and the First Plaintiff declared that all the statements and answers given by them in the proposal form were true, full and complete in every particular and that they had not withheld any information. It is further averred in the same defence that:

(a) the deceased and the First Plaintiff declared that the statements in the proposal and the declaration therein should be the basis of the contract of assurance between them on the one hand and the Defendant on the other;

(b) the deceased and the First Plaintiff agreed that if any untrue averment was contained in the proposal form or declaration, the contract of assurance should be null and void and that all monies which should have been paid in respect of the contract should stand forfeited to the Defendant.

The Defendant claims that the deceased and the First Plaintiff made the following statements with regard to the deceased:

(a) That he did not have a usual medical attendant

(b) That no member of the family of the deceased, living or dead suffered from any hereditary disease (eg. diabetes, stroke, mental disorder, heart disease, high blood pressure).

(c) That no illness, accident or medical condition had prevented the deceased from carrying out work and that the deceased had not remained absent from his work due to such condition in the last five years.

(d) That no other Life Insurance was then in force over the deceased life.

The Defendant further claims that the information given in the proposal form and the declaration on the strength of which the joint policy was issued, was not true because:

"(a) The deceased had since 1990 been under the care and medical treatment of Dr DK Gikonyo.
(b) The deceased had been suffering from Ischaemic heart disease.
(c) The deceased was suffering from mature onset diabetes mellitis.

(d) The deceased was suffering from moderate primary hypertension,

(e) The deceased has suffered from pneumonia and been hospitalised in 1995.

(f) The deceased underwent heart surgery in October, 1996".

The Defendant also states that at the time of the proposal to the Defendant there were Life Insurance Policies in force in respect of the deceased with Alico (K) Limited and Mercantile Life and General Assurance Company Limited and accordingly by virtue of the false information and false declaration made by the deceased and the First Plaintiff) the Defendant was entitled and did repudiate liability. Because of that, it is finally averred by the Defendant no sum is due from the Defendant to the Plaintiffs or the estate of the deceased.

The Plaintiffs filed a reply to the defence on 21 February 2000 in which they stated that the statements, answers, information and/or declaration (made by the deceased and the First Plaintiff) were not material to the policy as they did not go to the root thereof and were completely peripheral and of no consequence. The Plaintiff also states that the Defendant was or was made aware and had knowledge of the actual and/or true facts regarding the matter, prior to the policy and is therefore estopped from denying knowledge of those facts as they actually existed. And in the alternative the Plaintiff stated that the Defendant by conduct or otherwise led the Plaintiffs to believe that it would always honour in full its obligations under the policy subsequent to the deceased's death and consequently it is estopped from recanting its obligations.

As aforesaid the material facts which the deceased and the First Plaintiff are alleged not to have disclosed arise from questions raised in the proposal.

The questions were as follows:

"1. *Question*: State the name and address of your usual medical attendant.

Answer: None.

2. *Question*: Does any member of your family, living or dead, suffer or has suffered from any hereditary disease (for example diabetes, stroke, mental disorder, heart disease, high blood pressure etc?) If yes, please give details.

Answer: None.

3. *Question*: Has any illness, accident, or medical condition prevented you from carrying out your work or have you remained absent from your work due to such a condition in the last five years?

Answer: None.

4. *Question*: What other insurance is currently in force in your life? Please give the name of the company, year of commencement of insurance, Amount and Policy Number.

Answer: None".

At the top of the proposal the following words besides others, are printed: "All material facts shall be stated. If there is any doubt whether certain facts are material then such facts shall also be disclosed".

And at the last page of the proposal there is a declaration that:

> "[T]he statements and answers have been given by me/us after fully understanding the questions and the same are true, full and complete in every particular and that I/we have not withheld any information and I/we do hereby agree and declare that these statements and this declaration shall be the basis of the contract of assurance between me/us and Kenindia Assurance Company Limited (hereinafter called 'the company') and that if any untrue averment be contained therein, this contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof

> shall stand forfeited to the company. I/we have read any answers completed in other than my/our own handwriting and confirm that they are correct".

It is the contention of the Defendant that the answers given by the deceased and the First Plaintiff to the above questions are all untrue and that they amount to non-disclosure of material facts which in terms of the policy entitle the Defendant to repudiate the policy.

It is settled law that a contract of insurance is *uberimae fides* and any undue disclosure of material facts in the proposal form by the insured will entitle the insurer to repudiate the policy. There are numerous authorities on the matter but I will confine myself to a few.

In the *Law of Insurance* by R Colinvaux (5 ed) paragraph 5.01 at 92 it is stated:

> "[I]n the case of certain contracts, however, the law demands a higher standard of good faith between the parties, and 'there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance'. As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith – *uberrima fides*".

And in *McGillivray on Insurance Law* (9 ed) paragraph 17 at 390 the learned author states:

> "Insurance is one of certain contracts expressed by the law to be contracts of the utmost good faith – *uberrimae fidei* – and as a consequence each party is required to disclose material facts before conclusion of the contract. The general principles upon which the duty of disclosure is based were stated by Lord Mansfield in the well-known leading case of *Carter v Boehm*. Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back in such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement … The policy would be equally void against the underwriter if he concealed … Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary".

Also in the case of *March Cabaret Club and Caseno Ltd v The London Assurance; March Cabaret Club and Casino Ltd v Thompson and Bryan Ltd*, Lloyds Law Reports [1975] Volume 1 at 169 which decision though based on the English Marine Insurance Act 1906 applies to non-marine insurance as well, it was held: "the assured must disclose to the insurer … every material circumstances which is known to the assured … If the assured fails to make such disclosure, the Insurer may avoid contract".

The effect of non-disclosure is also discussed in *The Law of Insurance* by R Colinvaux (above) at paragrah 5.02 where the learned author states that:

> "The duty to disclose is not an implied term of the contract itself. Unlike fraud or a breach of condition, non-disclosure never by itself gives rise to a claim for damages.

> Avoidance of the whole contract is the only remedy. Once the aggrieved party knows all the facts, and has had a reasonable time in which to make up his mind, he must make his election once and for all. He need not exercise it, however, until he does know all the facts; being put on inquiry is not sufficient. Thus where, although the assured has suppressed or misrepresented a fact, he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money. Similarly where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it".

As shown above, there are four different answers to the questions in the proposal which the Defendant contends amount to non-disclosure of material facts. Regarding that aspect of the matter, the First Plaintiff in cross-examination conceded that the answer to the questions relating to other policies, hereditary diseases, usual medical attendant and whether the deceased had been prevented from carrying out his work by illness, accident or medical condition had all been untrue or uncorrect. She admitted that the deceased used to be treated by Dr Gikonyo who had been his doctor since 1990. She also admitted that the deceased had a heart disease and was off work for three weeks when he went to South Africa for a heart operation. At the same time, Mr Isaac Pitt Ngaru (PW3) an insurance management consultant who testified for the Plaintiffs as an expert witness, while of the view that the repudiation of the policy by the Defendant was in the circumstances of the matter punitive, accepted that the information sought through the questions referred to above related to material facts. He stated:

> "I accepted that a person applying for insurance would be under an obligation to make full disclosure of any fact relevant to the medical condition. If any Applicant suffers from diabetes that would be a material fact to disclose. Also a man suffering from coronary heart disease – that would be material and relevant. Also hypertension – the same with intermittent bronchospasm – hospitalisation for pneumonia – all these are material and I would expect them to be disclosed.
>
> The existence of other policies is material and relevant. I agree that any answer saying that there were no policies when there were life policies is a serious omission".

The Plaintiffs' response to the Defendant's complaints regarding non-disclosure of material facts has already been adverted to; in brief it is that the facts not disclosed were immaterial and did not go to the root of the policy. With that contention, I do not agree. As aforesaid, it is even contradicted by the Plaintiffs' own witness Mr Ngaru (PW3). In my view there is the clearest evidence that there was non-disclosure of material facts in this matter.

The clearest case of non-disclosure of material facts relates to the Life Policies with Alico (K) Limited and Mercantile Life and General Assurance Co Limited. As mentioned above, the existence of those policies at the time of completing the Proposal Form was admitted by the First Plaintiff. In that respect there can be no doubt that the answer "None" to the question "What Life Insurance is currently in force on your life" was plainly untrue and a gross non-disclosure of a material fact.

If any authority were required for the right of the Defendant to repudiate the policy in those circumstances, then the case of *London Assurance v Mansel* [1879] 11 Ch. D 363 comes to mind. The headnote reads:

> "In a proposal by M to an assurance office for an assurance of his fife, in answer to the question, 'Has a proposal ever been made on your life at any other office or offices? If so, Where? Was it accepted at the ordinary premium, or at an increased premium, or

> declined?' his answer was, 'Insured now in two offices for £ 16 000 at ordinary rates. Policies effected last year'. The proposal was accepted, but the office having subsequently ascertained that the life of M had been declined by several offices:
>
> Held, that there had been a material concealment, and that the office was entitled to have the contract set aside".

Accordingly, having regard to the facts of this case and the law on the matter, I am of the opinion that by reason of non-disclosure of material facts the Defendant was entitled to repudiate the policy at the time it became aware of the true position regarding the information it had received from the deceased and the First Plaintiff. In the event however, the Defendant did not repudiate the policy within a reasonable time and instead continued to accept payment of the premiums from the First Plaintiff. By so doing, it is my view that the Defendant lost its right to repudiate the policy.

In paragraph 2(*c*) of the Reply to Defence, the Plaintiffs aver:

> "[A]lternative to the contents of subparagraph 2(*a*) hereinbefore the Plaintiffs state that the Defendant by conduct or otherwise led the Plaintiffs to believe that they would in all ways honour its obligations *vide* the said policy in full subsequent to the deceased's death and is therefore estopped from recanting its said obligations and/or constituted by the representations perpetuated by the said conduct or otherwise".

As mentioned above, the deceased died on 11 April 1999 and the death was reported to the Defendants on 1 May 1999. From that date up to 5 November 1999, the Defendant continued to accept the monthly premium of Shs 42 884 on the joint policy without raising any query on the matter. In his submission, Mr *Fraser* for the Defendant said that the premiums were accepted because they were being paid through a banker's order which the First Plaintiff had failed to stop upon the death of the deceased. However, I am unable to see what would have obliged the First Plaintiff to stop payment of the premiums prior to receipt of communication from the Defendant of its intention to repudiate the policy and particularly when the Defendant was all the while, accepting the payments without any complaint. In any case, the Defendant having tendered no evidence whatsoever in this matter regarding that or indeed any other issue, there is nothing to support what Mr *Fraser* says.

I say there was no evidence tendered on behalf of the Plaintiff notwithstanding Mr *Fraser*'s claim to the contrary because what he thought was evidence was in law nothing of the sort. I refer to two documents "MFIA" and "MFIB" which were referred to in the proceedings during the cross-examination of the First Plaintiff (PWI). (MFIA is subsequently referred to erroneously as exhibit A.)

Mr *Fraser*'s submission was that because the two documents were the subject of a notice to admit documents under Order XII, rule 2(1) of the Civil Procedure Rules and that there was no denial of the documents, they are therefore deemed to have been admitted by virtue of section 61 of the Evidence Act which provides that:

> "No fact need be proved in any civil proceeding … which by any rule of pleading in force at the time are deemed to have been admitted by their pleadings.
>
> Provided that the court may in its discretion require the facts to be proved otherwise than by such admissions".

He also referred to Order XII, rules 2(1) and (2) of the Civil Procedure Rules which provide:

> "2(1) Any party to a suit may by notice in writing call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document he shall, within fourteen days after service of such notice, serve notice that he does not admit the document and that he requires it to be proved at the hearing.
>
> 2(2) If such other Party refuses or neglects to serve notice of non-admission within the time prescribed, he shall be deemed to have admitted the document, unless the court otherwise orders".

It was Mr *Fraser*'s contention that where documents are the subject of a notice to admit documents and such documents have been admitted, they are (*a*) admissible in evidence without calling a witness and (*b*) they are also proof of the contents of the documents and the facts set out thereon.

Although Mr *Fraser* referred to Mulla (Code of Civil Procedure) and Sarkar (*Law of Evidence*) on the matter, he did not cite any specific statement or authority that directly supports what he said. With all due respect, I do not consider his contention to be sound in law. In my view, a document even if not denied, does not become part of the record nor do its contents become evidence unless it be formally admitted in evidence with the consent of the parties or is tendered in evidence through a witness. As to admission of facts, rule 4 of Order XII makes provision as to how notice to admit facts is to be given and what effect there is of refusal or neglect to admit them. The provisions are clear enough and I do not think I need to add anything in regard thereto.

But whatever the correct construction of Order XII, rules 2(1) and (2) and 4 of the Civil Procedure Rules may be, the major problem with the stand taken by Mr *Fraser* is that no notice was actually issued by the Defendant either under Order XII, rule 2 or under rule 4 in the instant case. I say so because having carefully gone through the case file, the only documents I can find relevant to what Mr *Fraser* was talking about are:

(a) a document headed: "Plaintiffs List of Documents For Discovery (Order X, rule IIA Civil Procedure Rules)" filed by the Plaintiffs' advocates; and

(b) a document headed: "Defendants List of Documents"

filed by the Defendant's advocates which were presumably done pursuant to the same rule, namely Order X, rule IIA of the Civil Procedure Rules.

The above two lists cannot in any way be considered to be either Notices to Admit Documents or Notice to Admit Facts as required by Order XII, rules 3 and 5 (see Forms 9 and 10 of Appendix B) and consequently Mr *Fraser*'s submission on the matter are in my view misconceived. For all those reasons. I do not consider MFIA and MFIB as either part of the record or evidence in this matter.

It may also be argued on behalf of the Defendant that the material facts the non-disclosure of which purportedly caused the repudiation of the policy did not come to the Defendant's possession until after the completion of the investigations lodged following the claim by the First Plaintiff. However, the position in the matter is that in the statement dated 18 June 1999 made to the Defendant's own investigators, the First Plaintiff disclosed the existence of the other policies with Alico and Mercantile Finance. Given that fact, it is obvious that from that moment onwards the Defendant knew or ought to have known that it was entitled to repudiate the policy on account of non-disclosure of that particular material fact. Consequently, by failing to take any steps to repudiate the policy but instead continuing to accept the premiums from the First Plaintiff for another 5 months after becoming aware of the existence of circumstances

which entitled it to repudiate the policy, the Defendant lost the right to avoid the policy.

In Colinvaux (above) paragraph 5–02 it is stated:

> "The duty to disclose is not an implied term of the contract itself. Unlike fraud or a breach of condition, non-disclosure never by itself gives rise to a claim for damages. A voidance of the whole contract is the only remedy. Once the aggrieved party knows all the facts, and has had a reasonable time in which to make up his mind, he must make his election once and for all. He need not exercise it, however, until he does know all the facts; being put on inquiry is not sufficient. Thus where, although the assured has suppressed or misrepresented a fact, he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money. Similarly where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed and accept further Premiums on the same policy, they lose their right to avoid it".

In my view therefore, the position in this matter is clear. The Defendant had a right to repudiate the policy upon the discovery of non-disclosure of material facts by the deceased. Accordingly, although the evidence is not very clear when the Defendant first became aware of the matter (the blame for the lack of clarity squarely falls upon the shoulders of the Defendant it having called no evidence in this matter at all) at the very latest it knew by 18 June 1999 that the answer to the question regarding other life policies was untrue and that it had the right to repudiate the policy. In my opinion therefore, the Defendant lost the right to avoid the policy by accepting further premiums on the policy from that moment.

For all the above reasons, the Plaintiff's claim succeeds. There will therefore be judgment for the Plaintiffs against the Defendant for KShs 4 million with interest thereon from the date of filing suit till payment in full. The Defendant will bear the Plaintiffs' costs of this suit.

For the Plaintiff:
Information not available

For the Defendant:
Mr Fraser

Kenya Airline Pilots Association v Kenya Airways Ltd
[2001] 2 EA 402 (ICK)

Division:	Industrial Court of Kenya at Nairobi
Date of Ruling:	26 February 2001
Case Number:	94/93
Before:	Chemmuttut J, Maithya and Kerich (Members)
Sourced by:	LawAfrica
Summarised by:	HK Mutai

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[1] Labour – Award of the Industrial Court – Interpretation of award – Benefits to be paid on redundancy – Jurisdiction and powers of the Industrial Court – Principles governing the Industrial

Court in determining disputes – Whether the court was governed by general principles of contract law – Whether the Respondent was liable to pay the costs of a full check – Section 16(5) – Trade Disputes Act (Chapter 234).

Editor's Summary

In an award dated 6 May 1994, the Industrial Court permitted the Respondent to declare 14 members of the Applicant union redundant on condition, *inter alia*, that it paid them all their entitlements in accordance with clause 40 of the parties' collective agreement. On 30 June 1997, the Applicant filed an application on behalf of the 11 surviving grievants (three having died in the interim) seeking the interpretation of the award with respect to clause 40. Clause 40(*c*)(i) provided that employees being declared redundant were to receive six months' written notice or six months' salary and fixed allowances *in lieu* of notice, whereas clause 40(*d*)(ii) provided that in the case of flight engineers, a full and valid annual check at the company's expense would be given. The Applicant contended that the Respondent was not in a position to conduct the full and valid annual check and should instead pay the grievants the costs of taking the check elsewhere or compensation *in lieu* thereof. The Respondent argued that it had paid the grievants six months' salary and fixed allowances *in lieu* of notice and that it had made arrangements for the required training programme (the "annual check") but, due to the grievants' lack of co-operation, the check had not been completed. It therefore claimed that, the company having made every effort to fulfil the requirements of the award, it should be discharged from further liability under clause 40.

Held – It was well-settled that the Industrial Court, functioning under the Trade Disputes Act (Chapter 234), had the power to alter the terms of a contract between an employer and his employees to resolve any industrial dispute; *Pakistan Tobacco Company v Pakistan Tobacco Company Employees* [1961] PLC 1033 and *New Maneckchowk Spinning and Weaving Co v Textile Labour Association* [1961] PLC 663 applied. The Industrial Court was not fettered by the terms of the contract or agreement between the employer and employees and it could create new obligations or modify contracts in the interest of industrial peace, to protect legitimate trade union activities and to prevent unfair labour practices or victimisation. The Industrial Court was not intended for the enforcement of any legal rights under the general law but was aimed at obtaining certain benefits on the basis of socio-economic justice. It was therefore not necessary for the Industrial Court to act in accordance with the general rules of law in giving redress for industrial grievances. Accordingly, the parties were obliged to abide by an award given by the Industrial Court, whether they liked its terms or not. In the circumstances and on the evidence placed before the instant court, the Respondent did not have, from 1994 onwards, the capacity or the approval from the Directorate of Civil Aviation to conduct a full and valid check due to the unavailability of local facilities. There were therefore no grounds supporting the Respondent's argument that the grievants had refused to undertake the complete course for their full and valid annual check. The Respondent was accordingly liable to pay the grievants a refund and/or expenses for the check.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

India

New Maneckchowk Spinning and Weaving Co Ltd v Textile Labour Association Ahmedabad [1961] PLC 663 – **AP**

Pakistan Tobacco Co Ltd v Pakistan Tobacco Co Employees and others [1961] PLC 1033 – **AP**

United Kingdom

Harlow v Minister of Transport [1951] 2 KB 98

Ruling

CHEMMUTTUT J, MAITHYA AND KERICH (MEMBERS): The court announced its award in this dispute on 6 May 1994, and on 30 June 1997, the Union filed an application dated 26 June 1997, for the interpretation of the award under section 16(5) of the Trade Disputes Act, Chapter 234, Laws of Kenya (which is hereinafter referred to as the Act). The company filed their reply statement thereto on 15 September 1997; and the counsel for the parties made their opening submissions on 15 September 1998. Consequently, the parties sought several and intermittent adjournments for negotiating a compromise on the matter, but these attempts at an amicable settlement proved futile and accordingly, final submissions were made or tendered on 6 and 13 October, 2000.

The relevant part of the award at page 25 which the Association desires for interpretation reads as hereunder:

> "[W]e do not see any justification of ordering the Respondents to retrain the grievants as pilots or retain them in service. Accordingly, we allow them to declare the 14 grievants redundant with effect from the date of this award on the following conditions:
>
> (a) That the grievants be paid all their entitlements up to 5 May 1994, in accordance with Clause 40 of the parties' agreement".

Clause 40 of the said collective agreement deals with redundancy and the following subclauses are apposite or relevant to this application for interpretation:

> "40 Redundancy
>
> c) An employee declared redundant shall receive:
>
> ii) Six (6) months written notice or six (6) months salary and fixed allowances in lieu of notice.
>
> d) Prior to the expiry of the period of notice as indicated in clause (*c*)(i) above, the redundant employee will be given the following at the company's expense, and as arranged by the company:
>
> ii) A full and valid annual check if he is a flight Engineer".

According to the Association, the requirements for "a full and valid annual check" entailed in a nutshell (*a*) ground refresher course (*b*) simulator check and (*c*) check ride in an aircraft for at least six (6) hours and six (6) flights; and that the ground course did not include written Type (Rating) Examination (TTR). In any case, they said, since the company had disposed of the aircraft fleet or did not have the relevant aircraft to conduct "a full and valid annual check" for the grievants, when the notification was issued to declare them redundant, then the latter (grievants) were entitled to be paid the costs or compensation in lieu

thereof, pursuant to Clause 40(*d*) of the parties' collective agreement in force at the material time.

In reply, the company submitted that the grievants were paid six (6) months' salary and fixed allowances in lieu of notice as provided for under Clause 40(c)(i) of the parties collective agreement, but it was impossible for them (the company) to give the grievants a full and valid annual check prior to the expiry of the period of notice. They pointed out that, after some meetings and consultations between the parties and the Directorate of Civil Aviation (which is hereinafter called the DCA), full arrangements were made for the required training programme and simulator checks, which included examination requirement, but only five of the grievants actually completed all the classroom work and "all refused to take the examination". Therefore, the company were unable to confirm to the DCA that the required refresher course had been successfully completed, and were also unable to proceed to the next phase of the annual check. They contended that the purpose of Clause 40(d) of the parties' collective agreement was to equip the grievants with appropriate licences to enable them seek employment as such elsewhere, but not to encash them. For this reason, the demand for payment of costs in lieu of a full and valid annual check was an afterthought as there is no provision in the parties' collective agreement for payment of such costs, otherwise the grievants would also demand payment in lieu of air passages and freight entitlement.

In the circumstances, the company urged the court to rule that the position of the Association is wholly inconsistent with the parties' collective agreement, the very clear language of the award and the intention of the court; that the only reason why the checks were not completed was due to lack of co-operation and intransigence of the grievants who refused to complete essential elements of the required training; that the company have made every endeavour to fulfill the requirements or conditions of the award, and that they (the company) should, therefore, be discharged from further responsibility and liability under clause 40(d) of the parties' collective agreement and the said award.

Before I proceed to consider the demand of the Association, it would be useful to consider the scope and the power of the Industrial Court while determining or adjudicating an industrial or a trade dispute. In industrial adjudication, an award is not the result of an agreement between the parties. It is a superimposed decision upon them by the *force majeure* law; and the parties to the award have to abide by it whether they liked the terms of the award or not. Industrial adjudication, according to the strict law of master and servant, may contain provisions for settlement of a dispute which no ordinary court of law could order if it was bound by ordinary law, but the Industrial Court is not fettered in any way by these limitations. Industrial adjudication, therefore, may involve the extension of an existing agreement or the making of a new one, or in general the creation of a new obligation or modification of an old one, while commercial arbitration generally concerns itself with the interpretation of the existing obligation and disputes relating to existing agreements. An ordinary court of law proceeds on the footing that no power exists in the court to make contract for people and that the parties must make their own contracts. The ordinary courts, therefore, reach their limit of power when they enforce contracts which the parties have made. But in industrial adjudication the Industrial Court is not so fettered by the law of contract or the terms of agreement

between the employers and the employees and that it may create new obligations or modify contracts in the interest of industrial peace, or to protect legitimate trade union activities and to prevent unfair labour practice or victimisation. I am fortified in this view by the following observation contained in Ludwig Teller's Labour Disputes and Collective Bargaining, Volume 1 at 536:

> "Industrial arbitration may involve the extension of an existing agreement or the making of a new one, or in general the creation of a new obligation or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements".

It was observed by BZ Kaikaus J in the Supreme Court of Pakistan in the case of *Pakistan Tobacco Co Ltd v (1) Pakistan Tobacco Co Employees (2) Province of East Pakistan and (3) A Awal, Industrial Tribunal, Dacca,* [1961] PLC 1033, at 1049 as under:

> "It will be proper to state here the difference between an ordinary arbitration and a proceeding before an Industrial Tribunal. The arbitrator like a Court simply determines what the rights of the parties are. He neither purports to grant nor can he grant to a party any right which it does not possess. If an arbitrator were, for instance, to find in a case of inheritance that one of the heirs is entitled under the relevant law to one third shares of the estate of the deceased he could not on equitable grounds convert that one-third to one-half. The scope of the jurisdiction of the Industrial Tribunal is, however, entirely different. The Tribunal does not discover what the rights of the parties are. If he were simply to do that he would never be able to help the employees because the rights of the employees are based on contract and cannot go beyond the terms of the contract. The Tribunal possesses a jurisdiction by which it alters the terms of the contract and grants to the parties which they do not possess under the law on what it considers to be just and equitable grounds. Truly speaking, there are no fetters at all on the discretion of the Tribunal to vary the conditions of service".

Thus, it is now well-settled that the Industrial Court, functioning under the Act, can alter the terms of a contract between an employer and his employees in order to resolve any industrial dispute. The Supreme Court of India in the case of *New Maneckchowk Spg. and Wyg Co Ltd v Textile Labour Association Ahmedabad* 1961 PLC 663, after considering a number of cases of Federal Court of India, held that "it is open to an Industrial Court in an appropriate case to impose new obligations on the parties before it or modify contracts in the interest of industrial peace". There is no doubt, therefore, that this Court can impose new obligations on the parties in this matter with the object of securing industrial peace and harmony between them because the paramount object of the labour laws is to establish and maintain harmonious relationship between the employees and the employers.

I would now proceed to consider the demand raised by the Association in this application for interpretation of the award. The counsel for the parties argued this application for interpretation with their usual tenacity and also referred extensively to the correspondence exchanged between the parties and the DCA on the necessary requirements for a full and valid annual check. The arguments developed to almost a full-scale second hearing of the dispute, but I do not think that any useful purpose will be served by going into them in detail because the real question that arises for consideration is whether, on the foregoing principles of industrial law, the company is liable to pay and/or refund to the affected Flight Engineers the costs of a full and valid annual check, and if so, how much?

During the course of the proceedings in this application for interpretation, I ordered the parties to produce documentary proof showing the cost of validation of a flight engineer's licence in accordance with clause 40(d)(ii) of the parties' collective agreement. In compliance with the said order, Mr Stephenson Macharia Muhuthia, who is one of the grievants affected by the said award and this interpretation, deponed, on his own behalf and also on behalf of the other ten (10) grievants and the Association, *inter alia*, that his licence expired during the redundancy proceedings; that upon realizing that the company was not serious in giving them a full and valid annual check, he decided and arranged to obtain revalidation of his licence; that he complied with the requirements set out by the DCA who conducted the revalidation process from December 1995 and the facilities were offered to him by the African Airlines (International) Limited, who initially bore the cost thereof; that on 10 February 1996 his licence was revalidated at a cost of US$ 39 000, excluding other incidentals, which he repaid by working for them (African Airlines [International] Ltd) at a reduced earnings or salary for a period of 26 months between February, 1996 and April, 1998 at the rate of US$ 1 500 in a month, and that he was not required by the DCA to sit any written examination before it (DCA) revalidated his licence. Mr Muhuthia annexed a bundle of documents as evidence or proof, marked "X", in support of his affidavit.

Mr Benny Kanyi Waweru, who was similarly affected by the said award and this interpretation, swore that, in consultation with the other ten (10) grievants, he made inquiries on the cost for a full and valid annual check, and he received the following quotations, the details of which are attached thereto and marked "BKW-I":

> "(a) African Express (plane alone) US$ 6 500 x 6 hours = US$ 39 000.
>
> (b) American Airlines (without plane but including accommodation and subsistence) = US$ 17 145
>
> (c) Air Transport International = US$ 43 225".

He deponed further that he also inquired about the availability and whereabouts of the facilities and he was informed by the DCA that there were no local institutions and the type of aircrafts for this purpose.

In his lengthy replying affidavit, Captain Joe Mutungi, who is the Director of Flight Operations, emphatically deponed that the affidavits by Messrs. Muhuthia and Waweru were not admissible; and even if they were admissible, which was denied, the amounts thereon were grossly exaggerated and did not represent the cost of a full and valid annual check in 1994. He stated that, contrary to the statements contained in paragraph 2 of the two deponents' affidavits that the company was not serious in giving the grievants a full and valid annual check, the company was actually able and ready, or in a position, in 1994 to give the grievants a full and valid annual check and had, in fact, initiated in July 1994 a ground refresher course as a first step towards giving them the said check, but the grievants and the Association refused or neglected to complete the said ground refresher course; and in the circumstance, no further steps could be taken towards the completion of the full and valid annual check. Captain Mutungi annexed a bundle of correspondence between the parties and the DCA in support of this statement, marked "Exibit MI". He pointed out that it was impossible to comment on or reply to Mr Muhuthia's statement under paragrah 3 and 4 of his affidavit because he (Mr Muhuthia) did not spell out what the requirements of the DCA were, or what the revalidation

process entailed with which he complied, or what facilities were availed to him by African Airlines (International) Ltd; but to his (Mutungi's) knowledge the airline did not, in or about December 1995, have a ground school or simulator training facilities which would have satisfied all the requirements laid down by the DCA for giving of a full and valid annual check. Therefore, it would be impossible, he said, in the absence of any evidence on the record in support of the bald statements to comment on the cost incurred by Mr Muhuthia as alleged in paragrah 5 of his affidavit. As regards the quotations under paragrah 4 of Mr Waweru's affidavit, Captain Mutungi did not admit their validity and relevance, and opined that the same were exorbitant and unacceptable. On the availability of the facilities for a full and valid annual check, Captain Mutungi felt that the information under paragraph 5 thereof should be struck off on the ground that its source was not disclosed and identified. In any case, the onus of identifying the appropriate training facilities for the full and valid annual check in 1994 lay upon the company, and the DCA were only required to approve them.

I have shown hereinabove that the Industrial Court can, in appropriate cases, impose new obligations on, or alter or modify the terms of contracts between the employees and the employers in order to resolve an industrial dispute and secure industrial peace and harmony, that is, more emphasis is laid upon the measures governing peace and tranquility in industrial disputes. The Act is a special law and must, therefore, prevail over the general law of the land, for example the Law of Contract Act Chapter 23, Laws of Kenya. In section 2 of the Act, a "trade dispute" is defined as follows:

> "'Trade dispute' means a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions, connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements; and it also includes an apprehended trade dispute".

On deciding any industrial or trade dispute, one has to give an appropriate relief or reliefs where necessary; and it may be useful to point out here that the Industrial Court is not intended for the enforcement of any legal right under the general law, but it is meant merely for obtaining certain benefits on the basis of socio-economic justice. Therefore, in giving the redress in industrial grievances, it is not necessary for the Industrial Court to act in accordance with the general rules of law, but to settle the matter in the best way possible in order to equitably and fairly secure industrial peace and harmony in the industry concerned. Thus, Industrial Courts can by their awards make contracts which are binding on the parties, create new rights and impose new obligations arising out of the awards. These contracts and obligations may not be acceptable to the parties, especially to the employers, but nevertheless they bind them. It would, therefore, be wrong to import the technicalities of general law into industrial disputes brought under the Act, which is a special statute dealing with a special subject. This rule is based on the maxim *generalia specialibus non derogant* for instance general things do not derogate from special (see *Harlow v Minister of Transport* [1951] 2 KB 98).

To me, the numerous correspondence and other documents on the record in this matter, particularly between the company and the DCA, say it all. On

careful perusal and thorough scrutiny of the said correspondence and documents in support of and against this application for interpretation of the award in respect of clause 40(*d*)(*ii*) of the parties' collective agreement in force at the material time, that is for the period 1 April 1992 to 31 March 1994, it is obvious that, prior to the expiry of six (6) months period from the date of the award, the company was liable to give "a full and valid annual check" to the grievants "at their (company's) own expense". This was because the retention of the grievants became unnecessary when the aircrafts in which they were trained and engaged had been replaced. Therefore, from 1994 to date, the company have had no capacity and approval from the DCA to conduct a full and valid annual check to the grievants because of the unavailability or lack of local facilities. Hence the deliberate, contradictory, ambiguous and dilatory exchange of numerous correspondence between themselves (company) and the DCA regarding the requirements of the same. This procrastination and recalcitrant attitude of the company let some of the grievants to renew or revalidate their licences at their own expense. In the circumstances, I am unable to see any force in the contention or arguments of the counsel for the company, Mr *Inamdar*, that the grievants had refused to undertake the complete course for their full and valid annual check; and I, therefore, find that the company is liable in this matter.

Having discussed and found as above, the question now for consideration is what would be the relief or reliefs to which the grievants are entitled as reasonable and fair refund and/or expenses for their full and valid check. As deponed hereinabove, Mr Muhuthia had his licence renewed or revalidated by the African Airlines (International) Ltd at a cost of US$ 39 000, excluding other incidentals, for example uniforms, subsistence and transport, while Mr Waweru stated that, on enquiry and in consultation with other grievants, the following quotations for a full and valid check were received:

"(a)	Air Transport International	=	US$ 56,850.
(b)	American Airlines	=	US$ 57,226".

These quotations are contained in his annexure, marked "BKW-I", which relate to the year 2000. In reply, Captain Mutungi did not specifically challenge or controvert the aforementioned amounts, but only objected in general terms to the acceptability and admissibility of the two affidavits sworn by Messrs *Muhuthia and Waweru*. The fourteen (14) grievants who were affected by the award are listed at page 3 thereof; but, sorrowfully, however, I understand that three (3) of them, for whom no orders will be made, have since passed away, leaving eleven (11) grievants who are now affected by this interpretation of the award.

Some of these grievants, like Mr Muhuthia, renewed their licences at their own expense; and doing the best I can in the circumstances, and taking into account the pros and cons of the parties' contentions and the evidence on the record, I am of the considered opinion that the company must pay to each grievant US$ 45 000, being a reasonable and fair refund and/or expense for a full and valid check in accordance with clause 40(d)(ii) of the parties' collective agreement. It is also my considered view that since this is a refund or expense on a course, there should be no deductions whatsoever.

Finally, this ruling is not, however, a bar to those grievants who may, in the alternative, still wish or desire to obtain the renewal or revalidation of their

licences through the arrangement and at the expense of the company. This is my ruling on the interpretation of the award, and I so order. The members have concurred with this decision.

For the Applicant:
S Adere instructed by *Adere and Co*

For the Respondent:
IT Inamdar instructed by *Inamdar and Inamdar*

Kenya Seed Co Ltd v Oil Crop Development Ltd
[2001] 2 EA 410 (HCK)

Division:	High Court of Kenya at Nairobi
Date of Ruling:	January 2001
Case Number:	431/00
Before:	Mulwa J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Trade marks – Deputy registrar rejecting applications for registration – Appeal from registrar's decision – Whether registrar entitled to oppose appeal – Trade mark distinguished from seed varieties – Whether Applicant was proprietor of trade marks in issue – Trade Marks Act (Chapter 506) and Seeds and Plant Varieties Act (Chapter 326).

Editor's Summary

Kenya Seed Co Ltd ("Kenya Seed") sought registration of trade marks for "Hybrid Seed Maize H511" and other similar marks. The applications disclaimed the exclusive use of the constituent words apart from the marks as a whole. The deputy registrar rejected the applications and issued a ruling to that effect. Kenya Seed then brought this application by notice of motion against Oil Crop Development Ltd ("OCD"), who had opposed the application for registration on the ground that they (OCD) traded in the seed variety for which a trade mark was sought.

Kenya Seed contended that the purpose of a trade mark was to distinguish the goods; they were not registering a seed variety and therefore OCD's objection was an irrelevant one.

Held – Distinctiveness of a trade mark is a prerequisite to registration. The words, letters and numerals used by the Applicant satisfied this test of distinctiveness. The Applicant's trade marks were not intended to hinder the legitimate use by others of variety names. The only thing seed companies must do is to recognise the proprietary rights of the developers of parental lines of the varieties. *Wheatcroft Bothers Ltd Trade Marks* case [1954] Ch D 110 distinguished; *SmithKline and French Laboratories Ltd v Sterling Winthrop Crop Ltd* [1975] All ER 578, *Re F Reddaway and Co Ltd Application* [1914] 1 Ch 856 adopted.

Seed varieties are not registrable as trade marks but as seed varieties under the Seed and Plant Varieties Act (Chapter 326). The Applicants however were seeking to register trade marks not the seed varieties. Article 20(1) of the UPOV Convention considered.

Per curiam: Section 21(2) of the Trade Marks Act (Chapter 506) provides who may oppose the registration of a trade mark. Any person who has given notice of opposition and a statement of grounds of opposition is at liberty to do so. He may be challenging on the ground that he owns or has an interest in the trade marks or even for public policy reasons. It does not matter so long as the challenge is in good faith and is not brought by a mere busybody and is not motivated by malice or brought merely to annoy the Applicants.

Application granted.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

United Kingdom

F Reddaway and Co Ltd Application [1914] 1 Ch 856 – **A**

SmithKline and French Laboratories Ltd v Sterling Winthrop Crop Ltd [1975] All ER 578 – **A**

Wheatcroft Bothers Ltd Trade Marks case [1954] Ch D 110 – **D**

Ruling

MULWA J: This is an appeal arising from the ruling of the deputy registrar trade marks, John E K Muchane (hereinafter deputy registrar) dated 30 March 2000 where he rejected the Applicant's applications for registration of the following six trade marks in Part "B" of the Trade Marks Register:

1 TMA No. 44768 (Words and device) *Hybrid Seed Maize H5I1*. The exclusive use of the words "Hybrid", "Seed" and "Maize" letter "H" and numerals "5", "I" and "1" were each separately and apart from the mark as a whole disclaimed.

2 TMA No. 44769.

3 TMA No. 44746.

4 TMA No. 44781.

5 TMA No. 44781.

6 TMA No. 44776.

Similar disclaimers to those of TMA number 44768 above were entered by the Applicant. Additionally, each mark was restricted to particular colours named in those applications and associated with the other trade marks and accompanying applications. The appeal is brought by way of a Notice of Motion under Order IV, rule I of the Civil Procedure Rules, section 21(6) and (7) of the Trade Marks Act Chapter 506 Laws of Kenya and rule 117 of the Trade Marks Rules.

The Applicant seeks orders that the ruling of the said deputy registrar rejecting its six applications for registration of trade marks be set aside and the trade marks be registered.

This appeal is based on 12 grounds common to each application for registration of trade mark. They are enumerated in the Notice of Motion dated 3 May 2000 and filed on the same day.

In my view the issues for determination in this appeal are:

1 Whether the Respondent was entitled to oppose the applications for registration of the trade marks in issue;

2 Whether there is a distinction between registration of trade marks under the Trade Marks Act Chapter 506 and Registration of seed varieties under the Seeds and plant varieties Act Chapter 326.

3 Whether the Applicant is the proprietor of the trade marks in issue.

I shall take each of these issues in turn.

It is the Applicant's case that the Respondent was not entitled to oppose the Applicant's application for registration of the trade marks in issue and the deputy registrar erred in law and in fact in finding that the Respondent was so entitled.

Mr *Kenani*, the learned counsel for the Applicant submitted that the fact that the Respondent had traded in the seed variety was not enough to entitle it to oppose the Applicant's applications as there was not even any evidence that the Respondents were mandated by the Kenya Agricultural Research Institute (hereinafter referred to as KARI) to do so. The learned counsel further submitted that the application does not fall within section 21 of the Trade Marks Act and therefore it was wrong for the deputy registrar, to base his decision on it. It is also the learned counsel's submission that the deputy registrar did not exercise his discretion judiciously.

Mrs *Wanyanga*, the learned counsel for the Respondent submitted that the deputy registrar dealt with the matter properly by finding that the Respondent was entitled to oppose body under section 21(2) and (3) of the Trade Marks Act.

Section 21(2) of the Trade Marks Act makes provides for who may oppose an application for registration of a trade mark. This section provides as follows: "Any person may, within the prescribed time from the date of the advertisement of an application, give notice to the registrar of opposition to the Registration".

Subsection (3) provides that such person shall include a statement of the grounds of opposition.

It is clear to me as it was to the deputy registrar that "any person" who has given notice of opposition and a statement of grounds of opposition to the registration is at liberty to do so. He may be so challenging on the grounds that he owns the trade marks or has an interest in the trade marks or even for public policy reasons. It does not matter so long as it is in good faith and is not brought by a mere busybody or is motivated by malice or is brought merely to annoy the Applicants. Comments on interpretation of the law in line with this finding have been made in *Kerly's Law of Trade Marks and Trade Names* (12 ed) at paragraph 4.32 specifically on sections 18(2) and 32 of the Trade Marks Act [1938] of the UK which are identical to our sections 21(2) and 35 respectively.

I now turn to the issue whether there is a distinction between registration of trade marks under the Trade Marks Act Chapter 506 and registration of seed varieties under the Seeds and Plant Varieties Act Chapter 326. In fact the crux of this appeal is my view the determination of what is a trade mark.

It is the Applicant's case that the deputy registrar misdirected himself as to the nature of the Applicant's application and failed to distinguish between an application for registration of Trade Marks and registration of seed varieties. Mr *Kenani*, the learned counsel for the Applicants submitted that the Applicant's need for the trade marks applied for was for the purposes of distinguishing the Applicant's goods.

A trade mark is a distinctive mark or device affixed to or accompanying an article intended for sale, for the purpose of indicating that it is manufactured, selected or sold by a particular person or firm. Section 2(1) of the Trade Marks Act Chapter 506 defines a trade mark as follows:

> "A trade mark means (except in relation to a certification trade mark) a mark used or proposed to be used–
>
> (*a*) In relation to goods for the purposes of indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as a registered user to use the mark, whether with or without any indication of identity of that person or distinguishing goods in relation to which the mark is used or proposed to be used from the same kind of goods connected in the course of trade with any person …".

A mark is defined in the same section as including distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter or numerical or any combination thereof whether rendered in two dimensional or three dimensional form.

Such marks are registrable under the Trade Marks Act Chapter 506. Seed varieties or seed denominations are registrable under the Seed and Plant Varieties Act Chapter 326.

It is argued for the Applicants that their applications were for registration of trade marks under the relevant Act. I have carefully looked at each of the Applicant's applications for registration of trade marks and there is no doubt in my mind that what the Applicant sought to register were trade marks in form of words, letters and numerals intended to indicate to prospective buyers of seeds that the seeds bearing the trade marks sought to be registered were selected and/or sold by the Applicant. There was also a combination of colours for each mark. The Applicant did disclaim the exclusive use of the words, letters and numerals each separately in each case save the mark as a whole.

In my view, it is these marks that are being sought to be registered and not the particular variety in each case. I have also perused the memorandum of understanding (hereinafter "MOU"). Paragraph 3:2:6 talks about variety trade marks, it does not talk about varieties, but in my view trade marks of the seed varieties.

Mr *Kenani*, the learned counsel for the Applicants submitted that seed variety would have a name possibly a scientific one and that the deputy registrar failed to appreciate the trade mark applied for was meant to distinguish the Applicant's goods in the market.

What then is a variety? I have looked at the definition in the Collins Concise Dictionary. The relevant definition is that relating to horticulture; or stockbreeding which is as follows: "a strain of animal or plant produced by artificial breeding". The words, letters and numerals cannot be description of the particular breed varieties in each case. Mrs *Wanyanga*, the learned counsel

for the Respondent cited *Wheat Croft Bothers Ltd Trade Marks* case [1954] Ch D 110 and *SmithKline and French Laboratories Ltd v Sterling Winthrop Crop Ltd* All ER 578 and submitted that the Applicant's application is on variety names which are not distinguishable. I agree with her on the issue of distinctiveness to the extent only that a trade mark must be distinctive to be registrable. The words, letters and numerals according to the Applicants are meant to distinguish its seed in the market and to also to differentiate the seeds that are suited to particular ecological zones, altitudes or soils.

The Applicant's application was for registration in Part B of the Register. Under section 13 of the Trade Marks Act, capacity of being distinguished is a prequisite to registration. In *Wheat Croft* case (*supra*) such trade marks as Mouhin Rouge was found not to be distinctive as being purely descriptive of the rose Mouhin Rouge. It was then logical to conclude that the registrations were made for the purpose of hindering the legitimate use by other variety names. Not so in our instant case. *Wheat Crop* case is distinguishable on that score. The words, letters and numerals were disclaimed in their separateness. The Respondent and others could as well use other words, letters and numerals.

For instance, the record shows that the Respondent was already in business producing Pannar HB 614D and H512 before the applications were made. This is distinct from the trade marks which the Applicant wants registered. They are distinct in the words and letters and numerals used. The Applicant's applications are different.

The mark as the Respondents sought to do with the above quote Pannar HB 6140 and H512 sought to distinguish its goods with which it is connected. I therefore do not agree with Mrs *Wanyanga* that the trade marks in issue are mere variety names. They may be connected as indeed they must for they are all referring to seeds. The word "Pannar" distinguishes the rest of the trade mark so as to make the Respondent's trade mark distinct from H614D traded by the Applicant. This must be in view of the fact that the Applicant registered a disclaimer to the actual words, letters and numerals as they stand alone. Surely there should be a way of protecting businesses even in the liberalized market. *SmithKline and French Laboratories Ltd v Sterling Winthrop Crop Ltd* dealt with the description of the external appearances. In this case it was held that the set colour combination applied to the capsules and their pellets to distinguish SKF goods from those of other manufacturers was distinctive.

I am inclined to the view that the trade marks in issue were not intended for use to distinguish one variety introduced by the Applicant from the generality of varieties of seeds in each case but rather to distinguish the Applicant's seeds introduced into the market from the generality of seeds of the same variety by other seed companies.

See *Re F Reddaway and Co Ltd Application* [1914] 1 Ch 856 and *SmithKline v Sterling Winthrop* (*supra*).

The only thing seed companies must do is to recognize the proprietary rights of the developers of parental lines of the varieties such as KARI. The fact that the Applicant seeks trade marks in the form of the words, letters and numerals will not prevent Respondents from obtaining the parental material and produce seeds. That is the concern of the MOU between the Applicant and KARI. The

trade marks have nothing to do with the development of parental lines and seed production.

In my view, the Applicant or the Respondent for that matter on its own or with any other partner may maintain for its own good parental lines for seed production. The Applicant is seeking to have what it maintains and selects alone or with any other party distinguished from those by other seed companies.

At this juncture, I wish to address the issue whether seed varieties are registrable as trade marks as raised by Mrs *Wanyanga,* the counsel for the Respondent. I agree with her that they are not. Article 20(1) of the UPOV Convention is clear on this. Seed varieties are registrable under the Seed and Plant Varieties Act Chapter 326. The Applicant, however, as I have found above, was seeking to register trade marks not the seed varieties. Therefore, distinction has to be made between such a registration of trade marks under the Trade Marks Act Chapter 506 and Variety Registration under the Seed and Plant Varieties Act. Chapter 526. Similar trade marks have even been registered, a fact which is conceded by none other than the registrar of trade marks. The Applicant's applications ought to be allowed.

Mr *Kenani* for the Applicant in his reply conceded that the Applicant is not after ownership of the varieties.

In each application, disclaimers of particular words, numerals, letters and restrictions of colours were made which separately cannot stand except as a whole. The result is that UPOV'S position on use of variety names is immaterial.

I therefore find that the trade marks refer to the Applicant's clover device and not the seed varieties or denomination. Had the deputy registrar directed himself to this issue and in particular the nature of the Applicant's application and the principles of trade marks law he would have come to a different conclusion.

The issue as to ownership of the trade marks is clear. The MOU has it all. At its preamble while recognizing that the developed crop varieties are subjects of the provisions of the Seeds and Plant Varies Act Chapter 326 the MOU at paragraph 3:2:6 grants the Applicant the right to registered Variety Trade Marks. This, in my understanding in trade mark relating to those varieties inform of devices to distinguish them for marketing purposes and was not a registration of the variety itself.

The deputy registrar failed to appreciate KARI's withdrawal of opposition to the registration of the trade marks. KARI's letter of 3 April 1998 confirm that it did not object. The trade marks are the Applicant's but the varieties or the parental lines belong to KARI. This is because as stated in the letter, KARI or its predecessors bred the crop varieties in issue. The parental lines this largely remained KARI property same where it undertook development of parental lines with other parties. The ownership of the seed varieties remained in KARI. The issue of ownership of seed variety has not opened for the registrar to decide it has the trade marks.

I find that in respect of the trade marks in issue the Applicant had ownership and was within its right to apply for registration of the trade marks under section 20(1) of the Trade Marks Act.

In the circumstance I find and hold that the Applicant's appeal must succeed. I order that the ruling of the deputy registrar dated 3 March 2000 be set aside and the Applicant's trade mark be registered.

The Plaintiff shall have the costs of this appeal.

For the Applicant:
Mr Kenani

For the Respondent:
Mrs Wanyanga

Kenyenga v Ombwori
[2001] 2 EA 416 (CAK)

Division:	Court of Appeal of Kenya at Kisumu
Date of judgment:	18 May 2001
Case Number:	96/98
Before:	Gicheru, Lakha and Owuor JJA
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Civil procedure – Pleading and procedure – Adverse possession – Trust – Order XXXVI – Civil Procedure Rules.

Editor's Summary

O filed suit in the superior court by way of plaint seeking possession of the disputed property. K filed a defence and counterclaim in which he sought general damages for breach of contract and trust and a declaration that he was the rightful owner of the property to the extent of his share therein. The property in dispute was acquired by a land-buying company in which O was a shareholder. K claimed that he had acquired an interest in the property by adverse possession for well over 12 years. The High Court found that adverse possession had not been established because the Appellant had failed to show that he had occupied any specific area for a particular length of time.

On appeal, the Court of Appeal considered the question of the proper way of pleading adverse possession.

Held – The appeal court can entertain an issue that goes to jurisdiction even where the same was not dealt with in the lower court. *Muhia v Mutura* CA number 142/00 and *Domodar Jinabhai v Eustace Sisal Estate Ltd* [1967] EA 158 followed.

A claim for adverse possession must be brought by originating summons per Order XXXVI, rule 3(*d*) of the Civil Procedure Rules. This is a mandatory provision and failure to comply with it makes a suit incontestably bad in law. *Bwana v Said* [1991] 2 KAR 262, *Lali v Mathenge* [1993] LLR 2776 (CAK) followed.

The claim on trust would not succeed because it had not been pleaded, contrary to Order VI, rule 8 of the Civil Procedure Rules. As a rule, relief not founded on pleadings will not be given and cases must be decided on the issues

on record. *Captain Gandy v Casper Air Charters Ltd* [1956] EACA Vol 23 followed.

Appeal dismissed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Bwana v Said [1991] 2 KAR 262 – **F**

Domodar Jinabhai Co Ltd v Eustace Sisal Estate Ltd CA number 51 of 1965 [1967] EA – **F**

Gandy v Casper Air Charters Ltd [EACA] 1956 Vol 23 – **F**

Lali v Mathenge [1993] LLR 2776 (CAK) – **F**

Muhia v Mutura CA No 142 of 2000 – **F**

Judgment

GICHERU, LAKHA AND OWUOR JJA: This appeal concerns a piece of land known as Settlement Scheme/Ekerubo/92 (the suit land) which is now registered in the name of Joel Ombwori (the Plaintiff/Respondent) but was at the time when litigation between him and Wilson Kenyenga (the Defendant/Appellant) commenced in 1986, the property of Ekerubo Farmers Co-operative Society Limited.

The Respondent filed a suit by way of a plaint in the superior court at Kisii claiming, *inter alia*, the following reliefs:

"(a) possession of the said portion of land;

(b) a declaration that the Defendant is not entitled to enter or use a portion of the Plaintiff's land;

(c) an injunction to restrain the Defendant whether by himself or his servants or agents or otherwise howsoever from entering or using the said portion of plot No. 92 above".

In a statement of defence filed by the Appellant and a counterclaim, he sought orders *inter alia:*

"1. Special damages in the sum of KShs 70 000.

2. General damages for breach of contract and for breach of trust.

3. A declaration that the Defendant is the rightful owner of plot No. 14 (now No. 92) to the extent of his share therein".

The suit land was part of Ekerubo Ranch formerly owned by Ekerubo Farmers Co-operative Society, consisting of 100 registered owners. All these people apparently came from a place known as Magombo in Nyamira District.

As far back as 1965, these people got together and organised themselves under Ekerubo Co-operative Society Limited for the purpose of acquiring the said ranch comprised of 4871 acres through the Settlement Fund Trustee. The Respondent was one of the founder members (number 14) and thereafter was chosen as the first chairman of the society. After the loans owed to the Settlement Fund Trustee had been paid, the ranch was subdivided and every member allocated his share. The Respondent was allocated the suit land. Before the

subdivision, the land was basically used by the society mainly for ranching purposes, but as more people moved in, each member was initially allocated 10 acres for cultivation of crops. In 1991, when the loan had been paid, and subdivision was complete each member got an additional 36 acres; thereby making a total of 46 acres. The Respondent's claim in the plaint was that the Appellant was neither a member nor a shareholder of the Ekerubo Farmers Co-operative Society Limited and therefore land could not have been allocated to him. Prior to the subdivision of the ranch, the Appellant was a herdsman employed by the society and upon subdivision his employment was terminated. In this regard, paragraph 9 of the Respondent's plaint in the superior court read as follows:

> "9. The Defendant having had his services so terminated wrongfully and without colour and right entered the said land (plot No 14) and wrongfully took possession of a portion of the said land and has thereby trespassed and is still trespassing thereon".

Consequent thereto, the Appellant deprived the Respondent the use and enjoyment of his land and occasioned him loss and damage. This was the basis upon which he prayed for possession of the portion of land that the Appellant occupied plus damages or mesne profits.

The Appellant denied that he was ever in the employment of the Ekerubo Farmers Co-operative Society Limited. His story was that he was a co-owner with the Respondent of plot number 14 (now plot number 92) having contributed to the purchase of the same. Therefore, he was in law and equity entitled to a half-share in the suit land. In the alternative he claimed that he had acquired an interest in the land by reason of having lived on the suit land for a period of over twelve years pursuant to the Limitation of Actions Act.

He left his home and went to Ekerubo Ranch in 1968 at the invitation of the Respondent as a partner and a relative. Soon after that he began putting up a house and cultivating the initial 10 acres of land given to them. Although he was not a registered member of the society, he was a shadow-member to the Respondent's membership, hence his having to deliver all his produce mainly pyrethrum under the Respondent's name. He produced 54 receipts as exhibits and claimed that they were given to him by the society from the proceeds delivered by him, which monies he contributed for the purchase of the land. In addition he made other financial contributions from the sale of animals, and all these monies were put on the Respondent's account.

The Respondent did not take kindly to this. He asserted that he was a senior veterinary officer employed by the Kenya government and could not have sought out the Appellant, a young unemployed and sickly boy, to be his partner. As far as the Respondent was concerned, the Appellant moved on to his land when he no longer was employed by the society as the master roll of the society produced in evidence clearly indicated.

The Learned Judge of the superior court, Mbaluto J, heard the evidence of both sides consisting of the parties themselves and not less than four witnesses from either side. He believed in part the evidence of the Plaintiff in that the Appellant did not come onto the suit land as a co-owner. Further, there was no agreement between the two as to the co-ownership of the suit land nor was there sufficient evidence to establish the claim that the Appellant had made any capital investment in the purchase of the suit land. As for the claim based on

adverse possession, the Judge found that the same had not been established for the reason that the Appellant had failed to prove that he had occupied any specific area of the suit land; nor was there sufficient evidence of the length of the time he had occupied the land.

Counsel for the Appellant has argued as one of his main grounds the issue of the Learned Judge not addressing his mind to the evidence adduced and reaching a finding that indeed and in fact the Appellant had made out a case that warranted trust being construed or implied in his favour.

We do agree with Mr *Bw'Omote*, counsel for the Appellant, that entirely lacking in the judgment of the superior court is a finding on the issue of trust. We will revert to this issue later.

Our understanding of the matter, therefore, is that the Learned trial Judge, in coming to the conclusion that he arrived at, relied substantially on his finding that the Appellant had not established his claim that he had acquired a right in the suit land by way of adverse possession. Therefore, he was a mere trespasser. Our concern now is the manner or form adopted by the Appellant in his endeavour to obtain the relief he sought in court. This issue was not pleaded nor was it raised by way of submissions in the superior court. Notwithstanding the fact that Mr *Sichangi* did not properly place the issue before this Court in terms of rule 91 of the Rules of this Court, both counsel did canvass the issue before us. It goes to the jurisdiction of the court. See *Muhia v Mutura* CA number 142 of 2000 (Ur) where this Court quoted with approval Sir Charles Newbold P in the case of *Domodar Jinabhai Co Ltd and Another v Eustace Sisal Estate Ltd* CA number 51 of 1965 [1967] EA at 158: "A question of jurisdiction is, however a matter of which the Court can and should take cognisance whether or not the matter is raised in argument and as the matter is quite clear we have thought it unnecessary to invite submissions from counsel on the point".

This Court was satisfied as we are now that it had the jurisdiction to deal with the point of law raised in the appeal notwithstanding the fact that the same had not been raised or decided upon by the lower court.

The Respondent commenced this action by way of plaint. The Appellant's claim by way of counterclaim was that he had acquired a right over a portion of the suit land by way of adverse possession. Paragraph 4 of his defence stated as follows:

> "4. Without prejudice, to the foregoing and in the alternative, the Defendant says that by reason of his occupation of the said Plot for a period exceeding twelve (12) years he has acquired an interest, in the said Plot by reason of the Provisions of Limitation of Actions Act".

Order XXXVI, rule 3(*d*) of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to court. Such claims for adverse possession are brought by way of originating summons. This is a mandatory provision and it has been repeatedly held by this Court that failure to comply with this mandatory provision makes a suit incontestably bad in law. See *Bwana v Said* [1991] 2 KAR 262 and *Lali v Mathenge* [1993] LLR 2776 (CAK).

Consequently, an order for adverse possession could only have been made in favour of the Appellant if he had complied with Order XXXVI, rule 3(*d*). On this ground alone it would be in order for us to disallow this appeal. However, we will briefly deal with those grounds of appeal that attacked the failure of the

Learned Judge to find that there was sufficient evidence upon which to imply a trust in favour of the Appellant.

The second ground upon which the Appellant based his claim was a trust. We have carefully considered the pleadings. We are satisfied that trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with Order VI, rule 8 of the Civil Procedure Rules. In any event, as pointed out earlier in this judgment, the Plaintiff in his own pleadings and evidence clearly claimed that he was a co-owner of the suit property. It is our view that such a claim is inconsistent with a claim under a trust. In the absence of a pleading of trust, this claim cannot be permitted to be raised or decreed. As a rule, relief not founded on pleadings will not be given and cases must be decided on the issues on record see *Captain Harey Gandy v Casper Air Charters Ltd* [EACA] 1956 Volume 23. The Learned Judge cannot be faulted for not having found that indeed the Respondent held the suit land in trust for the Appellant.

This becomes even more necessary when the statute provides categorically as is the case with Order VI, rule 8 that the particulars of trust must be pleaded. We are, therefore, entitled to also reject this limb of the Appellant's case.

For the above reasons, we find no merit in the appeal and dismiss the same with costs to the Respondent.

For the Appellant:
Information not available

For the Respondent:
Information not available

Kihara v Barclays Bank (K) Ltd
[2001] 2 EA 420 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	6 February 2002
Case Number:	33/02
Before:	Ringera J
Sourced by:	N Malik
Summarised by:	W Amoko

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[1] Mortgage – Statutory power of sale – Exercise of statutory power of sale – Circumstances in which the court may issue an injunction to restrain the exercise of statutory power of sale – Whether the fact that a defaulting chargor has a claim in damages against the chargee constitutes a ground upon which an injunction might issue.

[2] Practice – Injunctions – Interlocutory injunctions – Whether it is necessary that the reliefs sought in the underlying suit in which the interim injunction is sought should include a prayer for a permanent injunction – Consequences for failure to do so.

Editor's Summary

In 1988, while still employed by the Defendant, on the foot money he borrowed from it, the Plaintiff purchased certain property which he charged to the Defendant as security. The Plaintiff alleged that some time in March 1995 he

was forced to take early retirement despite the terms of his original contract of employment which had been unlawfully altered by the Defendant without consultation. The Plaintiff defaulted in the repayment of the loan and the Defendant issued the requisite notices. The Plaintiff then commenced proceedings seeking relief against the Defendant on diverse grounds including unlawful termination of the contract of employment and violation of his constitutional rights. His also applied for an interlocutory injunction to issue restraining the Defendant from selling the property until the hearing and determination of the suit.

Held – Whether interlocutory injunctive relief can or cannot issue depends on the nature of the suit instituted and the procedural rules on which the application for interlocutory relief is grounded. When the application is brought under any of the subrules of Order 39, rule 1 of the Civil Procedure Rules there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. Where the application is under Order 39, rule 2 of the Civil Procedure Rules, it is an express requirement that the suit in which the temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort complained of. *Mansukhlal Patel v Brian Hume Naylor and others* (ur) civil appeal number 10 of 2000 and *Laxmanbhai Construction v Anspar Beverages Ltd* (ur) HCCC number 1327 of 2001 explained.

The Plaintiff's application for interlocutory relief did not sound under rules 1(*a*) or 1(*b*) at all (though both rules had been invoked) but fell squarely under rule 2. Though this had been mentioned by counsel the plaint had not been amended, and the application for an interim injunction was incompetent as the Plaintiff did not seek any relief in the form of a permanent injunction in the plaint.

The mere fact that a borrower has a claim in damages against a lender which is equal to or in excess of the debt due does not at law entitle it to resist the lender's attempt to exercise its statutory power of sale when this has properly arisen. *Elijah arap Bii v Kenya Commercial Bank* (ur) HCCC number 200 of 2000 adopted. Accordingly the Plaintiff had failed to make out a *prima facie* case with a probability of success.

As the Plaintiff had put up the property as security for the loan with full knowledge that should he default it would be sold, he had converted it into a commodity for sale and there was no commodity for sale the loss of which could not be adequately compensated in damages. The forced sale value of the property was KShs 1,5 million, an amount well within the means of the Defendant. Even if the Defendant had shown that he had a *prima facie* case with a probability of success, the application would still fail on the merits as he had not satisfied that court that if the sale proceeded he would suffer irreparable injury which could not be compensated by an award of damages.

Application dismissed.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Elijah arap Bii v Kenya Commercial Bank HCCC number 300 of 2000 – **A**

Giella v Cassman Brown and Co Ltd [1973] EA 358

Laxmanbhai Construction v Anspar Beverages Ltd [2001] LLR 1351 (CCK) – **E**

Mansukhlal Patel v Brian Hume Naylor and 2 others (ur) civil appeal number 10 of 2000 – **E**

Southern Credit Banking Corp Ltd v Charles Wachira Ngundo HCCC number 1780 of 2001

Ruling

RINGERA J: In a plaint filed in court on 3 September 1998, Paul Muhoro Kihara, the Plaintiff herein, avers that he had a contract of service with Barclays Bank of Kenya, the Defendant herein, whereby he had security of tenure and was entitled to work until he attained the retirement age of 60 years if he did not commit any act of gross misconduct. He further avers that in March 1992 the bank introduced an early retirement scheme without consulting him and because of such non-consultation and want of consent by him the scheme was an unlawful alteration of his contract of service. He avers that by various acts of deceit, intimidation, harassment, humiliations, tricks and other oppressive measures he was forced to take early retirement in March 1995 contrary to his contract of service. He contends in the alternative that even if the early retirement scheme did lawfully alter his terms of service, the manner in which the scheme was implemented with regard to him amounted to infringement of his fundamental rights to liberty, freedom from servitude, freedom from degrading and inhuman treatment, and the right not to be discriminated against contrary to the provisions of sections 72, 73, 74 and 82 of the Constitution, general damages, and the costs of the suit.

In 1988 while the Plaintiff was in the employment of the Defendant he borrowed the sum of KShs 649 000 to purchase a property known as Nakuru/Langalanga/321. He secured the borrowing by charging the said property in favour of the bank. The said property is a residential property and the Plaintiff and his family derives support from the rent fetched by the same. The Plaintiff defaulted in the payment of the said loan and he was served with a notice of the intended exercise of the bank's statutory power of sale on 26 July 2000.

On 19 December 2001, the Plaintiff filed an application for an interlocutory injunction to restrain the Defendant from selling the said property pending the hearing and determination of his suit.

The application is expressed to be under Order 39, rules 1, 2, 3 and 9 of the Civil Procedure Rules. The application is made on the grounds that the Plaintiff's breach of the contract of lending with the bank – which contract the bank is relying upon to exercise the statutory power of sale – is self induced by the bank in that the bank having unlawfully broken the Plaintiff's contract of employment it has deprived him of the means with which to pay the loan; it is a settled principal of law that no person will found a right or a claim on his own wrong; and it is the bank which owes the Plaintiff money and not *vice versa*. The application is supported by the Plaintiff's affidavit sworn on 31 October 2001. The application is opposed. There are grounds of opposition filed by Purity Kinyanjui, a senior analyst in the Defendant's debt recovery unit, sworn

on 11 January 2002. The application was canvassed before me on 18 January 2002.

Having considered the application, the affidavits on record, the grounds of opposition and the submissions on record I take the following view of the matter. Two principal issues arise for determination; first, whether or not the application is fatally defective as the plaint does not contain any prayer for a permanent injunction; and secondly, whether or not the Plaintiff is entitled to a temporary injunction on the usual principles in *Giella v Cassman Brown and Co* Ltd [1973] EA 358.

On the competence of the application the Defendant's argument is that as the plaint filed herein does not pray for any relief in the nature of a permanent injunction, interlocutory injunctive relief cannot be granted as to do so would be to grant it *in vacuo.* Reliance was placed on my own decision in *Southern Credit Banking Corp Ltd v Charles Wachira Ngundo* HCCC number 1780 of 2001. The Plaintiff's argument was that it was not necessary to have a prayer for a permanent injunction in a suit before a court could grant an interlocutory injunction. Reliance was placed on the Court of Appeal decision in *Mansukhlal Patel v Brian Hume Naylor and others* CA number 10 [2001] and my own decision in *Laxmanbhai Construction v Anspar Beverages Ltd* [2001] LLR 1351 (CCK). The Plaintiff also submitted that the plaint could be amended, if need be. To my mind, whether interlocutory injunctive relief can or cannot issue when permanent injunctive relief is not sought in a suit depends on the nature of the suit instituted and the procedural rules on which the application for interlocutory relief is grounded. Under Order XXXIX, rule 1, where in any suit it is proved by affidavit or otherwise (*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (*b*) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against him in the suit, the court may grant a temporary injunction to preserve the *status quo* with respect to such property. Under this rule there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. Such was obviously the case in the *Mansukmal Patel* case. The application sounded under Order XXXIX, rule 1(*a*) and the Court of Appeal was perfectly correct in its observation that in the circumstances of that case the purpose of the interim or interlocutory injunction was to preserve the disputed property. It was also the case in the *Laxmanbhai Construction* case which sounded under Order XXXIX, rule l(*b*). On the other hand, where the application for injunction sounds under Order XXXIX, rule (2), it is an express requirement of the rule that the suit in which the temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort in question. The rule reads as follows:

> "2(1) In any suit for restraining the Defendant from committing a breach of contract or other injury or any kind … the Plaintiff may, at any time after the commencement of the suit … apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of …".

Now reverting to the application before me, it is evident that although the same is expressed to be grounded under Order XXXIX, rules (1), (2) and (3)

the same does not sound under rule 1(*a*) or (*b*) at all for the property subject matter of the injunction is neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree. And rule (3) is merely procedural on the giving of notice of the application for injunction. The application thus falls squarely under rule 2. As indicated above, my reading of that rule is that the application must be made in a suit wherein the relief of a permanent injunction is sought. Such is not the case in the suit filed by the Plaintiff. In those circumstances and seeing that the plaint has not been amended to incorporate such prayer and there is not even an offer of an undertaking to do so (the Plaintiff's counsel merely observed that a plaint can be amended) I am constrained to agree with the submission on behalf of the bank that the application is incompetent and ought to fail on this ground alone.

On the Plaintiff's entitlement to an injunction assuming that the application is a competent one, I must say the following. The Plaintiff has not disputed the validity or the terms of the charge pursuant to which the bank seeks to exercise its statutory power of sale. He has also not disputed that he is in default of loan repayment or that he has been served with the requisite statutory notice. What he is saying is that he cannot repay the loan, nay, he will not repay because the bank has unlawfully and unconstitutionally brought his banking career to an end and thus disabled him from honouring his financial commitments. Whereas this argument is on the supposition that the Plaintiff's career was wrongfully brought to an end a morally attractive one, it does not appear to me to be sound in law. It does not appear to me to have a *prima facie* chance of success at the trial for there is nothing in the contract of charge to indicate that it was subject to the Plaintiff's continued stay in the employment of the bank until he reached the retirement age of 60 years. The Plaintiff's case is of course that his employment contract and the contract of lending were inextricably intertwined. While that is a matter for adjudication at the trial, I am at this stage unpersuaded that it is a serious arguable point for two reasons. First, the parties did not expressly so provide in their contract. Secondly, I am of the view that it is more probable than not that it will be held at the trial that it was not necessary for the efficacy of the borrowing contract that the Plaintiff would remain an employee of the bank and accordingly such continued employment could not be said to be an implied term of the borrowing contract. The Plaintiff is also saying that as he has made a claim for a cool KShs 13 million plus in his suit against the bank and the bank is only demanding KShs 1 271 626-90 or so from him he cannot be owing it anything. In *Elijah arap Bii v Kenya Commercial Bank* HCCC number 300 of 2000 I was faced with a similar claim. I asked myself the question whether as a matter of legal principle a borrower can resist a lender's desire to exercise the statutory power of sale on the basis that he has in a suit pending in court made a claim for damages against the lender which is equal to or in excess of the debt due to the lender. I answered the question as follows:

> "In my opinion, a legal claim, until and unless admitted or proved is no more than a hope for money. It is a contingent asset or in the language of the learned, a chose in action which cannot be offset against an existing liability. The borrower cannot be heard to say that he does not owe the lender money because there is a chance that a court of law may at an unknown time in the future adjudge the lender to be indebted to him in a sum equal to or exceeding his present liability".

I am still of the same conviction. Having taken that view of the matter it appears to me to be wholly unnecessary to consider, even *prima facie*, the merits

or otherwise of the Plaintiff's claim for breach of his contract of employment and/or breach of his constitutional rights as pleaded and to some extent canvassed before me. The argument was interesting but I think it prudent to reserve my opinion on that issue. To recapitulate, I am of the opinion that the Plaintiff has not shown any *prima facie* case with a probability of success at the trial that the bank will have breached any contract with him or that it will have otherwise caused him any other injury unlawfully if it exercised its statutory power of sale in the circumstances of this case. So the Plaintiff fails to pass even the very first substantive hurdle in his quest for interlocutory injunctive relief. That finding is sufficient to dispose of the application. Be that as it may, I will consider the second condition for the grant of an interlocutory injunction.

Is the Plaintiff's probable injury one incapable of being adequately compensated in damages should his arguments prevail at the trial? I am not so persuaded. To my mind a person who offers his property as security for a borrowing does so knowing only too well that in the event of default in repayment of the loan such property will be sold. To put it another way, to offer a property as security for a loan is to convert it into a commodity for sale. And there is no commodity for sale whose loss cannot adequately be compensated in damages. Such is the case here. The open market value of the Plaintiff's property is said to be KShs 1,5 million according to the notification of sale thereof. That is an amount I am sure Barclays Bank can meet if the Plaintiff's arguments were to prevail at the trial. In other words, I am of the view that even if the Plaintiff had persuaded the court that he had a *prima facie* case with a probability of success, he would have met his waterloo in the second condition for the grant of an interlocutory injunction. In those circumstances, there is neither necessity nor utility in weighing the balance of convenience.

The upshot of the matter is that the Plaintiff's application for an interlocutory injunction is dismissed with costs to the Defendant.

For the Plaintiff:
Information not available

For the Defendant:
Information not available

Kutegana v Uganda
[2001] 2 EA 425 (SCU)

Division:	Supreme Court of Uganda at Mengo
Date of judgment:	11 January 2002
Case Number:	33/00
Before:	Oder, Tsekooko, Karokora, Mulenga and Kanyeihamba JJSC
Sourced by:	B Tusasirwe
Summarised by:	M Kibanga

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[1] Criminal law – Alibi – Appellant relying on alibi – Testimony of Appellant – Trial court rejecting defence of alibi – Whether court entitled to reject defence.

[2] Criminal law – Identification by single witness – Complainant attacked and robbed by Appellant in moonlight – Complainant stating he saw and identified Appellant – Whether conviction sustainable in circumstances.

Editor's Summary

On the morning of a day in October 1995, the Appellant went to the home of the complainant and inquired whether the complainant had some palm leaves used to make fishing baskets. The complainant answered in the affirmative and the Appellant informed the complainant that he would return later with money for some leaves. The Appellant and the complainant were people known to each other since childhood.

At about 10:00pm that same day the complainant went outside his house to collect something. He saw, with the aid of the moonlight, the Appellant standing in one corner of the complainant's house, armed with a panga and a torch. The Appellant was with another man whom the complainant did not identify.

The Appellant then quickly approached the complainant and demanded money. When the complainant told him that he did not have any money, the Appellant cut him on the forehead with a panga. The Appellant dragged the complainant into the house while kicking and stepping on him. The complainant then showed the Appellant where the money was and with the aid of the torchlight from the Appellant's colleague's torch, the Appellant took the money. He then inflicted some more cuts on the complainant, carried him to the bed, covered him with a blanket and left him for dead. The complainant later regained consciousness and crawled to neighbours house. the neighbour reported the matter to the police. The following day the complainant informed a witness that it was the Appellant who had attacked him. The Appellant was arrested and charged with capital robbery.

The Appellant's defence was alibi. The trial Judge rejected it and sentenced him to death. The decision of the trial Judge was upheld by the Court of Appeal. the Appellant then appealed to the Supreme Court on two grounds, namely, the Court of Appeal erred in law by finding that the identification by a single witness was sufficient to sustain conclusion and the Court of Appeal erred in rejecting the defence of alibi.

Held – It could not be suggested that a conviction based on identification of the accused by one witness would never be upheld and it was the duty of the court to satisfy itself that in all circumstances it was safe to act on such identification; *Roria v Republic* [1967] EA 583 followed.

Although a fact could be proved by the testimony of a single witness that did not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the condition favouring a correct identification were difficult; *George William Kalyesubula v Uganda* Cr. Appeal No 16 of 1977 (ur) and *Abdalla Nabulele v Uganda* [1979] HCB 77, followed.

There was no evidence that the complainant had not identified the Appellant correctly and the conclusion of the High Court and the Court of Appeal could not be faulted.

The burden of proving an alibi does not lie on the prisoner beyond reasonable doubt. It is the duty of the court to direct its mind properly to any alibi set up by an accused, and it is only when the court comes to conclusion that the alibi is unsound that it would be entitled to reject if; *Sekitoleko v Uganda* [1967] EA 531 and *R v Thomas Finel* [1916] 12 Cr. App. Rep 77, followed.

The conclusion of the High Court and the Court of Appeal on the defence of alibi were correct. The finding s of the Court of Appeal were upheld and the appeal dismissed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Abdalla Nabulele v Uganda [1979] HCB 77 – **F**

George William Kalyesubula v Uganda criminal appeal number 16 of 1977 (ur) – **F**

R v Thomas Finel [1916] 12 Cr. App. Rep. 77 – **F**

Roria v Republic [1967] EA 583 – **F**

Sekitoleko v Uganda [1967] EA 531 – **F**

Judgment

ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA JJSC: The Appellant Stephen Kutegana, was indicted in the High Court sitting at Jinja for aggravated robbery contrary to sections 272 and 273(2) of the Penal Code Act. He was convicted on 23 May 1999 and sentenced to death. His appeal to the Court of Appeal was dismissed; hence this appeal.

The brief facts of the case which were accepted by the lower court was that the complainant Batulumayo Mukasa (PW1) had known the Appellant from childhood. On the morning of 6 October 1995 the Appellant went to Batulumayo's home and inquired if Batulumayo had palm leaves for making baskets used for fishing. On being told that he had the leaves, the Appellant informed Batulumayo (hereinafter referred to as the complainant) that he would return with the money for them in the evening. At around 10:00pm when the complainant went outside his house to collect his bed pan, he saw, with the aid of moonlight, the Appellant, standing in one corner of his house, armed with a panga and a torch. The Appellant was with another man whom the complainant never identified. The Appellant quickly moved towards the complainant and got hold of complainant's hand and demanded money from him. When complainant told him that he had no money, the Appellant cut him, on his forehead with the panga asking, "How about the money you have been lending out!" The Appellant dragged him inside the house, kicked and stepped on him. At that time, the complainant told the Appellant that there was money inside the house.

The complainant led the Appellant inside the house where the money was. Appellant's colleague had a torch, which he flashed to enable the Appellant see and get money from where it had been kept. After being given Shs 670 000 the Appellant inflicted on the complainant more cut wounds on the head, shoulder and other parts of the body. He took the complainant to his bed, covered him up in the bed and left him for dead. The complainant was only unconscious. Later, the complainant regained his consciousness, managed to crawl out of his bed and out of his house to the house of PW2, Balodha, his neighbour whom

he woke up. Balodha (PW2) reported the matter to the LC's who in turn reported the matter to police. The complainant was taken for medical treatment. On the following day, the police arrested the Appellant and charged him with the offence of capital robbery.

At his trial, Appellant's defence was an *alibi* to the effect that at the time of the robbery he was at his house. The trial Judge rejected the defence of the Appellant and believed the prosecution evidence and consequently convicted the Appellant. The decision of the trial Judge was upheld by the Court of Appeal. From the decision of that court, the Appellant has appealed to this Court on two grounds, namely:

(1) That the Learned Justices of Appeal erred in fact and law by finding that identification made by a single witness was sufficient to sustain the conviction in the circumstances.

(2) That the Learned Justices of Appeal erred in fact and law in rejecting the Appellant's *alibi*.

When this appeal came up for hearing Ms *Luswata*, counsel for Appellant, submitted that although there was a robbery committed at the home of the complainant the evidence was not sufficient to prove that the Appellant participated in the robbery. She submitted that although the lower courts appreciated the principles applicable to evidence of a single identifying witness such as these spelt out in the case of *Abdalla Nabulele v Uganda* [1979] HCB 77, both the trial court and Court of Appeal had failed to properly apply them to the facts of this case. For instance, she contended that the lower courts never considered the fact that after the complainant was cut on the forehead, blood from the cut wound impaired his vision as a result of which he could not see and recognise his assailant. Accordingly, she contended that the lower court ought to have looked for corroboration, which she submitted was missing. She also pointed out that when the complainant reported to his immediate neighbour at night, he never disclosed the names of the robbers, which meant that he had not identified the Appellant.

Mr *Wamasebu*, Principal State Attorney for the state, submitted that there was sufficient evidence of identification of the Appellant at the scene of crime as found by the trial Judge and upheld by the Court of Appeal. On the argument by counsel for Appellant that the complainant could not identify the Appellant, because blood oozing from the cut wound on the forehead impaired his vision, Mr *Wamasebu*, submitted that before he was cut, the complainant had already seen and identified the Appellant with the aid of the moonlight. He also argued that the ability of the complainant to recognize the Appellant was enhanced by the fact that on the morning before the robbery the complainant saw and conversed with the Appellant who called on the complainant and asked if he had palm leaves to sell.

In this appeal, the prosecution case depended exclusively on the identification by a single witness. This Court and its predecessors have considered in many cases the problem of cases depending on evidence of identification by a single witness. In the case of *Roria v Republic* [1967] EA 583 the East African Court of Appeal stated at 584D–E:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner LC said recently in the House of Lords in the course of debate …

> There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if they are as many as ten – it is on question of identity. That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never he upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification".

This position was restated by the predecessor to this Court in *George William Kalyesubula v Uganda* criminal appeal number 16 of 1977 (ur) in the following passage:

> "The law with regard to identification has been stated on numerous occasions. The courts have been guided by *Abdulla Bin Wendo and another v R* (*supra*) and *Roria v Republic* (*supra*) to the effect that although a fact can be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error".

These points were re-emphasized by the same court in *Nabulele's* case (*supra*).

We have examined the evidence of the complainant regarding identification of the Appellant at the scene of crime. We note that the evidence of the complainant was accepted by the trial Judge and upheld by the Justices of Appeal. The latter court observed:

> "The Learned trial Judge examined the circumstances in which identification came to be made viz the length of time the encounter lasted, the distance between them i.e between the complainant and the Appellant and the light. There was moonlight outside and in the house, there was a torch which Appellant's colleague was flashing. He also considered the previous familiarity of the complainant and the Appellant. It is the sum total of these factors which affected his decision. We therefore think that there cannot be any doubt that the Learned Judge properly applied the principles aforesaid and reached the correct conclusion".

We were not persuaded by Ms *Luswata*'s argument. First there is no evidence on record that the complainant's vision was impaired or otherwise adversely affected by blood oozing from the cut wound on the forehead. The assertion was speculation on learned counsel's part. What is more, we agree with Mr *Wamasebu* that the complainant saw and recognised the Appellant even before he was cut. Secondly, the failure of complainant to disclose the name of his assailant to his neighbour to whom he first reported the incident does not necessarily mean that he had not recognised the assailant. It could be due to other reasons. It is significant, however, that as early as 8.30 am. on the following day, he disclosed to Constable Samuel Muwanika (PW6),who found him at Kakoge Aid Post, weak and full of sleep that the name of his attacker was Kutegana Stephen son of Munaaba. In the result, ground one must fail.

In the second ground the complaint is that the Learned Justices of Appeal erred in fact and law in rejecting the Appellant's alibi. Ms *Luswata* submitted that the prosecution had failed to place the Appellant at the scene of the crime. She contended that the trial Judge rejected the evidence of the Appellant because he found him to behave strangely by not remembering certain names

and so the Judge held that the Appellant was evasive and inconsistent. She submitted that the trial Judge never evaluated the evidence to show whether the Appellant was at the scene of crime. She contended that apparently many suspects were arrested and that this shows that the police were not sure of the perpetrators of the robbery.

The learned Principal State Attorney Mr *Wamasebu* urged us to uphold the finding of the trial Judge that the behaviour of the Appellant was strange, that Batulumayo, an elderly man had a sharp memory which impressed the trial Judge who found the Appellant a liar. The Learned trial Judge's impression of the complainant is summed up as follows:

> "In his statement which he made to police on 12 October 1995, he gave a detailed account of all that happened to him. He was not shaken in cross-examination. Despite giving his age as 81 years, his memory was sharp. Indeed, he impressed me as a truthful and credible witness …"

On the other hand the Learned trial Judge's findings and assessment of Appellant's evidence is stated in these words:

> "The accused tried to put a defence of alibi, saying he was at his home throughout. He even denied having gone to the home of the victim on the day in question. He even denies knowledge of the people known to be his mother, grandfather and other close relatives and friends. He even at first denied knowledge of Mukunga with whom he said he was arrested together for this offence only to admit he knows him later, saying the pronunciation the prosecution made was different from the one he knew. These are strange behaviours, which in our law could be interpreted to point to the guilt of the accused".

Clearly, the trial Judge who had the benefit of seeing the complainant and the Appellant testify was in a better position to make the conclusion he made.

The Court of Appeal reiterated the law on the burden of proof when an alibi is advanced by accused as a defence, and upheld the trial Judge in these words:

> "It is settled law that the burden of proving an *alibi* does not lie on the prisoner beyond reasonable doubt. *Sekitoleko v Uganda* [1967] EA 531. It is the duty of the court to direct its mind properly to any *alibi* set up by an accused, and it is only when the court comes to conclusion that the *alibi* is unsound that it would be entitled to reject it See *R v Thomas Finel* [1916] 12 Cr App Rep 77. We find that the Appellant's defence consisted of unexplained inconsistencies, which amounted to blatant lies. The evidence of the complainant placed the Appellant at the scene of crime. His evidence was sufficiently corroborated by the deliberate lies told by the Appellant. The Judge was therefore entitled to reject it and rightly held that they were a pointer towards his guilt".

We have not been persuaded that either the trial Judge or the Court of Appeal erred in law or in fact in the above quoted conclusions. In the result ground 2 must also fail.

Therefore this appeal has no merit. It is accordingly dismissed.

For the Appellant:
Information not available

For the State:
Mr Wamasebu

Masefield Trading (K) Ltd v Kibui
[2001] 2 EA 431 (CCK)

Division: Milimani Commercial Courts of Kenya at Nairobi

Date of Ruling: 22 February 2001

Case Number: 1796/00

Before: Hewett J

Sourced by: LawAfrica

Summarised by: W Amoko

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[1] Practice and procedure – Verifying affidavits – Whether a suit in which the verifying affidavit was defective had to be struck out – Whether court had discretion as to whether to strike out suit where verifying affidavit was defective – How such discretion to be exercised – Order VII, rules 1(2) and (3) – Civil Procedure Rules.

Editor's Summary

The Plaintiff commenced proceedings and filed a verifying affidavit sworn by one Stan Wanjenje under a power of attorney. The copy of the power of attorney annexed to the affidavit related to the Plaintiff's claim against a different corporation. The Defendant applied to have the plaint struck out for want of a verifying affidavit and in response the Plaintiff applied for leave to file a further affidavit supplementary to Wanjenje's affidavit. The applications were heard consecutively and a joint ruling delivered on both.

Held – The permissive language of Order VII, rule 1(3) of the Civil Procedure Rules leads to the conclusion that despite its mandatory terms, a breach of Order VII, rule 1(2) of the Civil Procedure Rules is an irregularity which can be waived or cured. *Brickfield Properties v Newton* [1971] 3 All ER 328 considered.

In exercise of its discretion when faced with an application to strike out a suit due to a failure by the Plaintiff to file a proper affidavit, the permutations of the circumstances under which the court might exercise its discretion in favour of the Plaintiff are never closed. Undue delay in seeking to rectify the defect will tend to disentitle the Applicant. Errors on the part of a litigant's advocate will be more readily overlooked than errors on the part of the litigant. A court will consider the extent to which the innocent party can be compensated in costs and court will exercise its discretion in light of the totality of circumstances before it. A court will proceed on the basis that the defect is an irregularity which can be cured or waived, and not a nullity. Dictum of Apaloo JA in *Wachira v Ndajairo* 1 KAR 1062 applied. *Pritchard v Deed* [1963] 2 WLR adopted.

While the verifying affidavit was defective by reason of the annexation of the wrong power of attorney, it was not totally invalid as the deponent did have authority to swear it. As the fault, if any, lay with the Plaintiff's advocate and action had been taken without undue delay to correct the error and the court had the power to allow a supplementary affidavit to correct the deficiency and it was in the interests of justice that the case should be heard on its merits, the Defendant's application to strike out would be dismissed and the Plaintiff's application for leave to file a supplementary affidavit would be allowed. *Eastern African Development Bank v African Greenfield* (ur) HCCC number 1189 of 2000 and *Kariuki v United Insurance Co Ltd* [2000] LLR 989 (CCK) distinguished.

The application had arisen as a result of the Plaintiff's advocate's oversight and therefore the costs of both applications were awarded to the Defendant. Application to strike out plaint dismissed while application for leave to file an affidavit supplementary to the verifying affidavit allowed.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Din v Anand 22 EACA 48

Eastern and South African Development Bank v African Greenfield HCCC 1189/2000 – **D**

Jamnadas v Hemraj [1952] 7 ULR 11 (U)

Jesse v McConnel [1966] EA 547

Kariuki v United Insurance Co Ltd [2000] LLR 989 (CCK) – **D**

Kinyanjui and others v Monyore 121/1993

Kisya Investment Ltd v Kenya Finance Corporation

Maina v Mugiria 1 KAR171

Mbogo v Shah [1968] EA 93

Patel v EA Cargo Handling Services Ltd [1974] EA 75

Sebei District Administration v Gasyali [1968] EA 300 301 302 (U)

Shah v Mbogo [1967] EA 116

Swanya v Daima Bank Ltd [1996] LLR 988 (CCK)

Wachira v Ndajairo 1 KAR 1062 – **AP**

United Kingdom

Brickfield Properties v Newton [1971] 3 All ER 328 – **C**

Cookson v Knowles [1978] 2 WLR 978

Les Fils Dreyfus SA v Clarke [1958] 1 All ER

Macfoy v United Africa Co Ltd [1962] AC 152

Pontin v Wood [1962] 1 QB 594

Pritchard v Deed [1963] 2 WLR – **A**

Smith v Middleton [1972] SC 30

Ruling

HEWETT J: I have before me two applications:

(i) dated 15 January 2001 by the Defendant to strike out the plaint under Order VIA, rule (*a*), (*c*)

and (*d*) (*sic*) and Order VII, rule 1(2) and (3) of the Civil Procedure Rules and section 3A of Civil Procedure Act.

(ii) dated 25 January 2001 by the Plaintiff asking for leave to file a further affidavit supplementary to the verifying affidavit sworn by Stan Wijenje on 9 October 2000 under Order L, rules 1 and 2 and section 3A Civil Procedure Act.

The case highlights the conflict between strict compliance with procedural requirements, which can sometimes work so as to deprive one party, and the Court, of the opportunity to delve into and decide the real issues in controversy.

The problem centres around two amendments made to Order VII (1), (2) and (3). These amendments were made on 5 May 2000 by LN 36/2000. Rule 1(2) and 1(3) read as follows:

> "1(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.
>
> 1(3) The court may of its own motion or on the application of the Defendant order to be struck out any plaint which does not comply with subrule (2) of this rule".

I think it may help deal with this problem if I look at those subrules on their own and in theory first before confusing the discussion with the facts of this case. The principal difficulty is that subrule (2) is mandatory in language: "The plaint shall be accompanied by an affidavit …" whereas subrule (3) is permissive only: "The court may order to be struck out any plaint that does not comply with subrule (2) …".

At first glance that is illogical. If subrule (2) is mandatory, logic would indicate that subrule (3) should be mandatory also, but surprisingly it is not. Does this mean to say that subrule (2) although expressed in mandatory terms is in truth somewhat less than mandatory? Are there different degrees of the word "mandatory" or can some interpretation be given to subrule (2) that is somewhat less than an absolute mandate? Regrettably there is no guidance; no guidance too when it comes to the court's clear discretion in striking out. What circumstances could or would or might lead a court to exercise its discretion under subrule (3) in favour of a Plaintiff in default under subrule (2)?

It is I submit helpful to look at a recent article by Juma J in Issue 2/2000 of *Hakimu*, the Official Magazine of the Kenya Magistrates and Judges Association. He entitled his paper "General Comments on Civil Procedure" but he was in fact looking at the year 2000 amendments to the Civil Procedure Rules and putting forward the thinking behind them. This is what he said about Order VII.

Some litigants had formed the habit of shopping for the "right courts" by filing cases arising out of the same cause of action in different courts. Others were never satisfied with the outcome of their cases and in ignorance or deliberately tried their luck by filing the same suit in a different court. To curb such abuse of court process Order VII dealing with the plaint was amended by adding a new paragraph (*e*). The plaint will, therefore, have to contain, apart from the details set out in Order VII, rule 1(*a*) to (*d*), a new paragraph (*e*) – an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant on the same subject matter.

It is not uncommon these days to find that a Plaintiff is represented by different firms of advocates. This arises as a result of "ambulance chasing". To try and put a stop to this kind of conduct, Order VII was amended by adding a new subrule (2). This subrule provides that the plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint. The affidavit is to be sworn by the Plaintiff, *not* his advocate. It is hoped that the Plaintiff will, therefore, instruct one advocate as he or she will be required to swear an affidavit. I need not emphasize the consequences of filing a false affidavit.

Perhaps this is a good a place as any to say, *obiter*, that I notice that the Woolf Reforms in England require a Statement of Truth from a Defendant; in Kenyan parlance, an affidavit from the Defendant verifying his defence. Judging by the large number of shaky and downright bogus defences we all see in the courts, such an amendment would almost certainly limit or close out altogether the bare denials and putting the Plaintiff to the strict proof thereof that is all too familiar an occurrence in today's pleadings.

To return to Order VII: Do the reasons for the change help in any way to elucidate the conflict between the mandatory provision at the time of filing with the later discretion to strike out or not? The answer is no; there is no clue except perhaps that the target was a narrow one; the filing of more than one suit on the same subject matter. Clearly the Rules Committee in drafting the amendments wanted to make it clear to Plaintiffs the absolute necessity of complying with the law and striking out in default was the obvious sanction. An alternative and equally effective one I venture to suggest would have been to give the Court the right to deprive the Plaintiff of his instruction fee in any event: and that would have been easier to administer.

I accept of course that amending the Civil Procedure Rules is a bit like pinning decorations on a Christmas tree blindfold and hoping to produce a harmonious result: there are all sorts of little quirks of language and procedure that it is all to easy to overlook or undermine. One of those that arose on these applications is the proviso to Order XVIII, rule 3(1) Civil Procedure Rules which reads:

> "3.(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
>
> Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".

Clearly a verifying affidavit is not in interlocutory proceedings. Clearly in heavy commercial cases it is very unlikely there is any one person in the Plaintiff corporation who personally knows all the facts on which the plaint is founded. It is going to be necessary for the leave of the court to be granted in nearly every long commercial case for statements to be permitted on information and belief in the verifying affidavit. I would be reasonably sure this is not what the Rules Committee intended.

Before going on to apply the facts, I looked again at Order VII, rules 1(2) and 1(3) and suddenly I wondered whether I did not see a chink of light that might help. My thinking went like this:

1. Assume there is either no verifying affidavit or a defective affidavit only.
2. Note that while there is no positive guidance as to whether or not the court should strike out the plaint, there is the implication in the use of the word "may" in rule 1(3) that the court is not required to strike out in every case.
3. If the court is not required to strike out in every case, does not that indicate that a missing or deficient verifying affidavit is an irregularity rather than a nullity. If it was intended to be a nullity then rule 7(1)3 could so easily have been drafted in mandatory form.
4. If a missing or deficient verifying affidavit is an "irregularity" that implies it can be waived by the Defendant taking a fresh step (see *Brickfield Properties v Newton* [1971] 3 All ER 328 or cured by an application to that effect.

5. Curing may involve altering the time frame. Order VII, rule 1(2) requires the verifying affidavit to "accompany" the plaint. Contrast Order L, rule 3 which requires an affidavit used in evidence in support of a motion to be "served". A mandatory requirement with no sanction spelt out for default. Order VII, rule 1(2) is also a mandatory requirement but with a permissive sanction spelt out.

   What does "accompany" mean? If the affidavit gets left behind so that it does not strictly accompany the plaint on filing can the Court give leave so as to allow the affidavit to catch up with the plaint. If the error is an irregularity only there would seem to be no fundamental reason why not: if it was a nullity of course, that would be the end of the affair.

6. I conclude that the permissive sanction of Order VII 1(3) leads me to the conclusion that despite the mandatory words in Order VII 1(2), a breach thereof is an irregularity that can subsequently be waived or cured.

So enough of speculation; let me look at the facts. The facts are that the plaint was filed 9 October 2000. It did contain in paragraph 3 the prescribed averment required by Order VII, rule 1(1)(*e*).

> "(*e*) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter".

It had a verifying affidavit sworn by Stan Wijenje on the same day. The affidavit was very short and read as follows;

> "1. That I am a duly authorised attorney of the Plaintiff company herein, and well seized of the matters relating to this case and hence competent to swear this affidavit (Copy of the same is annexed hereto marked 'SW 1'.
>
> 2. That the facts averred in the plaint are correct and in accordance with the records, documents and information availed to me by the Plaintiff.
>
> 3. That I swear this affidavit in confirmation as to the correctness of the facts averred in the plaint.
>
> 4. That what is deponed to herein is true to the best of my knowledge, information and belief, save for the information sources I have stated herein".

Not brilliantly drafted but as it stands there is nothing too wrong with that except for one thing. What was seriously wrong was that, in error, the wrong Power of Attorney was annexed. It seems that Mr Wijenje was the donee of two Powers of Attorney from the Plaintiff:

1) Dated 11 August 2000 in respect of the Plaintiff's claim against Hunkar Trading Company Limited – which was annexed in error.

2) Dated 11 August 2000 in respect of the Plaintiff's claim against all its debtors which should have been annexed but in error was not.

Mr *Njuguna* for the Defendant argues that because the Power of Attorney annexed to the verifying Affidavit was in respect of Hunkar Trading Company Limited there is in effect no verifying affidavit; certainly there is nothing sworn by the Plaintiff and what is sworn by the Plaintiff's Attorney, is sworn by an Attorney who lacked capacity to deal with the Defendant's affairs.

Mr *Njuguna* also attacked the Plaintiff's affidavit dated 25 January 2001 by Andrew Muchigi Karani in support of the application for leave to file a further affidavit supplementary to the verifying affidavit with the intent to cure the obvious defect in the latter. The main ground of the attack was that here there was an advocate swearing an affidavit in support of a contested matter of fact; that is not permitted. *Kisya Investment Limited v Kenya Finance Corporation*. He also pointed out that the affidavit offended the provisions of Order XVIII, rule

5 by using the plural: "we" instead of the first person which occurs in paragraphs 4, 5 and 8; it also occurs I note in paragraphs 3, 7 and 6. He further complained that the source of knowledge was not disclosed in paragraphs 7 and 8 nor does the deponent say he is authorized to swear the affidavit. These were matters considered in *Kisya Investment Ltd v Kenya Finance Corporation* which in turn was cited in *Swanya v Daima Bank Ltd* [1996] LLR 988 (CCK); also cited to me was *Kinyanjui and others v Monyore* CA 121/93. That affidavit by any stretch of the imagination is a comedy of errors and in my judgment the cleanest thing to do is to strike it out. Fortunately for the Plaintiff, Mr Herbert the managing director of the Plaintiff also swore an affidavit dated 22 January 2001 which duplicates much of the same ground as the affidavit struck out. That is fortunate as were it otherwise, I might have been held to be penalising a party for its advocate's default.

Mr *Kamau* urged on me the desirability of not deciding a case on technicalities. He started with section 3(2) Judicature Act Chapter 8:

> "3 (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay".

His emphasis of course was on "substantial justice". He referred me to a lengthy passage in the dissenting judgment of Apaloo JA in *Wachira v Ndajairo* 1 KAR 1062. That it was dissenting does not affect what he said or the citations he made as follows:

> "At all events, it seems to me the Appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a Court must, at least, at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules. As if often said, rules of procedure are good servants but bad masters. These rules have their origin in England and the philosophy there is to move from form to substance. Lord Denning, the celebrated English Judge has said *ad nauseam*, that technicalities are a blot in the administration of justice. English Courts have on numerous occasions refused to set aside process for technical irregularities. See *Macfoy v United Africa Company Limited* 1962 AC 152, *Pontin v Wood* 1962 1 QB 594 to mention only two".

In *Pritchard v Deed* 1963 2 WLR Lord Denning, regretting a technical decision by the majority of the Court said:

> "My brethren take a different view. They think the defect is fatal and the widow must be driven from the judgment seat without a hearing. I greatly regret that this should be so.
>
> Quite recently in *Pontin v Wood* (*supra*), Pearce LJ recalled the proud boast of Bowen LJ that 'It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation' ".

It would be strange if the principle today were otherwise in this or any of the newer Commonwealth countries where professional and judicial standards are less high than in England.

In the same case, Upjohn LJ, who wrote the leading judgment, examined the cases in which defects or irregularities were held to be fatal and those in which they were not and proceeded:

> "I do not think that the earlier cases or the latter dicta upon them prevent me from saying that the law when properly understood, is that Order LXX applies to all defects in procedure unless it can be said that is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Order LXX when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the person entitled to complain of the defect *ex debito justitiae*".

I think that exemplifies the present liberal approach to breaches of procedure rules.

Mr *Kamau* quite rightly, distinguished the two cases cited by the Defendant namely *Eastern and South African Development Bank v African Greenfield* HCCC 1189/2000 and *Kariuki v United Insurance Co Ltd* [2000] LLR 989 (CCK) as being cases where the *jurat* of the affidavits offended the mandatory provisions of section 5 of Chapter 15 and were, as it were, non-affidavits. In this case he said, the verifying affidavit was substantially in order: all that was wrong with it was its annexure – namely the "Hunkar" Power of Attorney was annexed. He suggested that the furthest it was necessary to go, even if indeed it was truly necessary, would be for the court to strike out that annexure given Mr Herbert's affidavit. He submitted that the Court has and always has had a power to allow a supplementary affidavit to correct a defect or misstatement in an earlier one. He cited *Les Fils Dreyfus SA v Clarke* [1958] 1 All ER at 459. There the affidavit in support of an application for summary judgment was defective for 2 reasons: it did not verify the debt nor verify the assignment thereof, by virtue of which the Plaintiff sued. The English Court of Appeal had no difficulty in holding at page 463F line 3 to say now that an affidavit filed by the Plaintiff in proceedings under rule. SC. Order XIV cannot be, as it were supplemented by a further affidavit by the Plaintiff with the leave of the court, is something which startles me and, as far as I know, no case has ever heretofore suggested that, with the leave of the court the Plaintiff's affidavit cannot be supplemented.

He further prayed in aid *Maina v Mugiria* 1 KAR at 171. That was a case involving the setting aside of an *ex parte* judgment so perhaps slightly different considerations apply but it does dwell on judicial discretion and the desirability of allowing a party at least to be given a hearing. On discretion Potter JA put in a nutshell the exercise of judicial discretion and appeal therefrom in these words:

> "Firstly, as was stated by Duffus P in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76C–E:
>
> 'There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he does so on such terms as may be just … The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules'.
>
> Secondly, as Harris J said in *Shah v Mbogo* [1967] EA 116 at 123 B:
>
> 'This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice'.
>
> That judgment was approved by the Court of Appeal in *Mbogo v Shah* [1968] EA 93. And in *Din v Anand* 22 EACA 48 Briggs JA said at 51:
>
> 'I consider that under Order IX, rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it

> should be exercised. In particular, mistake or misunderstanding of the Appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised'.
>
> Thirdly:
>
> 'A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice'. See per Newbold J in *Mbogo v Shah* [1968] EA 93 at 96G".

Kneller JA took the matter on as follows:

> "The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: *Patel v EA Cargo Handling Services Limited*, [1974] EA 75, 76BC (CAK).
>
> This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice*: Shah v Mbogo* [1969] EA 116, 123BC (K) Harris J".

The matters which should be considered, when an application is made, were set out by Harris J in *Jesse v Mc Connel* [1966] EA 547, 555F (K) which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shah*, [1968] EA 93, 95F (CAK).

There is also a decision of the late Sheridan J in the High Court of Uganda in *Sebei District Administration v Gasyali* [1968] EA 300, 301, 302 (U) in which he adopted some wise words of Ainley J, as he then was, in the same court, in *Jamnadas v Hemraj* [1952] 7 ULR 11 (U) namely:

> "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularily, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court".

And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Ainslie L in *Smith v Middleton* 1972 S C 30, "in a selective and discriminatory manner, not arbitrarily or idiosyncratically …" for otherwise, as Diplock L said in his speech in *Cookson v Knowles* [1978] 2 WLR 978, 981C (HL) "the parties would become dependent on judicial whim". So the Magistrate should have recalled these points.

If I find the verifying affidavit incurable I will have to exercise a judicial discretion. The Rules give me only the limited guidance to which I have already referred in theory: the authorities do help but in slightly different circumstances: Juma J's article gives me an insight into the mischief sought to be rectified by the amendments to Order VII, rules 1(2) and (3). When

should a court faced with the failure by the Plaintiff to file a proper verifying affidavit under Order VII, rule 1(2), not strike out the plaint under Order VII, rule 1(3).

Having looked at all these matters, it seems to me that the factors the court should look at include:

(i) The court cannot foresee all possible circumstances, so the permutations of circumstances in which the court might exercise its discretion in favour of the Plaintiff are never closed.

(ii) The court will consider delay; undue delay in rectifying a defect will tend to disentitle an Applicant.

(iii) The Court may look a little more favourably on a litigant whose advocate by oversight, inadvertence or excusable mistake, has risked depriving that litigant of a chance to have his case heard than if the litigant himself had been the cause of the defect.

(iv) The court will look unfavourably upon a person, unlikely in the case of a Plaintiff, who seeks to obstruct delay or abuse the process of justice by whatever means.

(v) The court will consider whether and to what extent the innocent party can be compensated in costs.

(vi) The court will look at all the surrounding facts, circumstances and merits prior to exercising its discretion.

(vii) The court will proceed on the basis that the failure is an irregularity that can be cured or waived and not a nullity.

I am sure there are many more factors but these will do for now. I have looked long and hard at the verifying affidavit in this case. I have come to the conclusion that while it is a defective affidavit by reason of the annexation of the wrong Power of Attorney, nevertheless it is not a totally invalid affidavit. The deponent did in fact have the authority to swear it at the time he swore it: the fault if any, lay with the Plaintiff's advocate, not with the Plaintiff itself: action has been taken without undue delay to correct the error: the court has now and always has had power to allow a supplementary affidavit to correct a deficiency in a prior one and that the interests of justice – by which in this case I mean a hearing on the merits, would be frustrated or delayed and are better served by allowing a supplementary affidavit than by striking out the suit.

Accordingly, I strike out the affidavit by Andrew Michiga Karani dated 25 January 2001.

I dismiss the Defendant's application to strike out the plaint. I allow the Plaintiff's application for leave to file a supplementary affidavit which is to be filed within 7 days and I give leave under Order XVIII, rule 3(1) proviso for that affidavit to contain matters of information and belief so long as the sources and grounds thereof are disclosed.

As regards costs, all these arguments have arisen due to the Plaintiff's advocate's initial oversight. It seems to me fair therefore to award the costs of both these applications – which were heard consecutively – to the Defendant.

For the Plaintiff:
Information not available

For the Defendant:
Information not available

Matic General Contractors Ltd v Kenya Power and Lighting Co Ltd
[2001] 2 EA 440 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	4 December 2001
Case Number:	26/01
Before:	Kwach, Shah and O'Kubasu JJA
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Winding-up petition – Debt in question subject of an unadjudicated suit – Proposed Respondent denying debt – Whether such debt forms proper basis for winding-up petition.

[2] Winding-up petition – Motive – Whether motive for instituting winding-up petition relevant.

Editor's Summary

In March 1999 the Respondent contracted the Appellant to undertake works on certain roads for one year. Between November 1999 and March 2000 the Appellant presented invoices to the Respondent for payment. The Respondent paid part of the sum claimed and extended the contract to August 2000. While the extended contract was still subsisting the Respondent invited pre-qualification tenders for the same job.

The Appellant felt it was entitled to the contract to the exclusion of all others. To assert that right and to recover the sums it alleged comprised the balance owed, the Appellant filed a case in the High Court.

The Respondent filed a defence to the suit and denied owing the Applicant any money. The Respondent said that the Applicant had claimed for greater amounts of work than had been done and had claimed under the wrong category. While that case was pending the Appellant wrote a demand notice to the Respondent for the other amount and threatened to institute winding-up proceedings if their money was not paid within a certain number of days. This letter was copied to many persons not involved in the dispute including the World Bank's country representative and various embassies.

The Respondent replied to the notice and informed the Applicant that the subject of the demand was in dispute and already in court, and that they should withdraw the notice for winding-up proceedings.

The Respondent alleged that the threat to institute a winding-up petition was meant to harass and intimidate the Respondent, and cause it to abandon its defence in the pending suit.

The Appellant refused to withdraw the notice. The Respondent then filed suit (the second suit) against the Appellant for a declaratory order that the Appellant was not entitled to file a winding-up petition against the Respondent in respect of the disputed debt and for an order for an injunction restraining the Appellant from filing a winding-up petition until the earlier suit was determined. Simultaneously the Respondent applied for a temporary injunction against the Applicant for the same reliefs. The High Court heard and considered the application and gave the temporary order against which the Appellant appealed.

Held – The Respondent had substantial defences in the earlier suit and there existed a *bona fide* dispute. The debt in dispute could therefore not form the basis of a winding-up petition.

The reckless distribution of copies of the demand letter that prompted the second suit, to all manner of people, was to intimidate the Respondent and undermine its credibility with Kenya's development partners and donors. Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it; *Re a company* [1894] 2 Ch 349 followed.

There was no proper basis for instituting a winding-up petition as the debt in question was disputed and the court had not made a decision upon it.

The appeal was dismissed.

Case referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

United Kingdom

Re a Company [1894] 2 Ch 349 – **F**

Judgment

KWACH, SHAH AND O'KUBASU JJA: On 25 July 2000 Matic General Contractors Limited (hereinafter called "the Appellant") filed a suit High Court civil case number 1326 of 2000 in the superior court against Kenya Power and Lighting Company Limited, the Respondent in this appeal (hereinafter called "Kenya Power") seeking the following, among other reliefs:

(a) an injunction restraining Kenya Power, from accepting opening or confirming any pre-qualification documents from any other prospective contractors for the contract for opening, cutting and reinstatement of roads, pavements footpaths and laying of underground power cables within the city of Nairobi and its environs et cetera.

(b) KShs 28 686 121 with interest at 31 per cent per annum from 5 December 1999 until payment in full.

(c) a declaration that the Appellant was entitled to the exclusive performance of the Contract and the profits thereof.

The averments in the plaint in case number 1326 of 2000 run into 26 paragraphs. The gist of the claim was that in March 1999, Kenya Power contracted the Appellant to undertake the works to which I have already alluded. The contract price was to be computed by a formula agreed between the parties and payment was to be effected upon satisfactory completion of each job and within 30 days from the date of receipt by Kenya Power of the Appellant's invoice. The contract was for one year from 10 March 1999 terminable for failure to perform.

No formal contract was signed but the Appellant carried out the works and between 5 November 1999 and 30 March 2000 the Appellant presented invoices totalling KShs 41 462 239 for work done up to that point. Kenya Power paid KShs 12 776 118 leaving a balance of KShs 28 686 121. While this amount was still outstanding, Kenya Power extended the Appellant's contract to 26 August 2000. It was while this extended contract was still subsisting that Kenya Power invited pre-qualification tenders for the same job. The Appellant felt it was entitled to the contract to the exclusion of all others, and it was in order to assert that right and to recover the sums it alleged were owed to it by Kenya Power for the work he had already done, that the Appellant filed case number 1326 of 2000.

On 15 August 2000 Kenya Power filed a defence and denied the Appellant's claim in its totality. In paragraph 4 of the defence Kenya Power averred:

> "(4) The work done by the Plaintiff was not satisfactory and the claims put forward by the Plaintiff were incorrect and overstated in that the Plaintiff has claimed for greater amounts of work than had been done and claimed under the wrong categories in the contract".

Particulars given under paragraph 4 of the defence showed that work for which the Appellant claimed KShs 40 956 748-15 was worth only KShs 17 204 021-05, an overcharge of some KShs 23 752 727-10. It was also pleaded in the defence that any certificates issued by employees of Kenya Power were incorrect and were issued in error and by mistake, and that the errors and mistakes in the certificates were known to the Appellant. On the correct valuation of the work done by the Appellant, its claim had been paid in full and that Kenya Power did not owe it any money.

I have attempted to summarise the pleadings in case number 1326 of 2000 in order to demonstrate that Kenya Power denied liability for the amount the Appellant was claiming from it for the work allegedly done by the Appellant under the contract. Kenya Power denied being indebted to the Appellant in the sum claimed or any other amount or at all.

While case number 1326 of 2000 was still pending, and it is still pending to this day, the Appellant on 21 August 2000 sent a letter of demand to Kenya Power for KShs 31 449 512-37. The last three paragraphs of that letter were in the following terms:

> "This is therefore to demand immediate payment of our aforesaid outstanding amount failure to which (*sic*) we shall commence winding-up proceedings against Kenya Power and Lighting Company Limited without any further reference.
>
> We shall take this step because we have facts to believe that at the time the suit pending in court is finally determined you will not be able to settle the outstanding amount due to your bad financial position.
>
> By copy of this letter we do hereby instruct our lawyers to proceed with winding-up proceedings unless full payment is received on or before the expiry of the 21 days winding-up notice".

This letter, which was just a demand letter from a creditor to his debtor to pay a debt, was for some strange reason copied to all sorts of people including Mr Harold Wackman, country director, World Bank, Nairobi; ambassadors of France and Spain in Nairobi; Chief Executive Officers of ABN-AMRO Bank, African Development Bank, Standard Chartered Bank Kenya Limited, Co-operative Bank of Kenya Limited and Kenya Commercial Bank Limited. On 23 August 2000 the Appellant sent to Kenya Power by registered post a notice

under section 220 of the Companies Act (Chapter 486) requiring Kenya Power to pay KShs 31 449 512-37 within 21 days, failing which Kenya Power would be deemed to have been unable to pay its debts within the meaning of that section. The idea was that if this was true and Kenya Power did not pay the debt, the Appellant would then present a petition in the High Court for its winding up.

On receipt of that notice, Kenya Power instructed the firm of Hamilton Harrison and Mathews, advocates, who wrote to the Appellant's advocates on 25 August 2000 and stated *inter alia*:

> "The monies the subject of the notice under section 220 of the Companies Act are the subject matter of the pending court case, High Court civil case number 1326 of 2000. This fact is well known to you and your client. The debt is disputed.
>
> The fact is also well known to you and your client.
>
> *Winding up proceedings cannot be used for the recovery of disputed debts. The serving of the Winding Up notice is intended solely to embarrass and harass our client and prevent our client from pursuing its defence in court.*
>
> We require immediate confirmation in writing that the notice under section 220 of the Companies Act has been withdrawn together with an undertaking not to file a winding-up petition until there is a final decision in High Court civil case number 1326 of 2000.
>
> If we do not receive these undertakings by 4:00pm on Wednesday, 30 August 2000, our instructions are to immediately file court proceedings for an injunction to prevent any winding-up petition being filed and to prevent any repetition of the defamatory statements"(emphasis added).

PL Mutuli and Company, advocates for the Appellant, wrote back to Hamiltons on 28 August 2000 stating *inter alia*:

> "We are instructed that our client shall not withdraw the letters nor offer any apologies for the statements in the said letters as demanded by your client or at all. We are further instructed that no amount of intimidation, harassment, or threat by your client legally or politically will stop ours from pursuing its legal rights".

The advocates ended the letter by reiterating that the Appellant had hard facts and proof about Kenya Power's financial position and that the Appellant would plead justification in the event that a suit was filed against their client. Subsequent correspondence developed into a stalemate and in order to safeguard its position, Kenya Power filed High Court civil case number 1560 of 2000 on 31 August 2000, which is the subject matter of this appeal. It asked for two main prayers, namely, an injunction restraining the Appellant, its agents or servants from presenting or advertising winding-up proceedings for KShs 31 449 512-37 until that case and case number 1326 of 2000 are heard and determined; and a declaration that the Appellant was not entitled to file a winding-up petition against Kenya Power in respect of a disputed debt.

Simultaneously with the plaint Kenya Power also applied for a temporary injunction seeking the same reliefs Order 39, rules 2 and 3 of the Civil Procedure Rules. It was that application which Mbaluto J heard and in a considered ruling gave the orders sought by Kenya Power and against which the Appellant now appeals to this Court.

There are 17 grounds of appeal but for the purposes of this judgment I will deal only with grounds one, four and six. The other grounds are largely argumentative and are in my opinion irrelevant to issues in dispute in this appeal. The complaint in ground one is that the Learned Judge erred in law and in fact

in holding that the pendency of another suit is an acknowledgment by the Appellant that there is a dispute. In his ruling the Learned Judge dealt with this point in this way at page six:

> "The problem involved in this matter is not so much the Plaintiff's inability to pay the debt but rather the dispute about it. That there is a genuine and *bona fide* dispute between the parties is established by the fact that even before giving the winding-up notice the Defendant had filed a suit being High Court civil case number 1326 of 2000, in which one of the remedies sought was the recovery of KShs 28 686 121. In my judgment the filing of the suit is a clear acknowledgment by the Defendant of the dispute. Because of that the dispute regarding the recovery of the sum of KShs 28 686 121 by virtue of which the Defendant deemed it necessary to bring an action, the Defendant cannot now be heard to say, as it attempts to do in this matter, that the debt of KShs 28 686 121 or thereabout is not *bona fide*".

Mr *K'Owade*, for the Appellant, submitted that the finding by the Learned Judge that the debt was disputed was erroneous, and that it was a determination which the Judge could not make before hearing full evidence. He also said something about the shaky financial position of Kenya Power being a matter of public knowledge. With respect, I cannot accept this submission. After the Appellant filed case number 1326 of 2000, Kenya Power filed a defence and denied owing the Appellant any money as the Appellant had been paid in full for work it had done under the contract. It was also averred in the defence that the Appellant's claim had been concocted and was based on fraudulent certificates. In some cases, it was alleged, payment was sought for roads which did not exist. These are substantial defences which cannot be dismissed as disclosing no reasonable defence to the Appellant's claim. In the present case the dispute is not just over the amount of the debt but also as regards the existence of the debt. It is a *bona fide* dispute and until it is resolved it cannot form a basis for mounting a winding-up petition. This conclusion takes care of ground four of appeal which is that the Learned Judge erred in finding that there was a *bona fide* dispute over the claim in case number 1326 of 2000.

The Appellant's complaint in ground six is that the Learned Judge erred in law and in fact in placing a lot of weight and reliance on the motive of the Appellant in issuing the winding-up notice. Right from the start Kenya Power offered to provide a bank guarantee for the Appellant's claim. There is a letter to this effect from Standard Chartered Bank Kenya Limited dated 20 August 2000. This offer was rejected by the Appellant. Then there is the letter of demand dated 21 August 2000 to which I have already alluded. That letter was copied to all manner of people including the local representative of the World Bank, French Embassy and the Spanish Embassy. The Appellant's motive in this reckless distribution of copies of the letter was obviously to intimidate Kenya Power and undermine its credibility with Kenya's development partners and donors. I cannot imagine anything more egocentric.

In the case of In *Re A company* [1894] 2 Ch 349, it was held that where a petition against a company is presented ostensibly for at winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it.

I have no doubt in my mind that the Learned Judge was right in placing emphasis on the Appellant's motives, which in my view, were completely dishonourable. A winding-up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim that seems to me to require that the court should proceed cautiously. Here was a debt which Kenya Power disputed vigorously on substantial grounds and the Appellant was threatening Kenya Power with what really amounted to imminent corporate execution. Kenya Power had no alternative but to approach the court for redress having regard to the Appellant's intransigence. In my view until case number 1326 of 2000 is heard and finally determined the amount claimed in that case by the Appellant cannot form the basis of a petition for winding-up Kenya Power. A petition based on it would constitute a gross abuse of the process of the court.

I agree with the decision of the Learned Judge in every respect. I can detect no misdirection of any kind would lead me to think that he exercised his discretion wrongly. The debt was disputed on substantial grounds and the Appellant's motive in sending copies of the letter of demand to the chief executives of leading local banks, two diplomatic missions and the World Bank was quite clearly to put pressure on Kenya Power to abandon its defences and pay up. I would dismiss this appeal with costs to Kenya.

As Shah and O'Kubasu JJA also agree it is so ordered.

For the Appellant:
Mr K'Owade

For the Respondent:
Information not available

Mbugua v Mbugua
[2001] 2 EA 445 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 May 2001
Case Number:	1489/97
Before:	Visram J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Family law – Matrimonial property – Company shares – Whether court has jurisdiction under section 17 of English Married Women's Property Act 1882 to deal with question of beneficial interest in company shares.

[2] Family law – Matrimonial property – Direct contribution – Wife managing family business – Proceeds from family business used to acquire property – Property in husband's name – How to determine wife's share of property – Joint bank account – Proportion of ownership – Indirect contribution – Wife had left home without notice on previous occassions – Whether property was

acquired through joint efforts of both parties – Whether trust can be implied in the circumstances – Section 17 – Married Women's Property Act.

Editor's Summary

The Applicant was married to the Respondent in September 1981 and bore him six daughters. At the time of their marriage, they were both in salaried employment and neither had any capital property. In 1996 the Appellant left the matrimonial home and separated from her husband. Her husband had in his possession several properties including six pieces of land, various motor vehicles, shares in two companies and household goods.

The Applicant claimed to be entitled to an equal share in the aforesaid properties on the ground that the same had been acquired through the joint efforts of both parties. In support of her claim for direct contribution, she stated that she had resigned from her job and run the family business, Wachuchu Enterprises, from 1989 onwards. Some of the properties had been purchased from the proceeds of Wachuchu Enterprises but they were in the sole possession of the Respondent. Wachuchu Enterprises was a registered company and both parties were shareholders. The Applicant therefore sought a declaration on the proportion of ownership in Wachuchu Enterprises taking into account her active involvement in its affairs, and in another company wherein the husband held shares.

In support of her claim for indirect contribution, the Applicant stated that she had paid for household expenses of the family while her husband had paid for rent and other outgoings. However, it was common ground that the marriage had been stormy from the beginning. This situation had been partly caused by disputes over money. The parties had not realy pooled their resources effectively together. Evidence was led to show that the Applicant had abandoned the family on certain occassions, and that she had once travelled to London and withdrawn a large sum from the couple's joint bank account.

The husband contested the claim of the wife for an interest in any of his property. He denied any direct or indirect contribution from her. He alleged that she had placed an emotional strain on the marriage and had often been absent from home, and that a house-help had had to be employed to assist with the children. The husband added that he had even gone out of his way to purchase a property for his wife, which was in her possession.

The issue for determination was whether the Applicant was entitled to any share in the aforesaid properties, and if so to what extent. The court also considered whether title to company shares could be dealt with in an application under section 17 of the English Married Women's Property Act 1882

Held – To succeed in the section 17 application, the Applicant had to show that she contributed directly or indirectly to the acquisition of the properties claimed. The fact that the property was acquired during coverture was not, of itself, sufficient to entitle the claimant to a share therein. *Kimani v Njoroge* [1997] LLR 553 (CAK) (partial dissent of Gicheru JA) approved; *Kamore v Kamore* [2000] 1 EA 80 (CAK) followed.

Regarding the immovable property acquired solely from the husband's finances, the wife had failed to show any contribution to their acquisition. Considering that she had no knowledge of building construction, the fact that she had visited the site during construction of one of the properties did not by itself entitle her to any share therein.

Since the family business was owned by a limited company of which the parties were shareholders and directors, each of the parties was entitled to his/her shareholding in that company. Any dispute as to the company's management should be resolved under the Companies Act (Chapter 486). The court would therefore not entertain the Applicant's contention that the husband had altered the shareholding without consulting her.

Property acquired from the company and registered in the husband's name or in his possession should be shared in the proportion of the spouses' respective shareholdings. The fact that the wife worked for the company would not by itself imply an enhancement of her shareholding therein.

The parties were entitled to an equal share of the money held in joint bank accounts. The fact that the husband intended the money to be used for the benefit of the children did not change the title of the spouses to the same.

The wife's claim for indirect contribution would not stand. She had been equally absent from home and had not pumped much into the family coffers by her absence. Though she looked after the children, this is was a moral duty incumbent upon every mother. She had not shown any special input, considering that her husband had also spent time with the children, to justify her claim for any beneficial interest in her husband's property. *Gatimu v Gatimu* Nbi HCCC 1137/1999 distinguished.

Per curiam

(i) On the exercise *by* the court of powers under section 17 of the Married Women's Property Act:

(a) the court has no power to transfer title from one spouse to the other – *Pettitt v Pettitt* [1969] 2 All ER 365 approved, *Kamore* (*supra*) followed, *Midland Bank plc v Cooke and another* [1995] 4 All ER 562 distinguished;

(b) where both spouses contributed to the property but there was no understanding about sharing the beneficial interest therein and the spouse with title evinced no intention that the contributing spouse should share the same, the question of whether the contributing spouse is entitled to a beneficial interest is dependent on the law of trust – *Gissing v Gissing* [1971] AC 888 approved;

(c) there is no distinction to be drawn between direct and indirect contributions, except that in the latter case the relevant share in the beneficial interest is likely to be less easy to evaluate;

(d) a trial judge hearing a section 17 application should take into account the wife's back-up service on the domestic front in determing her beneficial interest in the property acquired during coverture – *Nderitu v Nderitu* [1997] LLR 2731 (CAK) followed;

(e) even where the wife had made measurable financial contributions to the family income and property, the court should also consider her substantial indirect contribution in paying for household expenses, food and clothing, schooling of the children and enhancing the family welfare – *Kivuitu v Kivuitu* [1991] 2 KAR followed;

(f) where it is difficult to make a precise estimate of the wife's share, a rough estimate should be made, which does not mean presuming equality of contribution – *Gissing* (*supra*) approved

(ii) Company shares can be dealt with under a section 17 application regardless of whether only one or both parties are shareholders therein. *Mungai v Mungai* [1995] LLR 405 (CAK) distinguished; *Mereka v Mereka* Nbi HCCC 32/1986 approved (principle not followed).

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Gatimu v Gatimu Nairobi HCCC No 1137/1999 – **D**

Kamore v Kamore [2000] 1 EA 80 (CAK) – **F**

Kimani v Njoroge [1997] LLR 553 (CAK) – **APP**

Kivuitu v Kivuitu [1991] 2 KAR – **F**

Mereka v Mereka Nairobi HCCC number 32/1986 – **APP**

Mungai v Mungai [1995] LLR 405 (CAK) – **F**

Nderitu v Kariuki [1997] LLR 2731 (CAK) – **F**

United Kingdom

Gissing v Gissing [1971] AC 888 – **APP**

Midland Bank plc v Cooke and another [1995] 4 All ER 562 – **D**

National Provincial Bank [1965] 2 All ER 4721

Pettit v Pettit [1969] 2 All ER 385 – **A**

Judgment

VISRAM J: This originating summons is brought under section 17 of the Married Women's Property Act [1882] (hereinafter referred to as "the Act") by Mrs Agnes Wanjiku Mbugua (hereinafter referred to as "the Applicant") against her husband Mr James Mbugua Macharia (hereinafter referred to as "the Respondent"). The Applicant seeks, amongst other orders, a declaration that a number of named properties, both movable and immovable, acquired by the joint efforts and funds of both parties during their marriage and presently in the possession of the Respondent are jointly owned by the Applicant and the Respondent.

The parties were married on 5 September 1981. They were blessed with 6 children, all daughters. These were:

(a) Anne Wachuchu born on 20 June 1982;

(b) Elizabeth Thogori born on 23 May 1983;

(c) Martha Wanjiru born on 15 November 1984;

(d) Eve Wariara born on 2 April 1988;

(e) Teresia Wangari born on 21 July 1991; and

(f) Catherine Wangui born on 15 June 1994.

All these children are now living with the Respondent. They are all in school and their education expenses are being met by the Respondent. There is no doubt that he is also responsible for their daily upkeep.

At the time of the marriage, the Applicant was employed as a secretary at Printing and Packaging Corporation Limited at a salary of KShs 2 800 per month and the Respondent was an Engineer at the Nairobi City Council at a salary of KShs 4 445 per month. At that time, none of them had any capital property. They started their married life in a rented house at Kariobangi South, Nairobi. They separated in 1996, and although the marriage is still in existence, there is pending in the Court of Appeal an action for judicial separation.

During the course of the marriage, several properties were acquired. These were as follows:

1. Plot No. 279, Ngei I;
2. Plot No. 570, Kayole;
3. Plot No. 930, Plainsview;
4. L.R. No. 10060/10, Nairobi at Dandora;
5. Kiambaa/Kihara/1372;
6. L.R. No. 80/7 (original number 80/4(1), Kiambu;
7. KYE 815 Peugeot saloon
8. KZP 107 BMW saloon;
9. KWS 070 Isuzu Truck – This having been sold by the time of the hearing;
10. KAC 126W Peugeot 504 pick-up;
11. KUZ 321 Peugeot 504 pick-up This having been sold by the time of the hearing;
12. Shares of the Respondent in Machiri Construction Limited (hereinafter referred to as “Machiri Construction”)
13. Shares of both parties in Wachuchu Enterprises Limited (hereinafter referred to as “Wachuchu Enterprises”)
14. KAD 828Y Peugeot 205 saloon;
15. KAA 11 9X Isuzu truck;
16. Four sofa sets;
17. Three Sony TV sets;
18. One Trident TV set;
19. One Sony Video;
20. One Philips Video;
21. One Sony music system;
22. One Panasonic radio cassette;
23. Six children’s beds, one double bed and two visitors beds;
24. One fridge;
25. One four-burner cooker;
26. Two computers with printers; and assorted crockery and beddings.

Apart from Plot 930, Plainsview, all the other properties are in the possession of the Respondent. The Applicant is in possession of Plot No. 930 Plainsview by virtue of a court maintenance order. That aside, it was not disputed that the Respondent bought L.R. number 26 Komorock South for the Applicant.

In her affidavit, the Applicant included Plot No. 188 of Kiambu Road and another unknown Plot at South C but there was no evidence to show that these two properties belonged to the Respondent. Apart from the properties already mentioned, the parties also operated two joint accounts with

Barclays Bank PLC in London, Britain. Those accounts were opened by the

Respondent in 1988 in his name. The Applicant was later made a signatory to them in 1991.

The Applicant was employed since the date of the marriage until 1989 when she resigned to run a family business. That business was a supermarket owned by Wachuchu Enterprises of which the parties were shareholders.

Although the marriage between the parties was graced with six children, it cannot be described as having been a comfortable one. In the Applicant's own words, the relationship was "stormy from the beginning". The Respondent, on the other hand, said that it was "no marriage at all". The Applicant's parents did not support that marriage. They looked down upon the Respondent as a poor man. In December 1981, barely three months after the marriage, the Applicant's parents took her away from the matrimonial home. In September 1982, the Applicant left the matrimonial home without informing the Respondent. Finally she left the matrimonial home in 1996 to an undisclosed destination without informing her family. It was later found out that she was in London.

The Applicant claims to be entitled to an equal share in the matrimonial properties on the ground that the same were acquired through the joint efforts of the parties. The Respondent, on the other hand, denied the Applicant's contribution to the purchase or acquisition of the properties registered in his name and the matrimonial property as a whole. He stated that those properties were bought from his own personal resources. He also stated that the Applicant had not contributed in any way to the London Bank accounts mentioned earlier.

The issue for determination in this case is whether the Applicant is entitled to a share in the matrimonial properties mentioned earlier and if so, to what extent.

Section 17 of the Act provides as follows:

> "In any question between husband and wife as to the title to or possession of property, either party … may apply by summons or otherwise in a summary way to any judge of the High Court of Justice … and the judge … may make such order with respect to the property in dispute … as he thinks fit …"

The provisions of this section gives the court power, in a proper case, to make such orders as it deems fit where there arises any question between the husband and wife as to the title to or possession of matrimonial property.

In order to succeed on an application under section 17 of the Act it is incumbent upon the Applicant to show that she contributed directly or indirectly to the acquisition of the properties claimed. The fact that the property was acquired during coveture is not, of itself sufficient to entitle the Claimant to a share in it. On this point Gicheru JA said as follows in *Kimani v Njoroge* [1997] LLR 553 (CAK) (Himself Omolo and Lakha JJA) (cited in *Kamore v Kamore* [2000] 1 EA 80 as interested Party Tunoi, Shah and Bosire JJA:

> "It was for the Appellant to prove on a balance of probabilities that she directly or indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was *invariably to be considered in its own special circumstances*. That onus of proof the Appellant, from the evidence available before the Learned trial Judge, was unable to discharge. To counsel, therefore, she was not entitled to any share of the properties set out in the judgment. [T]he Appellant's claim in the superior court was dependent on evidence of her direct and/or indirect contribution

> towards the acquisition of the properties listed in the originating summons in that court … It is only with that kind of evidence that the trial court would have been able to say what its effect in law was for as was observed by Lord Morris of Borth-Y-Gest in *Gissing v Gissing* [1971] AC 888 at 898C and D:
>
> > 'The Court does not decide how the parties might have ordered their affairs: it only finds how they did. The Court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony had been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment' ".

Although section 17 of the Act gives the court wide powers in these matters, there are now established certain principles upon which that power may be exercised. I will discuss those principles briefly as follows.

To begin with, section 17 of the Act does not in any way give the court power to substitute title from one spouse to the other or to give a portion of the title to one of the spouses. If it were otherwise, it would mean that the court could effectively change the title of the property from one of the spouse to another contrary to the intention of section 17 of the Act. That section does not cater for such drastic invocation. The Court of Appeal sounded this position clearly in the famous *Kamore* case (*supra*). In that case, the court quoted with approval the following statements by the Learned Law Lords in the House of Lords in the case of *Pettit v Pettit* [1969] 2 All ER 385:

> "I would approach the question this way. The meaning of the section cannot have altered since it was passed in 1882. At that time, the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put husband's property at the hazard of the unfettered discretion of a judge (including a county (*sic*) court judge) if the wife raised a dispute about it. Moreover, this discretion if it exists, can only he exercised in proceedings under section 17 (of the Act); the same dispute could arrive in other forms of action: and I find it even more incredible that it could have been intended that such a discretion should be given to a judge in summary proceedings but denied to the judge of ordinary character. It is perfectly possible to construe the words its having a much more restricted meaning and in my judgment they should be so construed. I do not think a judge has any more right to disregard property rights in section 17 proceedings than he has in other form of proceedings" (per Lord Reid at 388).
>
> "But when an application is made under S 17 there is no power in the court to make a contract for the parties which they have not themselves made, Nor is there power to decide what the court thinks what the parties could have agreed had they discussed the possible break-down or ending of relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17" (per Lord Morris of Borth-Y-Gest at 398 F).
>
> "The matter has now been again fully argued and the same authorities, considered together with the relevant statutes which preceded the Act of 1882 and I would only say that I adhere to the opinions expressed in the *National Provincial Bank* case [1965] 2 All ER 4721 in effect re-affirming the language of Romer LJ in *Cobb v Cobb* when he said –
>
> 'I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed properly and frequently has to do so on very little material, but where as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot

> in my opinion under S 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement way unfair' " (per Lord Hodson at 401A).
>
> "In my view, S 17 is purely procedural section which confers on the judge in relation to questions of the title no greater discretion then (sic) he should have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must he remembered that apart altogether from section 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that in my opinion, section 17 now disappears from the scheme and the rights of the parties must be judged on the general principles applicable in an Court of law when considering the questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those who are not so related whilst making full allowances in view of that relationship" (per Lord Upjohn at 405F).
>
> "I agree with your Lordships that the section confers no such powers on the court. It is, in my view, a procedural section. It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between the husband and wife as to the title to or possession of any property – not limited to 'family assets' as I have defined them. It is available while husband and wife are living together as well as when the marriage has broken up. The power conferred on the judge to 'make such order with respect to property in dispute … as he shall think fit' gives him a wide discretion as to the enforcement of the proprietary or possessory rights of the spouse in any property against the other but confers on him no jurisdiction to transfer any proprietary interest in property" (per Lord Diplock at 411G).

The court which decided the *Kimani v Njoroge* case also followed the *Pettit* case. Although the law in England has been changed so that *Pettit* case (*supra*) is no longer good law there, the Learned Judges of Appeal in the *Kamore* case stated without doubt that the *Pettit* case and *Gissing* case were good law in Kenya. The change in England was brought about by statutory enactments which has not happened in Kenya yet. For this reason, the case of *Midland Bank plc v Cooke and Another* [1995] 4 All ER. 562 relied on by the Applicant is irrelevant as it is not applicable in this country. That decision was decided in light of English statutory changes which rendered the *Pettit* case bad law in England. That is not the case in Kenya.

The *Gissing* case opened the way to seek relevant relief under section 17 of the Act by pleading trusts: express, implied or resultant. This had not been appreciated at the time of the *Pettit* case. The facts in the *Gissing* case were as follows:

The parties were married in 1935. In 1951, the matrimonial home was purchased for £ 2 695 and conveyed into the sole name of the Appellant. The purchase price was raised as to £ 2 150 on mortgage repayable by instalments, as to £ 500 by a loan to the Appellant by his employers, and the balance of £ 45 and the legal charges were paid by the Appellant from his own money. At no time was there any express agreement as to how the beneficial interest in the matrimonial home should be held. The Respondent (who was earning £ 500 per annum) made no direct contribution to the initial deposit or legal charges, nor to the repayment of the loan of £ 500 nor to the mortgage instalments. The Respondent provided some furniture and equipment for the house and for improving the lawn and in all spent £ 220 on this. The Respondent also paid for her and her son's clothes and some extras. It was not suggested that either the Respondent's efforts or earnings made it possible for the Appellant to raise

the £ 500 loan or the mortgage. Nor was it suggested that the purchase of the Respondent's clothes, or her son's was undertaken to assist the Appellant in meeting the repayment of the loan or the payment of the mortgage instalments which he undertook. The Appellant also paid the outgoings on the house and gave to the Respondent a housekeeping allowance, and he paid for the holidays. In 1961, the marriage broke down and, in 1966, the Respondent obtained a decree absolute. On the question whether the Respondent had any beneficial interest in the former matrimonial home, the House of Lords held that on the facts it was not possible to draw an inference that there was any common intention that the Respondent should have any beneficial interest in the matrimonial home. In summary, the *Gissing* court stated that where:

(a) both spouses contributed towards the purchase of matrimonial property, which was conveyed into the name of one spouse only; and

(b) there was no discussion, agreement or understanding between the spouses as to the sharing of beneficial interest in the matrimonial property; and

(c) the spouse in whose name the matrimonial property was purchased evinced no intention that the contributing spouse should have a beneficial interest therein,

the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial property is a matter dependant on the law of trust.

Lord Reid said as follows in *Gissing* case (*supra*) at 792:

> "If there has been no discussion and agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?"

In these matters, there is no distinction to be drawn between the position where a contributing spouse makes direct contributions towards the purchase of the matrimonial property and where the contributing spouse makes indirect contributions, although in the latter case the relevant share in the beneficial interest is likely to be less easy to evaluate. On this question Lord Pearson said as follows at 788 of the *Gissing* case (*supra*):

> "Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments".

The cases which present problems and the common ones in our country, are where the other spouse made an indirect contribution to the acquisition of the matrimonial property. That contribution has been recognized by our courts very well. In *Nderitu v Kariuki* [1997] LLR 2731 (CAK) (Kwach, Shah and Pall JJA), Kwach, JA said as follows on the question:

> "A wife's contribution, and more particularly a Kenyan African wife, will more often than not take the form of back-up service on the domestic front rather than a direct financial contribution. It is incumbent, therefore, upon a trial judge hearing an

> application under section 17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration".

In *Anne Matanu Kivuitu v Samuel Muhia Kivuitu* [1991] 2 KAR the Court of Appeal held that although the wife had made measurable financial contributions to the family income and to the acquisition of the matrimonial property, that was too narrow a basis on which to determine the parties' respective shares in the matrimonial home. The Court of Appeal ill that case was of the view that since the wife had made a substantial indirect contribution to the family income and assets by using her income to pay for household expenses, to prepare food and clothing the children, organizing their schooling and generally enhancing the welfare of the family, she was entitled to a share in the matrimonial home registered in the name of her husband. Where it is claimed that the other spouse made an indirect contribution, the fact that there is a difficulty in evaluating the relevant share does not of itself justify the application of the maxim "equality is equity" where the fair estimate of the intended share may be some fraction other than one-half. On this question Lord Reid said as follows at 782–783:

> "It is perfectly true that where she does not make direct payments towards the purchase of it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brocard 'Equality is equity' has been misused. There will be many cases where half share is a reasonable estimation, but there will be many cases where a fair estimate might he a tenth or a quarter or sometimes even more than a half".

In determining the share, one of the considerations to look at is the benefit gained by the party in possession of the matrimonial property during the period of exclusive possession as did the court in the *Kamore* case (*supra*).

It must be remembered that an application under section 17 of the Act deals with the property held by the husband and not that of third parties. Such an application cannot, therefore, cover property owned by a limited liability company which is a separate entity. That is perfectly clear. At this point it is opportune to ask whether an application under section 17 of the Act can cover shares of a party held in a limited liability company. The Respondent's advocates argued that that cannot be the case. In this regard, they relied on the case of *Mungai v Mungai* [1995] LLR 405 (CAK) (Kwach, Tunoi and Shah). In that case the Appellant had filed a petition for divorce and an originating summons under section 17 of the Act against her husband, the Respondent. Both suits were pending when she filed two petitions in this Court seeking, in each case, an order for the winding-up of two companies Magana Holdings Ltd and Muni Limited. The Appellant hold one share in Muni Ltd while the Respondent held 399 shares. Muni Limited was the majority shareholder in Magana Ltd. The trial Judge (Ole Keiwua J (as he then was)) struck out the two winding-up petitions on the grounds that they did not show any cause of action and were an abuse of the process of the court. He said that:

> "In view of the existence of an application under section 17 of the Married Women Property Act to declare the petitioner's rights to property, these petitions may be viewed as brought to embarrass and pressurize the Respondents (*sic*). Although I have not seen that application, maybe one of the orders would include declarations as to the extent of the petitioner's rights in the companies in view of her statement in paragraph 6 of the petition that site assisted in the raising of the monies used to buy these companies".

The Court of Appeal reversed this decision saying that the jurisdiction under the Act and the Companies Act (Chapter 486) were separate and independent of each other, Kwach JA said as follows: "The application under section 17 of (the Act) could only deal with property held by the Respondent as a husband. It could not cover shares held by the Respondent in a Ltd company in which the wife also held shares in her own right" (underling supplied).

Shah JA said as follows:

> "It would in my view be wrong to infer, merely because a section 17 application under (the Act) way pending between the parties who are co-shareholders in a company, that the winding-up petition was an abuse of the process of court. The law gives rights to seek such remedies as the parties may be entitled to. If different Acts of Parliament give rights to parties to ventilate their grievances in court, then the law must take its course, subject of course to the court being able to say that the Defendant/Respondent ought not to be vexed again in a matter pending earlier in another court In the instant cause there was no evidence before the Learned Judge that the issue of the Appellant's entitlement under the Act of 1882 was in any manner intertwined with the issue of winding up of the company. The 1882 Act remedies are of a special nature. Section 77 of the 1882 Act being a procedural section merely declares the rights of a married woman to properties jointly held by spouses or by the husband. That Act cannot decide anything that a company Court exercising its independent and separate jurisdiction under the Companies Act (Chapter 486) can decide. The two jurisdictions are totally independent of each. The wife's rights under section 17 of (the Act of) are separate and distinct from her rights as a shareholder/director of a company. The companies court will not make decisions (and cannot do so) as to property rights of the Appellant and the matrimonial court cannot make decisions declaring the Appellant's rights as a director/shareholder of a company. Even if there may be some overlap eventually that can be no ground for saying that section 17 of the Act of 1882 application overtakes the winding-up petition".

The reason I have produced the judgments of Kwach and Shah JJA is as follows: The question whether shares in a company can be a subject of an application under section 17 of the Act was not directly in issue in the *Mungai* case (*supra*). However, the two judgments shed some light on the Respondent's contention on the question. In my view, the *Mungai* case does not in any way support the proposition that shares owned in a limited liability company cannot be the subject of an application under section 17 of the Act. There is no doubt that the Respondent relied on the statement by Kwach JA quoted earlier. It is not clear what the Learned Judge meant to say but that statement does not, to my mind, support the proposition advanced for the Respondent. If it does, it would be very hard to justify in view of what follows. Does it then mean that section 17 would cover shares held by a husband in a limited company in which the wife held no shares? In any event, that statement would not cover situations where the wife is not only claiming her shares in a limited liability company in which her husband is also a shareholder but also claiming to be entitled to some of his shares quite apart from company law principles. It may also be asked as follows: If shares are the property of the husband, what would prevent them from being the subject of an application under section 17 of the Act? In my view, shares in a limited liability company are subject to an application under section 17 of the Act notwithstanding the fact as to whether both parties are shareholders in that company or only one of them. In fact, although the decision of this Court in the *Mungai* case (*supra*) was reversed by the Court of Appeal, a close reading of it reveals that it supports the proposition that shares in a limited liability company can be made a subject of an application

under section 17 of the Act. That aside, the judgment of Shah JA does not in any way say that such a claim cannot be made under section 17 of the Act. In my view, the *Mungai* case only says that proceedings under the Act are distinct and separate from proceedings under the Companies Act. That case, in fact, supports the proposition that a person with causes under both Acts may bring them without hindrance. In my view, shares being the property of a husband, are subject to an application under section 17 of the Act. It is only the property of the company which is not subject to an application under section 17 of the Act for the reason already stated. In saying this, I am not alone. This position was accepted by *Ransley* (Commissioner of Assize) in *David Mukii Mereka v Margaret Njeri Mereka* Nairobi HCCC number 32 of 1986 (Milimani Commercial Courts) when he said as follows: "There is nothing in that decision (the *Mungai* case (*supra*) which inhibits a court from dealing with the title to shares under … (the Act)".

That is what he said in his ruling in an interlocutory application. In his final judgment, he said as follows:

> "I do not accept Mrs Odul's (*sic*) submission that this (shares in a limited liability company) is a matter of company law which can only be dealt with under the provisions of the Companies Act. With respect to him a share is property and in proceedings of this kind a court is entitled to make a finding as to who is the true owner of such shares".

I agree with him fully.

Having discussed the above principles, can it be said that the Applicant is entitled to any share in the matrimonial property registered in the Respondent's sole name or in his possession?

As has already been seen, the Applicant's case is that she made financial contribution and other sacrifices towards the acquisition of the matrimonial property.

In disposing of this application, I will start with the landed property acquired during coveture and registered in the Respondent's name. Those properties have been listed earlier.

It is admitted that the Ngei I property was bought through a loan obtained by the Respondent from his employer. The Applicant also admitted that she made no direct contribution to the acquisition of that property. However, she said that she assisted in the construction of the buildings now erected thereon. At the time this property was acquired, the Applicant was employed. She said that she supervised construction of the buildings on it on weekends and when she resigned from her formal employment in 1989. The Applicant admitted that she did not have any construction knowledge and one is left wondering what supervision she did. There is no evidence at all that she did this. Even if that were the case, I think that what she did was no more than visiting to see the development her husband was carrying out. The same story was said of plot 570 Kayole. This was also acquired from funds raised from the Respondent's employment. There is no evidence of the Applicant's contribution to the acquisition of that property.

The Plot No. 930, Plainsview was acquired through a mortgage obtained by the Respondent from Kenya Re. The Applicant stated in her testimony that she had contributed to its deposit but could not, on cross-examination, remember doing so. That mortgage is still being paid for by the Respondent despite

the fact that this property is in the possession of the Applicant. In the circumstances, there is no evidence that the Applicant contributed to the acquisition of that property.

As to L.R. No. 1006/10, Nairobi at Dandora, the Applicant stated that that property was obtained from the proceeds of the family supermarket which she was managing when she resigned from her employment. This was not controverted in any material way by the Respondent and I have no doubt that it was acquired as stated.

Kiambaa/Kihara property was bought in 1983 from the Respondent's own resources. There is no evidence that the Applicant made any direct contribution to the acquisition of that property.

L.R. No. 80/7 (original number 80(4)1 Kiambu was bought in 1990. Although the Applicant admitted that she made no direct contribution to the acquisition of this property, she said that the same was acquired through proceeds from income from coffee and the supermarket which she was running. This testimony was also not successfully challenged by the Respondent and I accept that it was so acquired.

As to the motor vehicles, the evidence shows as follows:

(a) KYE 815 was bought by the Respondent from his own resources without any contribution from the Applicant;

(b) KZP 107 was bought by the Respondent but he stated that it was owned by Wachuchu Enterprises;

(c) KWS 070 was bought from the proceeds of the supermarket and was owned by Wachuchu Enterprises, although it has now been sold;

(d) KAC 126W was bought from the proceeds of the supermarket and was owned by Wachuchu Enterprises; and

(e) Although the Applicant says that KUZ 321 was bought through the savings of the parties, there is no evidence as to this. This must have been bought by the Respondent from his own personal resources.

As to the shares in Machiri Construction there is no evidence whatsoever of the Applicant's contribution to their acquisition.

Now as to the status of the supermarket it is clear that it was owned by Wachuchu Enterprises of which the parties were shareholders and directors. There can be no doubt that each of the parties is entitled to his/her shareholding in that company. However, any dispute as to the management and running of that company remains a matter to be resolved under Chapter 486. For that reason this Court will not entertain the Applicant's case that the Respondent altered the shareholding without consulting her. That is a matter outside section 17 of the Act. What this Court can deal with is only matter outside the question of title or possession of matrimonial property as established to be the property of the parties or one of them. Having said this, it is clear that property which belongs to Wachuchu Enterprises cannot be a subject of this application. It is property owned by a separate entity apart from the parties.

However, it is my view that property acquired from the proceeds of Wachuchu Enterprises and registered in the Respondent's name or in his possession, if any, ought to be shared amongst the parties according to their shareholding. There is no evidence that the Applicant contributed to the

Respondent's shareholding in that company. He is entitled to his shares in that company alone. However, as I have said, if there is any dispute as to his shareholding, that is a matter to be resolved under Chapter 496. Although the Applicant provided services to the supermarket, there is no evidence that this enhanced or diminished her shareholding in Wachuchu Enterprises. Her shareholding was not affected by the arrangement to have her manage the supermarket. She was working for Wachuchu Enterprises for all practical purposes and her work there must be looked at as such and not in any other way.

As regards the London bank accounts, the same are in the names of the parties and, without more, I declare that the parties are entitled to an equal share of the funds therein. Although the Respondent wanted this Court to believe that he had intended the money in those accounts to be used for the benefit of the children and although it is also clear that he opened those accounts alone and only brought the Applicant to be a co-signatory later, the fact that they were jointly owned is sufficient to make this Court order that she is entitled to half the share of the funds in those accounts. In an application under section 17 of the Act the court deals with the title of the parties to the matrimonial property and not what plans one party had for some particular property.

As has already been seen, apart from the properties acquired from the proceeds from the supermarket, there is no more evidence that the Applicant contributed directly to the acquisition of the properties registered and/or in possession of the Respondent. The only other question is whether she contributed indirectly to the acquisition of those properties.

In her testimony, the Applicant admitted that her marriage to the Respondent was "stormy" from the beginning. Although their accounts were different, there is no doubt that some of their matrimonial disputes wore caused by arguments over money. Further although it is also clear that the Applicant was in salaried employment from the date of marriage there is no evidence at all of monetary harmony between the parties. It may be, as the, Applicant said, that she paid for household expenses while the Respondent paid for rent, electricity and other expenses but it is unclear whether the parties ever pooled their resources together as the Applicant would want this Court to believe. It was her advocate who brought out the evidence that the Applicant's parents were intent to keep the Respondent away from her money. The general evidence does not reveal the Applicant as a responsible and co-operative partner. She came out as an extravagant person who could not hesitate to squander her husband's hard-earned wealth. Why, for instance, did she have to go all the way to London to seek legal advice? That aside, the Applicant did not convince me how she used the UK£ 23 000 she withdrew from the London accounts. She said that she used KShs 600 000 to buy a car and KShs 1,4 million to start a business which failed. It also appears that the Applicant was not only an economic but also an emotional strain on the Respondent and their family. Although there is no doubt that she ensured that food was on the table and saw the children to bed, she does not appear as someone who had her family at heart. She was unreliable and would abandon them without a second thought. It was the Respondent's testimony that on the occasion she left the matrimonial home she did so without information and would not care for their welfare while away. For instance, when she left in 1996, she did not inform them

where she was and during this time her family was subjected to two violent attacks. She did not care: She was in London trying, no doubt, to scratch together what she could as much she could. It must be remembered that each application under section 17 of the Act must be determined on its own facts as was said by Gicheru JA in the *Kimani v Njoroge* case (*supra*). This case is to be distinguished from the case of *Hannah Wanjiku Gatimu v Elkanah M Gatimu* Nairobi HCCC No 1137 of 1999 which is a case which was decided by me sometime last year. The Applicant in that case was found to be a supportive wife, a hospitable mother and a co-worker who always supported her family. At the time of the hearing of her application, she was still supporting her family. She was paying for the education of one of the children of the marriage who was studying at a university and supporting another who was staying with her (the Applicant's) sister. She had accommodated her husband at a house provided by her employer when they started their marriage life. She made substantial contributions to the acquisition of the family property both directly and indirectly. She provided emotional stability to the family when the Respondent was barely home. Most of the property in dispute in that case was acquired after the sale of a joint property of the parties. The Applicant in that case was a special mother and wife. There is nothing common between her and the Applicant in the present case. The Applicant in this case was as much away from the home as the Respondent which forced them to employ a househelp to assist with the children. However, there is nothing much she pumped into the family coffers with her absence. Even if it is assumed for a moment that she paid for food and clothing, there is no evidence at all that this was done to enable the Respondent to acquire the property now in dispute. It may also be true that she ensured that food was on the table and looked after the children but in my view this is a moral duty incumbent upon every mother. That was not any special input to make her lay a claim on her husband's property. It was also not disputed that the Respondent also spent time with the children by "playing" with them. In general, there is no evidence that the Applicant was to have any beneficial interest in the Respondent's property.

In conclusion, therefore, I would say that apart from the properties acquired from the proceeds of the supermarket owned by Wachuchu Enterprises, there is no evidence that the Applicant made any direct or indirect contribution to the acquisition of the property now registered in the Respondent's name or in his possession. I, therefore, make the following findings:

The Applicant is not entitled to any of the properties claimed in her originating summons except the following:

a L.R. No. 10060/10 Nairobi; and

b L.R. No. 80/7 (original number 80/4/1 Kiambu.

Her share in those properties shall be according to her shareholding in Wachuchu Enterprises. The Applicant is awarded the costs of this application. Those shall be the orders of this Court.

For the Applicant:
Information not available

For the Respondent:
Information not available

Microsoft Corporation v Mitsumi Computer Garage Ltd
[2001] 2 EA 460 (CCK)

Division: Milimani Commercial Courts of Kenya at Nairobi

Date of Ruling: 2 July 2001

Case Number: 810/01

Before: Ringera J

Sourced by: LawAfrica

Summarised by: C Kanjama

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[1] Civil procedure – Pleadings – Plaint – Verifying affidavit – Sworn on behalf of a corporation – Who is an officer of the company – Whether country manager of foreign unregistered company is an officer – Whether officer verifying corporation's plaint must depone his authority to so verify – Whether failure to state place of swearing is a fatal omission in an affidavit – Whether the provisions of the Oaths and Statutory Declarations Act (Chapter 15) apply to affidavits sworn outside Kenya – Whether verifying affidavit would be struck out – Whether court has discretion to refuse to strike out a suit, the verifying affidavit of which has been struck out – Order VII, rule 1(2) – Civil Procedure Rules

Editor's Summary

In June 2001 Microsoft Corporation ("Microsoft"), an American company, instituted a suit against Mitsumi Computer Garage Ltd ("Mitsumi"), a Kenyan company, for software copyright infringement. Microsoft filed a plaint with a verifying affidavit sworn by P in the United Kingdom. Microsoft also sought and obtained *ex parte* Anton Piller orders to search the premises of and confiscate the property of Mitsumi. Three days later an amended plaint was filed joining a Second Defendant, Mitsuminet. This plaint was verified by a second affidavit sworn by L.

On the hearing of the Anton Piller application *inter partes* ten days after filing of the suit, Mitsumi raised a preliminary objection that the plaint was fatally defective because the verifying affidavits were both incompetent and the attempted substitution of verifying affidavit was unlawful. The affidavit by P had been sworn in the United Kingdom. The jurat had not indicated the place of swearing, contrary to the Oaths and Statutory Declarations Act (Chapter 15), nor had P deponed on what authority she had sworn the affidavit. It was submitted that as P was an employee of Microsoft, she was not an officer of the company and therefore had no authority under Order III of the Civil Procedure Rules to swear the affidavit.

L swore in the subsequent affidavit that he was the country manager of Microsoft. It was contended for Mitsumi that Microsoft had no corporate presence in Kenya and carried on business through a subsidiary, and that Microsoft was not a foreign registered company and could therefore not possibly have a country manager. Counsel for Microsoft replied that verifying affidavits were introduced primarily to cure the mischief of multiplicity of suits, that the verifying affidavits had been sworn by competent officers of Microsoft and that any defects therein were merely procedural technicalities that did not affect the substance of the same.

Held – Order III, rule 2 of the Civil Procedure Rules requires an affidavit sworn on behalf of a corporation to be made by an officer thereof. This is a matter of substance, not form, and it is incompetent for any other person, no matter how conversant with the averments of the plaint, to make a verifying affidavit on behalf of the corporation.

The definition of "officer" in section 2 of the Companies Act (Chapter 486) is not an exhaustive one. Thus in addition to "director, manager or secretary", an employee with broad responsibility who holds a position of trust within the company may also be an officer for purposes of the Rules. Hence P was an officer of Microsoft.

The omission to state the place of swearing on the jurat of the affidavit is a defect under section 5 of the Oaths and Statutory Declarations Act. However, since P's affidavit had been sworn in the United Kingdom, the Oaths and Statutory Declarations Act did not apply. The omission to state the place of swearing in the jurat does not *ipso facto* make the affidavit fatally defective under English law. Hence P's affidavit would be admissible in Kenya with the aforesaid omission.

However, since P had not stated that she made the affidavit with the authority of Microsoft, her affidavit was substantially defective and incompetent and would be ordered struck out. L's affidavit would also be struck out for failure to disclose his authority.

Order VII does not require any verifying affidavit to accompany an amended plaint. L's affidavit was therefore unnecessary.

Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. It would be to elevate form and procedure to a fetish to strike out the suit on account of the defective affidavits. Order VII, rule 1(3), by the use of the word "may", leaves the question of whether a suit filed without a verifying affidavit should be struck out to the discretion of the judge. *A fortiori*, the error is also excusable in the event of the affidavit being defective.

Affidavits struck out. Prayer to strike out suit declined.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Kentainers Ltd v VM Assani HCCC number 1625 of 1996

Tom Okello Odondo v NSSF HCCC number 1759 of 1999

Ruling

RINGERA J: On 4 June 2001, Microsoft Corporation, an American company, instituted a suit in the High Court against Mitsumi Computer Garage Ltd, a Kenya company hereinafter referred to as "Mitsumi" for infringement of intellectual property rights. The plaint was accompanied by a verifying affidavit sworn by one Marilyn Lesley Pearman. On the same date, Microsoft moved the court under a certificate of urgency and obtained *ex parte* an Anton Pillar Order

against Misumi allowing it to enter the latter's premises to seize and inspect all computers and other equipment which allegedly contain or could contain pirated computer software, all purchase and sales records for the past one year and other records which constitute or could constitute evidence in the trial of the cause of action. On 8 June 2001, Mitsumi applied and was allowed to join Mitsuminet (Kenya) Ltd (hereinafter referred to as "Mitsuminet") as the Second Defendant to the suit. On the same date an amended plaint was filed. It was accompanied by a verifying affidavit sworn by one Louis Otieno.

At the hearing of Microsoft's application *inter partes* on 14 June 2001, Mr *Ochieng Oduol*, counsel for Mitsumi raised a preliminary objection on the ground. First, that the verifying affidavit of Marilyn Pearman is *ex facie* incompetent, fatally defective and inadmissible as a verifying affidavit. Secondly, that the verifying affidavit of Louis Otieno sworn on 7 June is *ex facie* incompetent, fatally defective and inadmissible as a verifying affidavit. And thirdly, that the substitution of the verifying affidavits by the Plaintiff in the suit is contrary to law.

The substance of the objection to the Pearman affidavit is this. The deponent is an employee of Microsoft whose responsibilities include overseeing software anti-piracy enforcement. She does not state under what authority she is swearing the affidavit. It is submitted that an affidavit by a corporation can only be sworn by an officer under authority of the corporation according to Order III, rule 2(*c*) of the Civil Procedure Rules. It is further submitted that as Pearman is an employee, her affidavit is insufficient for purposes of Order VII. Moreover, it is further submitted, the corporation's authority is not exhibited. The point is also taken that there is no indication in the jurat of the place of swearing contrary to the provisions of section 5 of the Oath and Statutory Declarations Act Chapter 15 of the law of Kenya. While on this, counsel submits that my own decision in this case of *Tom Okello Odondo v NSSF* [High Court civil case number 1759 of 1999] where I held that the omission to state the place where an affidavit was taken was a mere irregularity which the court could excuse under the provisions of Order XVII, rule 7 of the Civil Procedure Rules should not be followed for the reason that it did not address the issue of whether Order XVIII, rule 7 which is subsidiary legislation could be interpreted to defeat the express and mandatory provisions of section 5 of the Oaths and Statutory Declarations Act, which is a substantive enactment. Counsel cited section 31 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya in support of the proposition that subsidiary legislation should not be inconsistent with an Act. My own decision in *Kentainers Ltd v VM Assani* (High Court civil case number 1625 of 1996) where I opined that Rules of Court cannot be interpreted to nullity substantive enactments was also prayed in aid. Counsel submitted that the conflict between Order XVIII, rule 7 and section 5 of the Oaths and Statutory Declarations Act should be resolved in favour of the substantive enactment. The substance of the attack on Otieno's affidavit is this. He has described himself as the country manager of Microsoft. He has not deponed to the authority of the corporation to swear the affidavit. Moreover, it is argued, as Microsoft has no corporate presence in Kenya but carries on business in Kenya through a wholly owned and controlled subsidiary known as East African Software Ltd, the conception that the deponent is its country manager is illusory and untenable. It is pointed out that Microsoft is neither a registered foreign company nor is it exempted from registration under

the provisions of section 365(2) of the Companies Act, Chapter 486 of the Laws of Kenya. In the premises, it is contended, there cannot be a country manager purporting to swear an affidavit on behalf of such a corporation in Kenya. It is also contended that even if Microsoft has a corporate presence and a country manager in Kenya, such a manager cannot swear an affidavit. Reliance is placed on *Halsbury's Laws of England* (4 ed), Volume 10 paragraph 641 in that regard.

That passage reads:

> "Any persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be 'officers' of the company. The term is defined by the Companies Act 1985 as including any director, manager or secretary. 'Manager' means, in everyday language, a person who has the management of the whole affairs of the company. It connotes a person holding, whether *de jure* or *de facto*, a position in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit. It does not include a local manager".

The substance of the third point of preliminary objection is that the Civil Procedure Rules do not permit two verifying affidavits in the same suit. Counsel for the First Defendant asks me to uphold the preliminary objections and strike out the entire suit on the above grounds.

Mr *Iseme*, counsel for Microsoft, in reply asked me to consider the mischief the amendment to Order VII which introduced verifying affidavits was meant to cure. In that regard, he invited me to consider an extra-judicial commentary on the amendments which were affected *vide* Legal Notice number 36 of 2000 by the Honourable Mr Justice JVO Juma, the Nyeri Resident Judge. The commentary is in a publication called *Hakimu*. It is entitled "General Comments on the Civil Procedure (Amendment) Rules 2000". The Learned Judge describes the overall purpose of the amendments as follows: "The object of the amendments like any other amendments is to streamline the existing rules with hope of improving the civil justice in our courts. Improving the civil justice includes curtailing the abuse of the court process".

And commenting specifically on Order VII, rule (1)(2) which introduced the requirement of a verifying affidavit, the Learned Judge observes:

> "It is not uncommon these days to find that a Plaintiff is represented by different firms of advocate. This arises as a result of ambulance chasing. To try and put a stop to this kind of conduct, Order VII was amended by adding a new subrule (2). This subrule provides that the plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint. The affidavit is to be sworn by the Plaintiff verifying the correctness of the averments contained in the plaint. The affidavit is to be sworn by the Plaintiff *Not* his advocate. It is hoped that the Plaintiff will, therefore, instruct one advocate as he or she will be required to swear an affidavit. I need not emphasize the consequences of filing a false affidavit".

Mr *Iseme* submits it is clear from the above commentary that the purpose served by a verifying affidavit is to avoid multiple representation of a Plaintiff by requiring verification of the averments contained in the plaint. He submitted that the two affidavits assailed in this case verify the averments contained in the plaint and serve the intended purpose. As regards the competence of Pearman and Otieno to swear these affidavits on behalf of Microsoft, counsel submitted that an officer of a company is defined in section 2 of the Companies Act Chapter 486 of the Laws of Kenya, to include a director, manager or secretary. He submitted that both deponents are officers of Microsoft within the meaning

of the Companies Act and are accordingly competent to swear affidavits on its behalf as allowed by Order III, rule 2(*c*) as Pearman is an employee of the corporation and Otieno is the country manager of the corporation. He submitted that the passage in *Halsbury's Laws of England* relied on by the First Defendant favours his contention as Mr Otieno has the everyday management of the Plaintiff's affairs in this country. He submitted that there was no basis for saying that the concept of country manager is illusory and untenable. In his view section 356(2) of the Companies Act is a deeming provision which can be rebutted by evidence at the trial.

As regards the alleged omission to state the place of swearing in the jurat of the Pearman affidavit, counsel submitted that there was no such omission as the place was stated to be 33 Queen Street, Maidenhead, Berks, UK. He also relied on the case of *Tom Obondo Okello* (*supra*) for the proposition that such an omission is in any event a defect of form which is a mere irregularity curable under Order XVIII, rule 7. Counsel also invoked section 3 of the Judicature Act to urge me to do substantial justice without undue regard to the technicalities of procedure.

Mr *Ochieng Oduol* in reply submitted that Order XVIII, rule 7 applied to irregularities of form. It could not be used to excuse the swearing of an affidavit on behalf of a corporation by a person other than an officer thereof or the non-disclosure of the corporation's authority to such officer. In his view the designation of the person making the affidavit and the existence of his authority to make it are matters of substance. On the mischief sought to be prevented by the requirement of a verifying affidavit, counsel pointed out that the commentary cited by the Plaintiff is not judicial dicta. On whether or not Otieno is Microsft's country manager, counsel submitted that it cannot be assumed that East Africa Software Ltd though a subsidiary of Microsoft is the same entity as Microsoft. The two were different legal entities. Otieno was an employee of a subsidiary company and as such he could not purport to swear an affidavit on behalf of a corporation registered in the USA, counsel submitted. As an employee of a subsidiary, the submission that he was Microsoft's country manager was misplaced, counsel contended. On the question of Microsoft's Corporate presence, counsel submitted that the issue of adducing evidence did not arise for a foreign corporation is required to be either registered or unregistered. On the form and content of the jurat of an affidavit, counsel submitted that the Oaths and Statutory Declarations Act indicates what should be in the jurat and accordingly the witnessing referred to in the Pearman affidavit was not admissible as part of the jurat thereof. Finally, he submitted that there was no evidence that Pearman was an officer of Microsoft.

Having set out the submissions of counsel on the points of preliminary objections I think it is now convenient to consider the objection. I propose to deal with the points raised seriatim.

I start with the issue of the competence, propriety and admissibility of the Pearman affidavit. According to the provisions of Order III, rule (2) an affidavit by a corporation can only be made by an officer thereof who is duly authorized by the corporation to do so. I accept the submission by counsel for the First Defendant that this is a matter of substance, not form and that it is incompetent of any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation. I therefore ask myself

whether Marilyn Pearman is an officer of Microsoft and whether she is authorized to make the affidavit. She describes herself as an employee of the Plaintiff whose current responsibilities include overseeing software anti-piracy enforcement. She swears that she is conversant with all the facts giving rise to this suit and she verifies that all the averments contained in the plaint are correct. Now neither the Civil Procedure Act itself or the rules made thereunder defines the term "officer of the corporation". And the definition in the Companies Act at section 2 which defines "officer" in relation to an association or a body corporate to include a director, manager or secretary is an inclusive rather than an exhaustive definition. It is the same sort of definition offered in *Halsbury's Laws of England* (*supra*). It does not state that officer means director, manager or company secretary. It states it includes those mentioned. Obviously persons other than those expressly identified are included. When one turns to the dictionary for the ordinary meaning of the term "officer" it is found that one of the meanings of the word is "a person holding a position of authority or trust" (see *The Concise Oxford Dictionary*). The deponent to the affidavit herein being an employee of Microsoft with the broad responsibility she has described is obviously a person holding a position of authority or trust within Microsoft. She is thus an officer within the ordinary meaning of the word. As neither the Companies Act nor the Civil Procedure Act and Rules have assigned the term "officer" any special and exhaustive meaning, I find that Pearman is an officer of Microsoft within the contemplation of Order III, rule 2(*c*). However, while she may indeed be authorized to make the affidavit she does not depone to that fact. This is a substantial defect in her affidavit. How about the alleged omission in the jurat? The first thing to note is that the affidavit is taken in England. Neither counsel has addressed me on the implications and consequences of that. I must therefore do the best I can without the benefit of counsel's submissions on the point. The Oaths and Statutory Declarations Act Chapter 15, gives Commissioners for Oaths appointed under the provisions thereof jurisdiction throughout Kenya (section 4). It also commands the Commissioner to indicate in the jurat the place where he took the affidavit. Obviously a Commissioner for Oaths appointed under Chapter 15 cannot take an affidavit in England. Accordingly the provisions of section 5 of the Act or indeed any other section in Chapter 15 cannot apply to an affidavit taken out of Kenya by a foreign person. In the premises I think the issue of whether the affidavit complained of complies with section 5 of Chapter 15 raised by counsel for the first affidavit complained of complies with section 5 of Chapter 15 raised by counsel for the First Defendant is misconceived and is a mere moot point in the instant matter. The real issue and which issue was not debated ought to have been whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by who and what forms, if any, should it comply with. In that regard, I am not aware of any Kenyan legislation directly to the point. However, section 88 of the Evidence Act Chapter 80 of the Laws of Kenya, does seem to allow for the admissibility in Kenya Courts of documents which would be admissible in any court of justice in England under the law in force for the time being in England. In that respect it is observed that in England an affidavit taken in a commonwealth country is admissible in the Courts of Judicature without proof of the seal or signature of the person taking the affidavit (see Order XLI, rule 12 of the Rules of the Supreme Court in the Supreme Court Practice 1999 Edition). From the foregoing it follows the Kenyan Courts can admit affidavit taken in England which is a Commonwealth country. The affidavit herein having been taken in

England, I find the same to be admissible in this Court. As regards the formal validity of such a document I venture to think that in the absence of any Kenyan enactment governing the matter, it would suffice that the document is valid according to the laws of England. Section 5 of the Commissioner of Oaths Act 1889 reads: "Every Commissioner before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made".

And Order XLI, rule 4 of the Rules of the Supreme Court provide that an affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. As I pointed out in the *Tom Okello Obondo* Case the English practice is summarised in *Halsbury's Laws of England* (3 ed) Volume 15 at paragraph 15 where it is propounded that:

> "The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the court may possibly assumed that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked".

In short the English courts of Judicature may treat an omission to state the place where the affidavit is taken as an irregularity which the court can overlook despite the apparently mandatory rendition of section 5 of the Commissioners of Oath Act of 1889. In my opinion if failure to state the place where an affidavit was taken in the jurat thereof does not *ipso facto* make such an affidavit fatally defective and inadmissible in an English court despite the wording of the section of the law which I have just read, there is neither rhyme nor reason to hold that such an affidavit if filed in a Kenyan court is fatally defective and inadmissible.

In conclusion I hold that the Pearman affidavit which was taken in England would have been admissible in this Court notwithstanding any omission it may have had within the jurat as regard the place where it was taken. Be that as it may, nothing turns on that view of the matter as I found that as a matter of fact the affidavit in question does not suffer from such a defect. To conclude, the only merit I find in that first point of the preliminary objection is that the deponent Pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is a substantial defect which renders the said affidavit incompetent and courts its being struck out. I accordingly order it struck out for that reason.

As regard the objections to the affidavit of Louis Otieno, I accept the submission by counsel for the First Defendant that the affidavit too is defective for want of disclosing the authority upon which it is made. This ground alone invites its being struck out. I am not however persuaded that the affidavit should be struck out on the additional ground that the deponent has described himself as the country manager of Microsoft when Microsoft is neither registered nor exempted from registration under part 10 of the Companies Act. In the first place, even if I accept the view expressed in the passage in *Halsbury's Laws of England* relied upon by counsel for the First Defendant that the word "manager" does not in England include country manager, I can see no reason why in Kenya a country manager should not be regarded as an officer of a corporation on a proper interpretation of section 2 of the Companies Act Chapter 486 and by extension Order III, rule 2(*c*) of the Civil Procedure Act. In my opinion, and I so hold, such a person is an officer of the corporation. Neither do I accept the submission that since Microsoft is not registered as a

foreign company in Kenya, the concept of its having a country manager is untenable or illusory. My reading of part 10 of the Companies Act is not that all foreign companies which seek to do business in Kenya must be registered in accordance with that section. My reading of it is that a foreign company which does business in Kenya through an agent need not be registered and the agent's place of business shall not be deemed to be its place of business. If a foreign company is registered in Kenya under section 366, it shall have the benefits and be bound by the obligations and be subject to any penalties provisions to prohibit a foreign company from suing in the Courts of Kenya or as barring an officer of such a corporation from taking any step including making any affidavit which an officer of a corporation duly registered under the Act may undertake. I would in the premises dismiss the objection to Mr Otieno's affidavit on this ground as unmeritorious. While on this, let me state that while I accept that Microsoft and East African Software Limited. are two distinct entities in law, that does not preclude Mr Otieno from being an officer of Microsoft as he claims to be. If he is also at the same time serving East Africa Software Limited, so be it. That is a matter of contract between himself and Microsoft. Had it not been for the failure to disclose his authority for making the affidavit, I would have had no hesitation in find the said affidavit to be valid. However since the defect I have found to exist is a substantial one I would order the affidavit struck out on that account.

The third point of preliminary objection is entirely well taken. Order VII does not require any verifying affidavit to accompany an amended plaint or indeed any other pleading save the plaint originated the action. The verifying affidavit of Louis Otieno may have been filed by the Plaintiff *ex abundanti cautela* but it is definitely an unnecessary surplusage. I uphold this point of preliminary objection also but order that the said affidavit be struck out of the record.

The result of my consideration of the preliminary objection is that both verifying affidavits by Marilyn Lesley Pearman and Louis Otieno are ordered struck out.

The next matter for the consideration is whether I should consequently strike out the suit itself. Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in verifying affidavit neither goes to the jurisdiction of the court nor prejudices the Defendants in any fundamental respect. Indeed no prejudice has been alleged. Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two

considerations. First, subrule (3) of rule 1 of Order VII itself seems by the usage of the word “may” to leave the striking out of a plaint which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercised in the case of an omission of the verifying affidavit, a *fortiori* it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an appreciation of the mischief which the rule was meant to cure inclines me to the same conclusion. In that respect, I think that Juma J though speaking extra-judicially, correctly fingered that mischief to be the hitherto unseemly spectacle of legal multi-representation of Plaintiffs by advocates particularly in accident cases. Verification of the contents of the plaint was conceived as a cure for that mischief as the Plaintiff would be required to make an affidavit and he could not, it was thought, make two or more affidavits in respect of the same cause of action. If it be the case that the rule was intended to cure any other mischief the same is not manifestly obvious. However, the rule having been framed in broad terms verification of the plaint is now necessary in every type of action originated by a plaint. The broad purpose of the verifying affidavit is thus to verify the contents of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record. I would accordingly order that the verifying affidavit of Marilyn Lesley Pearman be struck out but the Plaintiff be at liberty to file a fresh verifying affidavit within 15 days of today.

The upshot of this matter is that I decline to strike out the suit but order that the verifying affidavits of Marilyn Pearman and Louis Otieno be struck out of the record. I further grant liberty to the Plaintiff to file and serve the Defendants with a fresh and compliant verifying affidavit within fifteen days of the giving of this order. The costs of the preliminary objection are awarded to the First Defendant in any event.

For the Plaintiff:
Mr Iseme

For the Defendants:
Mr Ochieng Oduol

Mpaka Road Development Ltd v Kana
[2001] 2 EA 468 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	22 October 2001
Case Number:	318/00
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	M Kibanga

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[1] Practice – Pleadings – Striking out pleadings as being frivolous, scandalous and vexatious – Order VI, rule 13(1)(b) – Civil Procedure Rules.

[2] Tenancy – Concurrent tenancies in respect of same premises – Whether concurrent tenancies

tenable in law.

[3] Tenancy – Whether allegation of concurrent tenancies in respect of same premises is frivolous and vexatious – Pleadings – Whether pleadings may be struck out for allegation of concurrent tenancies.

[4] Words and Phrases – "Frivolous, scandalous and vexatious".

Editor's Summary

The Applicant (the Plaintiff in the main suit), filed suit against the Defendant for arrears of rent. The Defendant filed a defence and counterclaim. In the counterclaim the Defendant was joined by a limited liability company, of which the Defendant was the director, as a co-Plaintiff. In the counterclaim, the two Plaintiffs claimed that the Plaintiff in the main suit had sent an auctioneer, who was joined in the counterclaim as a co-Defendant, to distrain the premises. The auctioneer had then locked the doors to the premises, causing the co-Plaintiffs in the counterclaim to lose business. The Second Plaintiff in the counterclaim also pleaded that the distress was illegal and excessive.

The Plaintiff in the main suit filed his defence to the counterclaim and applied under OrderVI, rule 13 (1)(*b*) and Order XXXV, rule 1 of the Civil Procedure Rules for striking out of the defence and counterclaim, and for summary judgment. The Plaintiff averred that both the defence and counterclaim were scandalous, frivolous and vexatious because they disclosed the existence of two concurrent tenancies over the same premises.

Held – A matter would only be scandalous, frivolous and vexatious if it would be inadmissible in evidence to show the truth of any allegation in the pleading which was sought be impugned, for example, imputation of character where character was not in issue. A pleading was frivolous if it lacked seriousness. It would be vexatious if it annoyed or tended to annoy. It would annoy or tend to annoy if it were not serious or contained scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading was *ipso facto* vexatious.

There was nothing scandalous about the defence and counterclaim. The claim as to tenancy by the First and Second Plaintiffs in the counterclaim connoted two simultaneous tenancies. There could not have been concurrent tenancies in respect of the same premises and tenancies could not have existed in the alternative. The pleading was frivolous and therefore vexatious.

The defence and counterclaim were struck out and judgment awarded to the Plaintiff in the original suit. It was not necessary to consider the application for summary judgment.

No cases referred to in ruling

Ruling

RINGERA J: By an application in the form of a chamber summons filed in court on 29 March 2001, the Plaintiff prayed for orders that (i) the Defendant's statement of defence be struck out, (ii) summary judgment be entered for the Plaintiff as prayed in the plaint, and (iii) the Defendant's counterclaim together

with the counterclaim by Anil Kapoori Pan Limited be struck out. The application was grounded on the premises *inter alia* that both the statement of defence and counterclaim were scandalous, frivolous or vexatious and that the defence did not raise any serious triable issues.

After hearing arguments from Mr *Ohaga*, counsel for the Defendant, and Mr *Oyatsi*, counsel for the Plaintiff, I reserved my ruling. In the said ruling I found the statement of defence and the set-off and the counterclaim to be frivolous and vexatious. I ordered them struck out with costs to the Plaintiff and entered judgment for the Plaintiff as prayed in the plaint.

I then concluded my ruling with the following words: "That being the view I take of the matter, it would be the vainest pedantry to proceed to consider the summary judgment aspect of the application. That I refrain from doing".

Now, Mr *Ohaga*, counsel for the Defendant, moves the court under Order XLIV, rule 1 and Order L, rule 1 for a review of the said ruling on the grounds that there is an error apparent on the face of the record and there is otherwise sufficient reason to review the ruling. The substance of his complaint as presented on the face of the notice of motion and in the submissions thereon is that the court was plainly in error in not considering separately the defence from the set-off and counterclaim and in not considering the Plaintiff's application under Order XXXV, rule 1. In his submission, had that been done, a different conclusion would have been arrived at in that the court would have found that the defence raised triable issues. Naturally, Mr *Oyatsi* is of a different opinion. He submits there is no error on the face of the record and the court was right to approach the application as it did in light of the pleadings, affidavits and submissions made thereon.

I have considered the submissions made by counsel keenly. And I have read and re-read my ruling of 20 May 2001. I find that at no time was I oblivious to the fact that two pleadings, namely the defence and the counterclaim, fell for consideration on the test of whether they were scandalous, frivolous or vexatious and whether the defence raised *bona fide* triable issues. Indeed at page 8 of the said ruling I crystallized the issues for determination in the application as: "First; whether the defence and counterclaim as drawn are scandalous, frivolous or vexatious, and secondly; whether the same disclose *bona fide* triable issues".

Having found the statement of defence and set-off and the counterclaim to be frivolous and vexatious, I felt that there was neither necessity nor utility in scrutinizing the defence with the judicial spectacles donned when an application under Order XXXV, rule 1 is considered. I thought it would be the vainest pedantry to do so.

I am still of the same persuasion. The court is not an academic forum. If a defence is struck out as being frivolous and vexatious, it would, in my opinion, be a moot point whether it did disclose *bona fide* triable issues. My omission to consider the defence herein from the perspective of Order XXXV, rule 1 was not inadvertent. It was meditated judicial choice. If it was incompetent I stand to be corrected by the Court of Appeal on such appeal as the Defendant might be advised to lodge. In the meantime, I remain unpersuaded that there is a mistake apparent on the face of the record or that there is any or any other

sufficient reason for a review of my ruling and the subsequent decree given on 29 May 2001.

The Defendant's motion is dismissed with costs to the Plaintiff.

For the Plaintiff:
Mr Oyatsi

For the Defendant:
Mr Ohaga

Mususa v Dhanani
[2001] 2 EA 471 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	25 January 2002
Case Number:	62/00
Before:	Kalegeya J
Sourced by:	LJS Mwandambo
Summarised by:	HK Mutai

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[1] Insolvency – Receiver – Collection of property by receiver – Property available for collection and sale – Donation of property to Defendants by company – Property still registered in company's name – Failure by directors to include donated property among assets handed over to receiver – Whether had power to donate property – Whether property formed part of the company's assets.

Editor's Summary

On 24 March 1999, KJM Ltd executed a debenture over all its assets in favour of CRDB Bank to secure overdraft facilities granted to it by the bank. In September 1999, the bank appointed the Plaintiff to be the receiver and manager of KJM's assets with the duty, *inter alia*, of taking possession of the properties and assets charged and selling them to realise the debt owed by KJM to the bank. After some time the Plaintiff came to learn of the existence of a property registered in KJM's name that had not been handed over to him by its directors. In a letter dated 5 June 2000 he wrote to ND, the First Defendant, who was in occupation of the property and had been one of KJM's directors, calling upon him to vacate the property. ND contacted his advocates who replied to the Plaintiff stating that the property in question had been donated and transferred to SD and MJ, the Second and Third Defendants, on 9 June 1998 by deeds of gift and transfer from the company. The letter went on to state that the transfer had not yet been effected because title to the property was in the hands of CFL, a company to whom the property had been offered as security by KJM in May 1997 to secure the extension of an overdraft. The Plaintiff then filed suit against the Defendants seeking first, a declaration that the property belonged to the Plaintiff as receiver and manager and second, an injunction to prevent the Defendants from dealing with the property in a manner inconsistent with the Plaintiff's interest. It was argued on behalf of the Plaintiff that a company lacked the capacity to feel

love and affection so as to transfer its property by way of gift. The Defendants denied the Plaintiff's claims and counterclaimed for a declaration that the deeds of gift and transfer were lawful and binding on the Plaintiff and an order compelling the Plaintiff to repay the

loan owed to CFL so that the certificate of occupancy could be released to the Second and Third Defendants. Counsel for the Defendants argued that a company as a legal personality had the capacity to donate its property and that the non-registration of the transfer did not invalidate it. At the trial of the suit, it emerged that the decision to transfer the property had been taken informally as a family matter by two of the company's directors, namely, ND himself and his nephew, and that there had been no resolution of the board to that effect.

Held – Though a company was incapable of feeling natural love and affection, it was nevertheless a legal person with full capacity to manage its own affairs and dispose of its property, including by way of gift. KJM thus had the capacity to donate any of its assets to any person. However, in this instance, several factors led to the conclusion that there had been no legal donation of property. These included the fact that, firstly, there had been no resolution by the board authorising such an undertaking, secondly, there was conflicting evidence as to whether the gift had been made to ND or to SD and MJ jointly and thirdly, if the property had indeed been donated to the Defendants, it was incredible that the company had still been able to use it to secure its liability to CFL. The property was therefore still part of KJM's assets covered by the general floating charge, subject to the first-ranking charge to CFL. Any residue remaining after satisfying CFL's liability would fall back into the pool of KJM's assets. The Defendants' counterclaim would therefore be dismissed and the Defendants restrained from disposing of or dealing with the property in a manner inconsistent with the rights of CFL and CRDB. Any other orders relating to the property would await a hearing at which CFL was present.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Ratilal Gorhanbhai Patel v Lalji Makanji [1957] EA 314

United Kingdom

Letters v IRC [1956] 3 All ER 388 [1957] 1WLR 201

Salomon v Salomon [1897] AC 22

Judgment

KALEGEYA J: In this case, the following facts stand uncontroverted. In September, 1999, the Plaintiff was duly appointed Receiver and Manager of KJ Motors Ltd "pursuant to a debenture instrument and mortgage deeds executed by the company in favour of CRDB Bank Ltd to secure overdraft facilities granted by the bank to the company" in March 1999. The debenture instrument of 1999 was tendered as exhibit P6. He gave notice of his appointment in terms of section 86(*i*) of the Companies Ordinance Chapter 212 *vide* exhibit P7. Among others, his duties included taking possession of the said KJ Motors Ltd's property and assets charged and selling them in order to realise the debt

owed by that company to the bank. The Receiver and Manager's appointment was executed by the bank *vide* exhibit P1, deed of appointment dated 15 September 1999. The said Receiver and Manager duly took possession of the assets of the company scattered in various parts of Tanzania. However, after some time he came to discover the existence of property on Plot No. 121, with title deed No. 186030/11, situated along Kilimani Road, Kinondoni District, Dar-es-Salaam. The Land Office records showed KJ Motors Ltd as the owner although the directors did not include it in the company properties handed over to him. He contacted them. He specifically wrote a letter to the First Defendant (N Dhanani), who was in occupation of the property, expressing his disappointment and calling upon him to vacate the same. This is reflected in a letter dated 5 June 2000 (exhibit P4). Upon receipt of exhibit P4 N Dhanani secured the services of Mr Felix Mbuya, advocate, who responded by letter, dated 12 June 2000, tendered as exhibit P5. As this letter reflects almost all of the contested elements it is here below reproduced in full:

"Ref.: FSM/KJMR/00/94

Date: 12 June 2000

The Receiver and Manager

KJ Motors Ltd in Receivership

International House

P O Box 45

DAR-ES-SALAAM

Dear Sir

RE: KJ MOTORS IN RECEIVERSHIP

Your letter Ref. No. kjm/s15/0006012 dated the 5 June 2000 addressed to our client namely Mr Nooraly Dhanani on the above subject has been placed in our hands with instructions to reply as follows:

1 That the house on Plot No. 121, Kilimani Street, Kinondoni District, Dar-es-Salaam comprised in the Certificate of Title No. 186030/11 (hereinafter called 'the property') which our client is occupying ceased to be an asset of KJ Motors Ltd by virtue of a Deed of Gift and a Deed of Transfer executed between KJ Motors and Miss Shirin Esmail Daudjee and Mr Mehboob Noorally Karmali Juma on 9 June, 1998 whereby the property was donated and transferred to the said Miss Shirin Esmail Daudjee and Mr Mehboob Noorally Karmali. As you may probably be aware the Deed of Gift as well as the Deed of Transfer were executed well before the execution of the Debenture by KJ Motors Ltd in favour of CRDB [1996] Ltd on the 24 March 1999. Photostat copies of the Deed of Gift and the Deed of Transfer are enclosed.

2 That in view of what is stated in paragraph I hereinabove, you will realise that there was no failure on the part of our client to disclose the house as an asset of KJ Motors Ltd as it had ceased to be such an asset.

3 That Crown Finance and Leasing Ltd has a legal charge over the property but an equitable charge could only arise in favour of CRDB Bank Ltd by virtue of the Debenture if KJ Motors Ltd still retained ownership of the property at the date of your appointment as Receiver and Manager. At any rate, if CRDB Bank Ltd holds an equitable charge on the property, which is denied, such equitable charge would be subordinate to the legal charge held by Crown Finance and Leasing Ltd.

4 That after the Deed of Gift and the Deed of Transfer was executed by KJ Motors Ltd and Miss Shirin Esmail Daudjee and Mr Mehboob Noorally Karmali Juma, it was agreed that the property would continue to be used as security for the overdraft facilities extended by Crown Finance and Leasing Ltd to KJ Motors

Limited provided that upon the repayment of the overdraft facilities by KJ Motors to Crown Finance and Leasing Ltd, the Title Deed of the property would be handed over to either Miss Shirin Esmail Daudjee or Mr Mehboob Noorally Karmali Juma to enable them to register themselves as the owners of the property.

5 That Miss Shirin Esmail Daudjee and Mr Mehboob Noorally Karmali Juma have been unable to register themselves as the owners of the property because of the failure of KJ Motors Ltd to repay the overdraft facilities to Crown Finance and Leasing Ltd.

6 That much as our client agrees that you have a duty to realise all the company's assets and pay the proceeds over to the creditors in accordance with the security they may hold and under section 259 of the Companies Ordinance (Chapter 212), you cannot offer the property for sale as it is no longer belongs to KJ Motors Ltd. In the same vein, you have no authority to give a notice to our client to vacate the property.

7 That our client as a director of KJ Motors Ltd and as a guarantor of the moneys advanced by CRDB Bank Ltd to KJ Motors Ltd is fully aware of his obligations under the receivership and the personal guarantee and has so far been co-operative with you in respect of all matters arising from the receivership, but he is not in a position to co-operate with you in giving you vacant possession of the property.

Yours faithfully,

(Sgs:)

F S MBUYA

CC: Crown Finance and Leasing Ltd

P. O. Box 1509

Dar-es-Salaam".

The Deed of Gift and Deed of Transfer referred to in exhibit P5, were tendered as defence exhibits DI and 2 respectively in their original form but whose copies had earlier on been tendered as exhibits P2 and P3. It is undisputed also that in May 1997, the disputed property was offered by the company as security for a banking overdraft extended to KJ Motors Ltd by Crown Finance and Leasing Ltd. Exhibit D3 (the facility letter) bears witness to this. The First Defendant is one of the directors of KJ Motors Ltd while the Second (DW5) and Third (DW4) Defendants are his wife and son respectively, to whom the property purportedly vested on the strength of the deed of gift and transfer (exhibits d1 and 2).

Based on that uncontroverted background the Plaintiff is before this Court urging for:

(a) a declaration that the disputed property belongs to Plaintiff in his capacity as a Receiver and Manager;

(b) a permanent injunction restraining the Defendants from disposing of, alienating and/or dealing with the property in the manner inconsistent with the interest of the Plaintiff; and

(c) an order for immediate release of the property to the Plaintiff. Costs of the suit, and any other relief the Court may deem just and proper to grant.

The Plaintiff argues that KJ Motors though a legal personality had no capacity of feeling love and affection so as to transfer its property to Second and Third Defendants by way of gift; that even if it had that capacity, the exercise lacked legality as the property was incumbered and the transfer not registered and the

whole exercise lacked director's consent hence tainted with illegality and fraud. The Plaintiff charges Defendants for manoeuvring to put beyond him as a Receiver and blocking him from possessing, the property in question.

On the other hand, the Defendants were not cowed down by the above as exhibit P5 quoted in full above displays. They maintain that out of "love and affection" and by a deed of Gift and Deed of Transfer KJ Motors Ltd transferred the property to Second and Third Defendants. Not only that, the Second and Third Defendants launch a counterclaim seeking:

(a) a declaration that the Deed of Gift and the Deed of Transfer were lawful and binding on the Plaintiff; and

(b) an order that the Plaintiff should pay the loan to CFL so that CFL can release the certificate of Occupancy Title No. 186030/11 to the Second and Third Defendants to enable them to be registered as the owners of the property.

The Plaintiff was represented by Mr *Mwandambo* of Sinare, Shiyo and Mwandambo, Advocates, while Mr Felix *Mbuya*, advocate, represented the Defendants. The Plaintiff called two witnesses while the Defendant called five.

Issues framed before the commencement of hearing are as follows:

"1 Whether the property on plot No. 121, Kilimani street, Kinondoni District, Dar-es-Salaam, comprised in CT. No. 186030/11 was part of the assets which KJ Motors Ltd charged in favour of CRDB Bank Ltd against an overdraft facility extended to it by the said CRDB Bank Ltd.

2 Whether KJ Motors Ltd as a company had capacity to donate the property described in 1 above to the Second and Third Defendants in consideration for love and affection through a deed of gift.

3 Whether there was legal transfer of the property from KJ Motors Ltd to the Second and Third Defendants.

4 If the answer is in the affirmative, whether the said transfer was tainted with fraud and illegalities,

5 What reliefs are each of the parties entitled to".

However, from what was disclosed in the course of proceedings, I have found it necessary to amend, rephrase, add and rearrange the above-enumerated issues for clarity on the contested matters. This Court is empowered so to act under O.XIV, rule 5 CPC, which provides:

"5(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced, …"

Treading on the above, issue (2) which will become issue (1), and so is issue (3) are rephrased, creating another issue in the process while others are re-arranged. The issues now stand as follows:

1 Whether KJ Motors Ltd as a company had the capacity to donate or give as a gift any of its property?

2 If the answer is in the affirmative, whether in 1997 the said company donated or gave as a gift, House on plot No. 121 Kilimani Road, Dar-es-Salaam, to Second and Third Defendants?

3 If the answer to (2) is in the affirmative whether there was a transfer of the property from KJ Motors Ltd to the said Second and Third Defendants?

4 If the answer is in the affirmative, whether the said transfer was tainted with fraud and illegalities?

5 Whether the property on plot No. 121, Kilimani street, Kinondoni District, Dar-es-Salaam, comprised in CT No. 186030/11 is part of the assets falling under the Plaintiff in his capacity as the official Receiver and Manager of KJ Motors under the overdraft facility received from CRDB by the latter in 1999.

6 Whatever way issue 5 is answered, what are the rights of the parties?

I will deal with issues 1 to 3 generally though zeroing in on issue two as I consider it to be the nucleus of the controversy and as in its wider focus; an answer thereto would determine answers to others.

As for evidence regarding the alleged gift and transfer we have DW1-5 testimonies. For clarity I will detail the same by giving excerpts of the depositions.

DW1 (Noorally Karmali Juma Dhanani) a founder member who has been a managing director for KJ Motors for over 40 years explains the source and modus of transfer as follows:

> "When I was occupying the premises they belonged to KJ Motors. There was a decision by KJ Motors to change the ownership. The decision was made in May 1997, by myself and Shiraz Dhanani. Following that decision there were documents – the transfer deed documents.
>
> The decision was that that property be given to me and my family as a gratitude for my services to the company. We two directors and the company secretary prepared the transfer documents. The transfer documents were made in favour of Mehboob N. Juma and Shirin Esmail Daudjee. The former is my son and the second is my wife.
>
> The two names came to be incorporated in the documents because the property was given to me and my family and because of my age I decided on them. I have the original transfer documents.
>
> These were signed by me and Shiraz and also signed by Mehboob N. Juma and Shirin Esmail Daudjee. These were sealed with company's seal.
>
> At the time the title was with Crown Finance Bank Ltd. This was because there was a loan taken by the company from that bank. The loan was taken in 1997 … On the first borrowing the loan was TShs 80 million. The loan is TShs 120 million …
>
> KJ Motors was obliged to pay the loan and have the title deed released so that it be handed over to Mehboob and Shirin. KJ Motors did not pay the loan. To date it has not paid it …
>
> I made attempts to have the documents registered with Register of Titles …
>
> The title was with Crown Finance hence no transfer could be made …".

Regarding KJ Motors' liability to CRDB and in relation to the property the witness deponed:

> "We also applied for a loan from CRDB. The loan amount was TShs 1,9 billion. This was total amount … the conditions given by CRDB for the loan were to execute a mortgage debenture as well as personal guarantees. We also executed a mortgage on Dar-es-Salaam Industrial property on plot No. 181 and 182 Chang'ombe … a workshop property at Tanga, a workshop property at Mwanza; commercial property at Dodoma. The property which is the subject matter of the suit was not subject of the mortgage. This was not included because the transfer documents were already signed and delivered to M Juma and Shirin. At the time of getting the CRDB loan this property was not included anywhere in our books …

> We also executed a debenture in favour of CRDB. In here this property was not referred to. I continue to reside in the premises and I am still residing there. I am residing there in the capacity that the property belongs to my family members. The share holders were aware of the board's decision to transfer the property to Second and Third Defendants.
>
> The shareholders did not object to this decision …".

The witness is very categorical that the decision to transfer the property was made by him and Shiraz and that it was a family matter. In cross-examination he said, "The alienation of company's property did not require the director's resolution as it was a family matter".

He gave further exposition in re-examination by responding:

> "The donation was a family matter because family directors decided to give me and my family property as a gratitude for my services. The Management and ownership of KJ Motors belonged to one family. If ratification was required it would have been family directors. For ratification by shareholders it would have been myself and Shiral Dhanani and the same would have been the case if ratification by board was required. So my reference to informal consent meant Shiraz and myself".

The other director, Shiraz (DW2) leaves no speck of doubt on the informality used:

> "[I]t was decided as a family that he should be given this property … those who made this decision were me and my uncle, First Defendant. The other directors were informed and they agreed to this … At the time of making this decision shareholders were First Defendant, the other one was an institution, called Concord Investment are 8–10 members … shareholders of KJ Motors were made aware of this decision and they agreed with it".

Under cross-examination he said:

> "I was involved in day to day Management of the company. I was the one who made a proposal regarding the donation of the property. The decision was subsequently made by me and First Defendant … as a family company we made many decisions or resolutions but which we were not drawing the minutes … I got the consent of donation from other members by telephone …".

In re-examination he said, "To me such decisions not minuted can be regarded as resolutions …".

DW 3, the company secretary caps it all because while he talks of a decision by the board he clearly shows that there was no meeting as such. He is on record stating:

> "Mr Noorally Dhanani was a founder member of KJ Motors and because of his outstanding services to the family company the board decided to give him the house on Plot No, 121 Kilimani Road as a gift.
>
> The board of the company was composed of First Defendant, Shiraz Dhanani, Nizar Dhanani and Alnoor Dhanani. The board which decided to give the gift was composed of Noorally Dhanani and Shiraz Dhanani. The other two directors had always remained as non-residents but whatever communication was done with them abroad was with other two directors. I came to know that they had given the house as a gift because Noorally Dhanani and Shiraz Dhanani called me and told me …"

As regards DW4 and 5, their testimonies do not assist in determining the question whether the company decided to give out the property as a gift let alone legally doing, so. DW4 (Mehboob – Third Defendant) deponed:

> "My father told me that his other company directors had agreed to give him his place of residence to be his own. So we were very happy with the news and the documents to that effect were prepared and duly signed by me …

> My father told me that the remuneration were restricted and insistence was on profit so the property was considered to be a joint payment as remuneration and for profit.
>
> Although the property was given to father the latter allowed me to execute the documents because he said that he wanted to pass the property to mother and me … We executed the documents to signify our acceptance …".

On the other hand, DW5 deponed: "I remember my husband told me that the property is transferred to me … He told me that it was being given to me as a gift. It was given to me and my son Juma".

Unlike the son, DW5 seems to harbour a belief that it was the company which donated the property to her. In cross-examination she states: "The company donated the property to me on account of love and affection".

I should pause here and give both counsel due appreciation of the energy expended in their final spirited submissions which covered 14 pages and 18 pages for Plaintiffs' and Defendants', respectively.

On deed of gift and transfer issue the Plaintiff's counsel insisted that as per Land Registry records ownership of the disputed property has never changed from KJ Motors hence it remained to be part of assets and properties charged by the company in favour of the bank on the strength of clause 2 of exhibit P6 and "by no means was the property excluded by clause 3" thereof as only Motor Vehicles under the motor vehicles dealership subject to the floating charge could be disposed of by the company in its ordinary course of business; that the mortgaging of the property to Crown Finance and Leasing Company Ltd did not bar the company from creating a floating charge (equitable charge) to CRDB although the former charge would rank first over the latter's; that the company is incapable of feeling love and affection; that the donation could not have been made on the basis that the company was a family business as that would violate the principle that a company is a separate entity from its members (*Salomon v Salomon* [1897] AC 22); that even if the company had the capacity to effect the donation, the same was purportedly made to First Defendant and not the Second and Third Defendants and that in any case the donation and transfer did not comply with the company's articles and memorandum of association as no resolution was made by the board to that effect let alone authorising the use of the company seal on transfer documents; that even if the transfer was otherwise proper it became invalidated because the deed of Gift was not registered in terms of section 8(1) of The Registration of Documents Ordinance, Chapter 117.

On the other hand, the Defendants' counsel argued that a company being a legal personality has a capacity to donate its property and give gift or gratuity to its directors or director's relatives as KJ Motors did in this case (making reference to *Halsbury's Laws of England* (4 ed) Volume 20 at 5 and 7); that the essential criteria of a valid and complete gift, which include an intention of the donor to relinquish the beneficial ownership in favour of the donee and an act or acts sufficient to implement that intention were made in this case as per executions of the deeds of gift and transfer, and a nominal consideration of just one shilling (referred to *Letters v IRC* [1956] 3 All ER 388, [1957] 1 WLR 201); that the transfer was completed after execution of the two deeds and that non-registration does not invalidate transfer as that can be done subsequently.

Now, the Plaintiff having proved that the property on Plot No. 121, Kilimani Street is in the name of KJ Motors (as per records of the Land Registry

and conceded to by both parties including their witnesses); that, CRDB having extended an overdraft facility to KJ Motors, a debenture was created; that for failure to service the facility the Plaintiff who was appointed Receiver and Manager by CRDB has taken over possession of company properties and assets which should be disposed of in order to realise the indebtedness of the company, the burden then shifts to the Defendants to prove that the disputed property is not one of the KJ Motors properties which should be placed under Plaintiff. Has the testimonies of the Defendants and their witnesses discharged that burden?

As indicated above, the issues are intertwined. We have to determine whether a company has the capacity to donate a gift or a gratuity; if so, whether in this case KJ Motors legally donated the disputed property to the donees and if positively answered, whether the property was duly transferred.

Starting with the company's capacity to give a gift, I am fully persuaded by the Defendants' argument that though it is incapable of feeling natural love and affection, it is capable of giving a gift. Let Mr *Mbuya*'s submission to which I subscribe as being the legal position, paint the picture: *Halsbury's Laws of England* (4 ed) Volume 20 at 5 states:

> "*Prima facie* everyone who is *sui juris* can dispose by way of gift of any property or any estate or interest in it to which he is entitled. It is clear on legal and equitable principles that a person *sui juris* acting freely fairly and with sufficient knowledge ought to have and has power to make in a binding and effectual manner a voluntary gift of any part of his property whether capable or incapable of manual delivery whether in possession of reversion and howsoever circumstanced".

The *Black's Law Dictionary* (6 ed) at 1434 defines "*sui juris*", as of his own right, possessing full social rights and civil rights; not under any legal disability, or the power of another, or guardianship, having capacity to manage one's own affairs, not under legal disability to act for one's self.

KJ Motors Ltd is a limited liability company incorporated under the Companies Ordinance (Chapter 212). A limited liability company is a legal person with full legal capacity to manage its own affairs and which suffers no legal disability. It can, therefore, make a gift either to its directors, members, employees or any other person.

Again *Halsbury's Laws of England* (4 ed) Volume 20 at 7 states:

> "A limited company frequently takes power by its memorandum of association to benefit gratuitously the company's employees and their relatives and to subscribe to charitable objects and without express power, a company incorporated by a special Act of Parliament or under the Companies Acts can give gratuities when to do so tends to the prosperity of the company's business".

Gratuity is defined in the *Black's Law Dictionary* (6 ed) at 701 as "something acquired or otherwise received without bargain or inducement, something given freely or without recompense; a gift". Mr *Mbuya* has not misdirected himself in the above exposition.

I thus hold that all other elements being met, KJ Motors Ltd had the capacity to donate any of its assets/property to any person.

Did KJ Motors donate the house on plot number 121, Kilimani Road, to the Second and Third Defendants? In my considered finding, although in their testimonies, as per excerpts above, DWI-5 so allege, supported by their counsel in his submissions, there was no donation, legally, worth the description. Why?

First, there is glaring evidence that there was no resolution by the board to such an undertaking. DW1 is categorical, "The decision was made … by myself and Dhanani".

When answering questions by Mr *Mwandambo,* he insisted on what took place: "The alienation of company's property did not require the director's resolution as it was a family affair … The transfer got an informal consent in the office. It was not necessary to be ratified by directors because it was a family matter".

As to what he meant by "informal consent" he plainly explained when re-examined by Mr *Mbuya*: "So my reference to informal consent meant Shiraz and myself". And, belatedly he adds that the non-resident directors also consented – this highly questionable story was put across when answering questions by the court.

The above is also reflected in DW2's testimony who said that he moved the proposition, concluding while under cross-examination by Mr *Mwandambo*: "The decision was subsequently made by me and First Defendant".

As did DW1, he belatedly hatches a story regarding the securing of other directors' consent; and in fact goes further to say that even shareholders consented – and for that matter, by telephone! The impregnable suspicion looming over this story as it does on that of DW1 needs no second telling.

The non-existence of the board's resolution is capped by the testimony of the company secretary (DW3) who would invariably be the appropriate person to know what transacts in board meetings. He is categorical: "There was no resolution on preparation of exhibit D1 and D2. There was no formal meeting".

As to how, when, and by whom the decision of gift-giving was made is purely hearsay as regards this key person (DW3) in company's affairs! He deponed: "I came to know that they had given the house as a gift because Noorally Dhanani and Shiraz Dhanani called me and told me".

As rightly submitted and conceded by both counsel, a company is a separate entity: a separate legal personality from the family Members. A decision which removes such asset from the company's assets could only be arrived at by the board. No board sat, no board's decision on gift-giving was made, as amply demonstrated. DW1 may have been a founder member of the company, and he may have immensely contributed to the company's flourishing let alone other Members and shareholders being family members, but he [or any fragmentation of directorship] could not legally decide to pass over the company's asset to himself (or anybody else) as a gift without the board's resolution, to that effect. He (DW1) and/or DW2 may have effected numerous informal transactions concerning KJ Motors for years under a belief or disguise of being "family matters" but that in itself did not clothe them with any legality. They were not. It is only that they were never challenged. This transaction however has instigated a challenge to the illegal "tradition" if it ever existed.

There is yet (secondly) another element which splashes another insurmountable uncertainty. To whom was the alleged gift given?

DW1 says it was given to him and his family for his exemplary services to the company. DW2 who deponed to have moved the proposition and finally

participated in the decision is silent about "family" but insists "It was given to my uncle as a gift".

He does not attempt to explain how the donees came to be other than the very person to whom the gift was given for "exemplary services". The same *lacuna* is not filled up by the company secretary's (DW3) testimony for he is equally totally silent. As for DW4 and 5, the excerpts quoted display how they treated the issue – the son (DW4) thought it was a gift from the father while DW5 thought it was a gift from KJ Motors and not for anything else but for "love and affection".

Thirdly, it defeats credulity that if indeed the company had donated the property to Defendants in May 1997 it could again in the same month (8 May 1997) use the same asset to secure its liability to Crown Finance and Leasing Co Ltd as by then, as per allegations, it was no longer the company's property!

The totality of the above clearly answers issue two negatively: the property in question was never donated or given out as a gift to the Second and Third Defendants.

Having answered issue two thus answers to issues three and four are obvious. There was no transfer of the property in question and therefore the question of a fraudulent or illegal transfer does not arise.

I should hurriedly add however, that although the allegations of gift or donation and alleged documentation as already held exhibit suspicions there is not sufficient evidence to support the charge of fraud in any of the alleged transactions. A charge of fraud though in civil matters, as rightly argued by Mr *Mbuya*, requires a higher standard of proof than an ordinary civil matter and should be strictly proved: *Ratilal Gorhanbhai Patel v Lalji Makanji* [1957] EA 314. Mr *Mbuya* very rightly relied on correct principles of the law when he made reference to *Mogha's Law of Pleadings* (4 ed) at 66, and the *Supreme Court Practice* 1985 Volume 1 at 283, wherein it is stated: "Mere suspicion is not enough, there must be circumstances incompatible with honest dealing" and "fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts", respectively.

As regards issue four the answer should obviously be positive. Throughout, the property in question remained part of KJ Motors Ltd's assets. It is also obvious however that it was already encumbered as it had already been mortgaged to Crown Finance and Leasing Limited since 1997 – this is therefore a first ranking charge. This however is not to say that it was totally excluded from the realm of floating charges for the company's liabilities. The property's residue after satisfying the Crown Finance and Leasing liability would naturally fall back into the pool of KJ Motors' assets which again fall under the floating charge where the company's liability lies. And, as the debenture to CRDB was created at a time when the said property was under the general assets of the company save for the first ranking charge to Crown Finance and Leasing obviously it is covered by the general floating charge aspect. With the above findings, the counsel's arguments on clause 3 of exhibit P6 – whether the property in question was or was not one of the company's assets that could be disposed of in its ordinary course of business, becomes irrelevant.

Finally, is the issue concerning the rights of the parties. In view of the findings reached, the Defendant's prayers cannot be entertained. They are accordingly dismissed. What about Plaintiff's? The prayers are reflected on page 41(1) of this judgment. Apart from the above prayers, PW1 and 2 made another prayer in the alternative: "I also pray that the property be vacated and handed over to the Receiver appointed by CRDB *or any other suitable third party regard being had to the fact that the charge to Crown Finance ranks first"* (emphasis mine on the relevant prayer).

I have carefully considered the matter and arrived at the following. Regard being had to the fact that CRDB does not have the first charge on the property and that Crown Finance and Leasing which has the first charge is not a party to these proceedings, Plaintiff's prayers cannot be allowed in the way and manner they are projected.

Instead, it is hereby declared that the property is one of the assets of KJ Motors Ltd; the Defendants are restrained from disposing of, alienating and/or dealing with the said property in a manner inconsistent with terms of credit facilities extended to KJ Motors Ltd by Crown Finance and Leasing Ltd and CRDB, and, for ends of justice, both the Receiver and Manager of CRDB (Plaintiff) and Crown Finance and Leasing should be heard on the issue first before the court decides into whose hands should the property be placed in terms of prayer (*c*) of the Plaintiff's prayers.

In conclusion, while the Defendants' counterclaim is dismissed in its entirety, the Plaintiff's claim is allowed to the extent indicated and subject to orders that will be made by the court after hearing, the Plaintiff and Crown Finance and Leasing on Plaintiff's prayer (*c*). Plaintiff is also awarded costs.

For the Applicant:
Information not available

For the Respondent/Defendant
Information not available

Mwakyoma v Mbeya-Rukwa Autoparts and Transport Ltd
[2001] 2 EA 482 (CAT)

Division:	Court of Appeal of Tanzania at Mbeya
Date of Ruling:	27 March 2001
Case Number:	7/00
Before:	Lugakingira JA
Sourced by:	H K Mutai
Summarised by:	LJS Mwandambo

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[1] Court of Appeal – Practice – Applications – Affidavits in support of applications – Validity of affidavit – Deponent's personal knowledge of the facts required – Whether the Civil Procedure Code applies to proceedings before the Court of Appeal – Section 2 and Order IXX, rule 3 – Civil Procedure Code of 1966 – Rule 46(1) – Court of Appeal Rules.

Editor's Summary

The provisions of the Civil Procedure Code do not apply to proceedings in the Court of Appeal. Section 2 thereof provides that the Code applies to proceedings in the High Court, courts of resident magistrates and district courts. Under rule 46(1) of the Court of Appeal Rules, an affidavit in support of a formal application must be sworn by a person having personal knowledge of the facts deponed to therein in order to be valid; *Malima v Mwingamno* civil application number 5 of 1987 considered.

Case referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed and "**LLR**" means LawAfrica Law Reports; "**O**" means overruled)

Malima v Mwingamno civil application number 5 of 1987 – **C**

Ruling

LUGAKINGIRA JA: This is an application by notice of motion to strike out civil appeal number 45 of 2000 lodged in this Court by the Respondent company from the decision of the High Court at Mbeya in Misceallenous. Civil application number 3 of 1995. The motion is supported by an affidavit sworn by one Kimpo Mwakyoma, a son of the Applicant. When the application came on for hearing, learned counsel for the Respondent, Mr *Mbise*, raised a preliminary objection giving three grounds: that Kimpo's affidavit was invalid as he is a stranger to the case; that the said affidavit is bad in law for being argumentative; and that the affidavit is again invalid for being hearsay evidence. I decided to hear both the preliminary objection and the substantive application in case it became necessary to decide on the merits of the latter.

In support of the grounds in the objection, Mr *Mbise* argued that Kimpo was not a party to the case or to the application and, therefore, not conversant with the facts thereof. He referred to rule 46(1) of the Court Rules regarding the kind of persons who may swear affidavits in support of applications. Mr *Mbise* next said that Kimpo's affidavit contravened the provisions of Order IXX, rule 3 of the Civil Procedure Code as it was argumentative rather than factual. He added that the deponent did not state, either, whether he believed the information obtained by him from his advocate. Finally, Mr *Mbise* said that the affidavit was hearsay, it being based an information obtained from a person who did not swear an affidavit of his own to support the application. He crowned his arguments by contending that Kimpo's affidavit was contrary to practice as it had no title and could be grafted onto any notice of motion.

Mr *Mkumbe* who appeared for the Applicant replied that under rule 46(1) affidavits can be sworn by persons other than the parties to the suit or application. He contended that Kimpo was conversant with the facts of the case, hence qualified to swear the affidavit he swore. Mr *Mkumbe* further contended, apparently similarly alluding to Order IXX, rule 3, that Kimpo believed the

information he (Mkumbe) gave him, otherwise he would not have supplied the affidavit. Mr *Mkumbe* then submitted that the affidavit was not hearsay since the source of information, himself, was before me. He conceded the absence of a heading to the affidavit but argued that the omission was cured by the fact that Kimpo's affidavit was specifically referred to in the notice of motion.

It seems unnecessary to go into the arguments pertaining to the substantive application as I think the matter is disposable on the basis of the preliminary objection. To begin with, I think the absence of a title to Kimpo's affidavit, although a defect, does not affect the validity thereof. I agree with Mr *Mkumbe* that the defect is cured by its reference in the notice of motion. Next, I wish to point out that the provisions of the Civil Procedure Code, 1966, do not apply to proceedings in this Court. According to section 2 of the Code, its provisions apply to proceedings in the High Court, courts of resident magistrates and district courts. Order.IXX, rule 3 of the Code was therefore wrongly cited or alluded to in the present context. In formal applications to this Court, the applicable provision is certainly rule 46(1). It states: "Every formal application to the Court shall be supported by one or more affidavits of the Applicant or of some other person or persons having knowledge of the facts".

Under this provision, then, the deponent to an affidavit must have personal knowledge of the facts to which he depones. True, persons other than the Applicant may also supply affidavits, but if they do, they must be persons who depone to what they personally know. In contrast, a deponent to whom Order IXX, rule 3 applies may depone to facts known to him and, in interlocutory applications, to statements of his belief. In this case, therefore, Kimpo had to depone to facts known to him.

Unfortunately, that was not so; Kimpo was in fact not conversant with the facts of the case, although he claims to the contrary in paragraph 3 of his affidavit. All the facts pertaining to the case are contained in paragraph 4(*a*), (*b*), (*c*), (*d*) and (*e*), and he states in paragraph 5 that what is stated in paragraph 4 is from information obtained from Mr *Mkumbe*. The whole of paragraph 4 is therefore hearsay and of no evidential value. The position in this application is not unlike what obtained in *Malima v Mwingamno* civil application number 5 of 1987, to which Mr *Mbise* referred. As in that case, it is inexplicable that Mr *Mkumbe* did not swear any affidavit in support of the application. Mr *Mkumbe*'s appearance before me did not cure the invalidity of Kimpo's affidavit; indeed, he carefully made no reference to the affidavit when arguing the substantive application.

It is evident from the foregoing that the notice of motion is not supported by a valid affidavit as required by rule 46(1). It is therefore incompetent. I accordingly uphold the preliminary objection and strike out the application with costs.

For the Applicant:
Mr Mkumbe

For the Respondent:
Mr Mbise

Ndyanabo v Attorney-General
[2001] 2 EA 485 (CAT)

Division:	Court of Appeal of Tanzania at Dar-Es-Salaam
Date of judgment:	14 February 2002
Case Number:	64/01
Before:	Samatta CJ, Kisanga and Lugakingira JJA

Sourced by: LJS Mwandambo

Summarised by: H K Mutai

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[1] Constitutional law – Fundamental rights – Right of access to justice – Election petition requirements – Payment of deposit before fixing of petition for hearing – Whether the requirement to pay deposit was a violation of a fundamental right – Whether the provision could be justified under the Constitution – Articles 13 and 30 – Constitution – Section 4 – Basic Rights and Enforcement Act 1994.

[2] Statutory interpretation – Conflict between provisions of amended Act and Rules made under earlier Act – Principles to be applied in resolving conflict – Whether Rules repealed by later Act – Whether Rules still in force – Section 111(2) – Elections Act 1985 – Rules 11(3) and 197 – Elections (Election Petition) Rules.

Editor's Summary

During the October 2000 Tanzanian general elections, the Appellant unsuccessfully ran for the Nkenge parliamentary seat. He thereafter filed a petition challenging the declared results. Section 111(2) of the Elections Act provided that the registrar was not to fix a hearing date for a petition unless the petitioner had paid into court a sum of TShs 5 million as security for costs. The Appellant failed to pay the deposit and, as a result, the registrar did not fix a date for the hearing of the petition. The Appellant thereafter filed another petition seeking a declaration that the statutory provision contravened articles 13(1), (2), and (6)(*a*) of the Constitution, which guaranteed equality before the law and prohibited discrimination. He contended that the subsection was arbitrary, discriminatory, unreasonable and an unjustified restriction on the right of a citizen to be heard by the court on his complaint regarding the conduct of parliamentary elections.

The Attorney-General in reply contended that the deposit requirement was consistent with the avoidance of unnecessary and unreasonable costs to the government as well as other individuals who might be involved in petitions and was saved from unconstitutionality by the clawback clauses of article 30(1) and (2)(*a*) in the Constitution. He further argued that the Appellant ought to have applied to the court under rule 11(3) of the Elections (Election Petition) Rules for a direction that he give such other form of security as the court thought fit or be exempted from the requirement altogether. The High Court, by majority, accepted the Attorney-General's arguments that the provision was aimed at protecting Respondents in election petitions on the question of costs and dismissed the petition.

The Appellant appealed against this decision on the grounds, *inter alia*, that the High Court had erred in holding that the right of access to court was fulfilled by simply filing pleadings and paying the requisite court fees. He further averred that the court had erred in not holding that the principle of

equal treatment meant that all persons must have free access to court and be equally protected from discriminatory preconditions curtailing the right to be heard. Further, it was argued that the trial court had erred in not holding that section 111(2) and (3) was arbitrary, and placed unreasonable and unfair limitations on Tanzanian citizens. The Appellant also contended that a petitioner could not rely on the provisions of rule 11(3) as that subrule had, by necessary implication, been repealed by section 111(2). The Attorney-General argued that section 111(2) did not constitute an impediment to justice but rather was a legitimate attempt to balance the rights and duties of litigants in election petitions in a manner permitted by article 30 of the Constitution. Though conceding that it was not clear what criterion was used in fixing the deposit at TShs 5 million, the Respondent submitted that the discretionary power of the High Court under the Rules had not been abolished by section 111(2).

Held – In interpreting the Constitution the court would be guided by the general principles that (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was constitutional, and (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, where those who supported a restriction on a fundamental right relied on a clawback or exclusion clause, the onus was on them to justify the restriction.

The use of the word "and" in article 13(5) could not have been intended by the framers of the Constitution who, bearing in mind the wording of the provision, must have intended to use the word "or" so that the provision would comprise two limbs. Accordingly, the word "discriminate", as used in the article, embraced juristic and collective bodies as well as natural persons and, in appropriate cases, juristic persons could complain of a violation of the principle of equality before the law.

A person's right of access to justice was one of the most important in a democratic society and, in Tanzania, that right could only be limited by legislation that was not only clear but which was also not violative of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent, impartial and accessible judiciary.

It was a well-established principle of law that Rules had to be read together with their relevant Act and that where an Act passed subsequent to the making of the Rules was inconsistent therewith, the Act prevailed unless it was passed with a different object. In this instance, it was clear that secction 111(2) had, by necessary implication, repealed rule 11(3) and that Parliament had wanted to make it a rule without exception that every petitioner, regardless of financial standing, deposit TShs 5 million before his petition could be fixed for hearing.

The High Court had erred in holding that the mere filing of pleadings and payment of court fees constituted access to justice. The right of access included the right to present one's case or defence before the courts and it was incorrect to say that once a petitioner had filed his petition, he had enjoyed the whole of his right of access to justice. Though fundamental rights could be limited, the limitations could not be arbitrary, unreasonable or disproportionate to any claim of state interest. The limitation imposed by section 111(2) was arbitrary and inflicted an unjustified disability on indigent petitioners. It also classified petitioners into those who would be able to have their petitions heard and

those to whom, as a result of poverty, the doors of justice would be shut. Though it was not a principle of law that all laws be of universal application, any classification had to have a rational nexus to the object sought to be achieved by the legislation in question. Consequently, Parliament had exceeded its powers by enacting section 111(2) and the said provision was unconstitutional. This being so, the end result was that rule 11(3) was still in force and a petitioner still had the right to apply for an exemption. Section 111(2) was therefore not unconstitutional in exempting the Attorney-General from the obligation of depositing money.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Chief Direko Lesapo v 1 North West Agricultural Bank 2 Messenger of the Court, Ditsobotla case CCT 23/99

Director of Public of Prosecutions v Daudi Pete [1993] TLR 22

Farooque v Secretary of the Ministry of Irrigation, Water Resources and Food Control (Bangladesh) and others [2000] 1 LRC 1

His Holiness Kesavananda Bharati Sripadanagalavaru v State of Kerala and another [1973] Supp SCR l

Kukutia Ole Pumbun and another v Attorney-General and another [1993] TLR 159

Madras v VG Row [1952] SCR 597

Sugumar Balakrishnan v Pengarah Imiresen Negeri Sabah and another [2000] 1 LRC 301

United Kingdom

Britt v Buckingham CC [1964] 1 QB 775 78

Chester v Bateson [1920] 1 KB 829

Ex p Davis [1872] LR 7 Ch 526

Francis v Yiewsley and West Drayton Urban District Council [1957] 2 QB 136

Harvest Sheen Ltd and another v Collector of Stamp Revenue 2 CHRLD 246

Kruse v Johnson [1898] 91

Pyx Granite Co Ltd v Ministry of Housing and Local Government and others [1960] AC 260

R and W Paul Ltd v The Wheat Commission [1937] AC 139

Raymond v Honey [1983] AC 1

Re Boaler [1915] 1 KB 21

Judgment

SAMATTA CJ: This is an appeal from a decision of the High Court (Kyando and Ihema JJ, Kimaro

J, dissenting) dismissing a petition filed by the Appellant for a declaration that section 111(12), (3) and (4) of the Elections Act of 1985 (the Act), is unconstitutional for being violative of article 13(1), (2) and 6(*a*) of

the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution). Essentially, the appeal is about access to justice.

The background to the appeal may, we think, be stated as follows. In the general election held in this country in October 2000 the Appellant, an advocate by profession, entered into a contest for the parliamentary seat in Nkenge Constituency. According to the results of the contest announced by the Returning Officer, the Appellant lost the election. He was aggrieved by those results. As he was entitled under section 111(1) of the Act, he filed an election petition before the High. Court, questioning the validity of the declared victory of one of his opponents in the election. The registrar of the Court has not, in compliance with the provisions of section 111(2) of the Act, fixed a date for the hearing of the petition. The subsection, as amended by the Electoral Laws (Miscellaneous Amendments) Act of 2001, reads:

> "(2) The registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court as security for costs, a sum of five million shillings in respect of the proposed election petition".

The Appellant, who has not paid the required deposit, decided to file, under article 30(3) of the Constitution and section 4 of the Basic Rights and enforcement Act of 1994, a petition questioning the constitutionality of the subsection and praying for a declaration that the said statutory provision is unconstitutional. It is the decision of the High Court on that petition which has given rise to the appeal now before us. Before the High Court it was the Appellant's contention that the requirement in the subsection is unconstitutional, on the ground that it is arbitrary, discriminatory and unreasonable and therefore it constitutes an unjustified restriction on the right of a citizen to be heard by the Court on his complaint against illegalities or irregularities in the conduct of a parliamentary election. The learned Attorney-General's response to the petition was a fairly simple one: the requirement to deposit Shs 5 million as security for costs was "consistent with the avoidance of unnecessary and unreasonable costs to the government, as well as individuals involved which can be caused by unreasonable and vexatious petitioners who might bring petitions without any reasonable cause". The learned Attorney-General urged the Learned Judges of the High Court to hold that the Appellant had taken a wrong step in law in challenging the constitutionality of the requirement of depositing TShs 5 million as security for costs; what he should have done was to file an application under rule 11(3) of the Elections (Election Petitions) Rules, 1971 as amended (for short "the Rules") for a direction that he gives such other form of security as the court would consider fit, or that he be exempted from payment of any form of security for costs. The learned Attorney-General also rested his defence to the petition on the provisions of article 30(2)(*a*) and (1) of the Constitution, asserting that those clawback clauses save the statutory requirement of depositing TShs 5 million as security for costs complained against by the Appellant from the vice of unconstitutionality. It was his case that the provisions of section 111 meet the test of constitutionality laid down by this Court in *Kukutia Ole Pumbun and another v Attorney-General and another* [1993] TLR159. Kyando and Ihema JJ, who examined the issues raised before the court at great length, entertained no doubt whatsoever that the statutory provision under attack does not suffer from unconstitutionality. In the course of their ruling they said: "We have carefully considered the parties' pleadings and their lucid

submissions thereto and we are of the firm view that the petition has been filed without any colour of merit. It is bound to fail".

Accepting, as they did, the contention of counsel for the learned Attorney-General that the impugned statutory provision was aimed at protecting Respondents in election petitions on the question of costs, the Learned Judges said:

> "As a general principle payment of security for costs is intended to secure 'the payment of costs if such person does not prevail'. And as correctly submitted by Mr *Mwidunda*, learned Senior State Attorney, for the Respondent the provision for costs puts a just and fair obligation on the part of the petitioner to secure the costs of those he drags to court and as such the provision is legally necessary to protect a Respondent in the costs to be incurred in the litigation. We agree and hold that the provisions of section 111(2) of the Elections Act 1985, as amended, are in tandem with article 30(1) and 2(*a*) and (*f*) of the Constitution of the United Republic of Tanzania, imposing limitations upon, and enforcement and preservation of basic rights, freedoms and duties".

Article 30(1) and (2)(*a*) and (*f*) of the Constitution provides:

> "30(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
>
> (2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of –
>
> (*a*) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;
>
> (*b*) – (*e*) …
>
> (*f*) enabling any other thing to be done which promotes or preserves the national interest in general".

The Learned Judges dismissed as untenable the contention of the Appellant that the provisions of section 111(2) and (13) of the Act are discriminatory on the ground that they deny equal access to the High Court because they place a private election petitioner and the Attorney-General on unequal footing on the matter of depositing a sum of money as security for costs. They said:

> "The Petitioner supports his proposition by contending that adherence to the rule of law demands equal treatment before the law in terms of article 13(1) of the Constitution and the extent that a legal provision which is discriminatory in itself or its effect is prohibited by article 13(2) of the Constitution. We quite agree that is a correct proposition of the law but we hasten to say that litigation, including election petitions involving the government, are governed and/or regulated by a specific legislation, the Government Proceedings Act of 1967 as amended whereas, as correctly submitted by the learned Senior State Attorney, litigants' costs against the government are more than secured under section 15 of that Act. We are of the considered view that such a practice is more of an exception than outright discrimination as alluded to by the petitioner. There is therefore no violence done to article 13(1) and (2) of the Constitution which basically guarantees equality before the law".

A little later, the Learned Judges concluded their consideration of the arguments of counsel. They said:

> "We agree that the spirit behind the amendment to section 111 of the Elections Act 1985 was intended to ensure that Respondents in election petitions are protected in

> terms of costs which they are forced to incur in defending their cases. We are not persuaded that the amendment was either intended to introduce a new aspect unknown to law or a precondition to curtail the right to fair hearing and equality before the law. For we reiterate that the legal requirement for payment of security for costs is well-established and accepted in many jurisdictions where the rule of law is vigorously followed. We on the other hand find it desirable to introduce such adequate safeguards for a petitioner (*sic*) who is not able to give the prescribed security for costs. Essentially this is what is provided for in rule 11(3) of the Election (Elections Petitions) Rules 1971 which we believe is still in force and applicable. For the avoidance of doubt we advise that the wording of rule 11(3) of the Election (Election Petitions) Rules, 1971, be also uplifted and introduced in the provisions of section 111 of the Elections Act 1985".

As already indicated, Kimaro J, found herself unable to share her brethren's views on the constitutional status of the challenged statutory provision. She held that the provisions of section 111(2) and (3) of the Act are violative of the Constitution. In the course of her dissenting ruling, she said:

> "By any standard the provisions of section 111(2) and (3) have been made arbitrarily and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. The impression created by the provisions is that they are safeguards of interests of few people".

Dealing with the argument of counsel for the Attorney-General that the amount of money required to be deposited as security for costs is not excessive, the Learned Judge said:

> "My views are that the amount being required to be deposited as security for costs being excessive, it is only few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned, will be curtailed. Accessibility to justice will be open to only those who can afford to pay security for costs".

The Appellant now says that Kyando and Ihema JJ, misdirected themselves in law in finding no merit in his petition, and Kimaro J, was right in dissenting from that view. Before us he was represented by Prof *Shivji*, who was assisted by Messrs *Maira, Rweyongeza* and *Magafu.* The High Court's decision is impugned on the following six grounds of appeal:

1 The trial Judges erred in law and in fact in holding that the right to access to court as provided under article 13(1) of the Constitution of the United Republic of Tanzania is fulfilled by simply filing the pleadings and payment of requisite court fees.

2 The trial Judges erred in law and in fact in not holding that the principle of equality before the law as contained in article 13(1) and 13(16)(*a*) of the Constitution of the United Republic of Tanzania means that all persons must have free access to court and must be equally protected from discriminatory pre-conditions which curtail the right to be heard.

3 The trial Judges erred in law and in fact in holding that the mandatory pre-condition of payment of TShs 5 million as per section 111(2) of the Elections Act 1985, is realistic, reasonable and necessary to achieve legitimate purpose of securing Respondent's costs in a petition without taking into account that the majority of Tanzanians are poor.

4 The trial Judges erred in law and in fact in not holding that implementation of section 111 (3) of the Elections Act 1985, is discriminatory in nature rather than an exception as natural persons are mandated to deposit security amounting to TShs 5 million for costs unlike the Attorney-General.

5 The trial Judges erred in law and in fact in not holding that sections 111(2) and (3) of the Elections Act, 1985 have been made arbitrarily and the limitations therein are unreasonable and unfair to the citizens of Tanzania.

6 The trial Judges erred in law and in fact in not holding that the mandatory pre-condition for security for costs as provided under section 111(2) of the Elections Act, 1985, operates as to stultify or curtail the right to fair hearing [of] an ordinary citizen who cast his vote.

Prof *Shivji* argued grounds 1, 2, 3 and 6 together, and the remaining two grounds also together. Mr *Mwidunda*, Senior State Attorney, who appeared, together with Mr *Salula*, for the Respondent Attorney-General, adopted the same method of presentation of his arguments. We hope we are not misrepresenting or failing to do justice to counsel if we seek to summarise their submissions.

Dealing with grounds of appeal 1, 2, 3 and 6, and citing article 13(1) and (6) of the Constitution, *Farooque v Secretary of the Ministry of Irrigation, Water Resources and Food Control (Bangladesh) and others* [2000] 1 LRC 1, *Sugumar Balakrishnan v Pengarah Imiresen Negeri Sabah and another* [2000] 1 LRC 301, among other authorities, the learned advocate for the Appellant pressed us to attach special importance to the right of unimpeded access to justice. In this connection, he called our attention to a number of passages from some judgments from various cases, including *Balakrishnan*'s case (*supra*) in which, speaking for the Court of Appeal of Malaysia, Gopal Sri Ram JCA, said:

> "We are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. Were it otherwise, the protection afforded by arts 5(11) and 8(1) of the Federal Constitution will be illusory and the language of the supreme law no more than high sounding words of no practical significance".

Prof *Shivji* challenged the constitutionality of section 111(2) of the Act with great force. He submitted that the statutory provision creates almost an insurmountable obstacle to the exercise of the right of access to justice because a trial of an election petition is made contingent upon paying the deposit. According, to counsel, the requirement, which leaves no discretion in the court, is a violation of article 13(1) and (6) of the Constitution. Relying on a passage in the judgment of the High Court of Hong Kong in *Harvest Sheen Ltd and another v Collector of Stamp Revenue* 2 CHRLD 246, the learned advocate submitted that "if a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place". He went on to contend that a petitioner in an election petition cannot ask the High Court to summon the aid of the provisions of rule 11(3) of the Rules in his favour. The subrule provides:

> "(3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that–
>
> (*a*) the petitioner give such other form of security as the court may consider fit; or
>
> (*b*) the petitioner be exempted from payment of any form of security for costs:
>
> Provided that no order shall be made under this paragraph unless an opportunity had been given to the Respondent, or, where there are two or more Respondents, to each of the Respondents to make representations in that behalf".

Prof *Shivji* contended that a petitioner cannot now make an application referred to in the subrule because, as the learned advocate put it, the subrule has, by necessary implication, been repealed by section 111(2) of the Act. Mr *Mwidunda*'s response to these arguments was an uncompromising one. He sought to combat the arguments by contending that section 111(2) of the Act does not in any way constitute an impediment to access to justice; what its provisions do is to balance rights and duties of litigants in election petitions. Treating article 30(2)(*a*) and (*f*) of the Constitution as the sheet-anchor of his response, the learned Senior State Attorney went on to submit that section 111(2) and (3) was enacted to ensure that the rights and freedoms of petitioners in election petitions are not used to the prejudice of Respondents in those proceedings as far as costs are concerned. According to the learned Senior State Attorney, the provisions of section 111(2) of the Act meet the test of reasonableness of a restriction on a fundamental right, laid down by this Court in *Pumbun*'s case (*supra*). Very fairly, however, he conceded that the Hansard does not disclose the criterion which was used in fixing five million shillings as the amount of deposit to be made. Mr *Mwidunda* further submitted that, contrary to Prof *Shivji*'s contention, section 111(2) has not abolished the discretionary power of the High Court under rule 11 of the Rules to direct that a petitioner provide some other form of security or to waive the requirement to deposit Shs 500 as security for costs. According to the learned Senior State Attorney, the requirement of depositing five million shillings does not limit the right of access to justice in election petitions.

Making his submissions on the fourth ground of appeal, Prof *Shivji* contended that section, 111(3) of the Act is discriminatory against a private petitioner because the Attorney-General is exempted from being required to make a deposit for security for costs. According to the learned advocate, whether Government Proceedings Act is applicable to election petitions or not, the private petitioner is discriminated against because an award for costs against the government is most unsecure. Mr *Mwidunda*'s response to this argument was that section 15 of the Government Proceedings Act protects the interests of a decree holder in a case against the Attorney-General; the costs of such a litigant are more than secure. The learned Senior State Attorney also sought to meet Prof *Shivji*'s challenge of the constitutional validity of section 111(3) of the Act by submitting that the discrimination envisaged under article 13(5) of the Constitution does not include the alleged discrimination in that section because the vice frowned upon by the constitutional provision is one relating to natural persons.

In support of the five grounds of appeal, Prof *Shivji* submitted that the requirement in section 111(2) of the Act, complained against by the Appellant, is arbitrary in two respects: (1) it does not leave any discretion in the court. (2) the amount was fixed arbitrarily. Putting it interrogatively, the learned advocate asked: Why was not the amount fixed at 10 million shillings or at 50 million shillings? He reminded us that costs of litigation cannot reasonably be fixed before trial. He then went on to submit, citing *Director of Public of Prosecutions v Daudi Pete* [1993] TLR 22, that a restriction on a fundamental right must serve legitimate purpose and has to be proportionate. According to the learned advocate, the net in section 111(2) has been cast too widely, and the statutory provision should, therefore, be struck down as being unconstitutional. Mr *Mwidunda,* calling our attention to the fact that litigation costs have been on the

rise in this country, valiantly contended that the sum of five million shillings cannot, in the circumstances, be said to be arbitrary. If the Appellant finds it impossible to raise that amount it is open to him, the learned Senior State Attorney went on to submit, to ask the High Court to invoke its discretionary power under rule 11(3) of the Rules in his favour. It will be recalled that the learned Senior State Attorney had earlier contended that the provisions of that subrule are still in force.

We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr Justice E O Ayoola, a former Chief Justice of The Gambia, in his paper presented at seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998: "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document".

Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.

With the above principles, among others, in mind, we proceed to deal with the arguments addressed to us. Convenience, we think, requires that we commence with Mr *Mwidunda*'s argument on the true application of article 13(5) of the Constitution. It will be recalled that it was the learned Senior State Attorney's submission that the provisions or the subarticle have nothing to do with discrimination against persons. Who, we ask, are the intended beneficiaries of the principle of equality before the law, embodied in article 13 of the Constitution? Mr *Mwidunda*'s answer would be: *Natural persons only.* According to the learned Senior State Attorney's submission, the principle does not relate to juristic persons or collective bodies. We have given anxious and careful consideration to this submission and in the upshot we are of the settled opinion that, though not lacking in attractiveness, it is without merit. But, first let us quote

the subarticle. Correctly and literally translated the provision should read (we think the official translation of it is not entirely correct):

> "(5) For the purposes of this article the expression 'discriminate' means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in such that certain categories of people are regarded as weak or inferior *and* being subjected to restrictions or conditions whereas persons of other are treated differently or are accorded opportunities or advantage outside the specified condition, or the prescribed necessary conditions, provided that the expression 'discriminate' shall not be so construed as to prevent the government from taking deliberate steps aimed at solving problems in society" (the underlining is supplied).

The language in this provision has exercised our minds considerably, but in the end we are satisfied that the use of the word "and" immediately after the word "inferior" could not have been intended, for, so read, the provision would not make much sense. The framers of the Constitution, it seems to us, bearing in mind the wording of the provision, intended the provision to comprise two limbs. They must, therefore, have intended to use the word "or" immediately after the word "inferior". If that word is taken to be used there, it cannot be doubted, in our opinion, that the definition of the expression "discriminate" in the provision also embraces juristic persons and collective bodies. We are emboldened in the view that the definition was not intended to relate to natural persons only by the fact that, while in article 12 of the Constitution the framers used the expression "human beings", in article 13(4) and (5) they chose to use the expression "person/s". The use of those two different expressions strongly suggests to us that the framers intended to make a distinction between the beneficiaries of the principles underlying the two articles. It appears unlikely that they would have been indifferent to discrimination which juristic persons or collective bodies might be subjected to. While we recognise that the wording of a relevant constitutional provision is important in determining whether the Constitution treats juristic persons and collective bodies as beneficiaries of the principle of equality before the law, we wish to draw attention to a footnote in the book, The *Irish Constitution* (3 ed) by JM Kelly and Gerry Whyte, in which the learned authors disclose, at 722, the way the courts in Germany and Italy have applied the principle on the aspect of beneficiaries. The footnote number 53, reads:

> "The position reached in Ireland, on the mere strength of a narrow interpretation of the phrase 'as human persons', should be contrasted with that reached in Germany and Italy in respect of the 'equality before the law' guarantee in the Constitutions of those countries. In both jurisdictions it has been for many years clear that juristic as well as natural persons are entitled to the benefit of the rule: and (in Germany) that even groups with no legal personality, such as political parties, may rely on it. The concise reasoning of the Italian Constitutional Court in a case about associations for the assistance of disabled persons be cited: 'An unjustified discrimination between the different associations must inevitably have repercussions on the legal sphere of the members, so must amount, even if only indirectly, to a violation of the equality of the citizen' (Corte constituzionale 1966/25). It is true that this conclusion is facilitated by article 2 of the Constitution, which guarantees the inviolable right of man 'whether as an individual, or in the social formations in which his personality unfolds'; but this is simply a handsome pleonasm. The very word 'citizen' carries within it the recognition that the subjects of the legal system exist within a society".

In an appropriate case a juristic person may, in our opinion, complain before the High Court of a violation of the principle of equality before the law.

We observed at the beginning of this judgment that, essentially, this appeal is about access to justice. That right has, for a very long time and in many jurisdictions, been regarded as one of the most important rights a person is entitled to enjoy in a democratic society. Even in England, consistent with the doctrine of Parliamentary sovereignty, legislative powers of Parliament have been regarded by courts to be unlimited, the right of access to justice has been jealously guarded by the courts. More than eighty years ago, in *In Re Boaler* [1915] 1 KB 21, Scrutton J emphasised the importance of that right. He said, at 26:

> "One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least erroneous meaning unless clear words are used to justify such extension".

The importance of the right has also been emphasized in many other English cases, including *Chester v Bateson* [1920] 1 KB 829; *R and W Paul Limited v The Wheat Commission* [1937] AC 139; *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Others* [1960] AC 260, and *Raymond v Honey* [1983] AC 1. In *Pyx Granite Co*'s case (*supra*), Viscount Simonds expressed the emphasis in the following celebrated words, at 286:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as Mc Nair J called it in *Francis v Yiewsley and West Drayton Urban District Council* [1957] 2 QB 136, 138; [1957] 1 All ER 825, a 'fundamental rule' from which I would not for my part sanction any departure".

While in England a person's right to unimpeded access to courts can be limited by mere express enactment, in Tanzania that right can be limited only by a legislation which is not only clear but which is also not violative of the provisions of the Constitution. Having considered the importance of access to courts in. the context of circumstances prevailing in Bangladesh, Rahman J, in *Farooque's* case (*supra*) said at 31: "Effective access to justice can thus be seen as the most basic requirement, the most basic 'human rights' of a system which purports to guarantee legal rights".

We agree with Prof *Shivji* (we did not hear Mr *Mwidunda* expressing a view contrary to that submission) that the Constitution rests on three fundamental pillars namely (1) rule of law; (2) fundamental rights. and (3) independent, impartial and accessible judicature. These three pillars of the constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof *Shivji*, it is access to justice which gives life to the three pillars. Without that right the pillars would become meaningless, and injustice and oppression would become the order of the day. About two years ago, delivering his judgment in *Chief Direko Lesapo v (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla*, case CCT 23/99, with which the rest of the members of the Constitutional Court of South Africa agreed, Mokgoro J said, at 15:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this

> context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable".

Access to courts is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered". Anyone seeking a remedy should be able to knock on the doors of justice and be heard.

We deem it logical, before examining the question whether section 111(2) of the Act is violative of article 13(2) of the Constitution, to deal first with the issue whether, as was very manfully contended by Mr *Mwidunda*, rule 11(3) of the Rules, as amended by the Elections (Election Petitions) (Amendment) Rules, 1981, and the Elections (Election Petitions) (Amendment) Rules, 1996, is still in force. Prior to the enactment of the section, the High Court had a discretionary power to direct either that a petitioner in a parliamentary election petition give such form of security it considered fit, or that the petitioner be exempted from payment of any form of security for costs. We propose, in the interests of clarity and for the sake of completeness, to quote the rule *in extenso*. It reads:

> "11(1) The registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court, as security for costs, a sum of five hundred shillings in respect of each Respondent.
>
> (2) Where any person is made a Respondent pursuant to an order of the court, the petitioner shall within such time as the court may direct or if the court has not given any direction in that behalf, seven days of the date on which the order directing a person to be joined as a Respondent is made, pay into the court a further sum of five hundred shillings in respect of such person.
>
> (3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that–
>
> (*a*) the petitioner give such other form of security as the court may consider fit; or
>
> (*b*) the petitioner be exempted from payment of any form of security for costs:
>
> Provided that no order shall be made under this paragraph unless an opportunity had been given to the Respondent, or, where there are two or more Respondents, to each of the Respondents to make representations in that behalf.
>
> (4) No security for costs shall be payable by a petitioner who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar-es-Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association".

Drawing our attention to the fact that the Rules were saved by section 129(*b*) of the Act when the legislation under which they were made was repealed, Mr *Mwidunda* strenuously argued that subrule (3) was not repealed or amended by the Electoral Laws (Miscellaneous Amendments) Act of 2000, and is therefore, still in force. By that Act, Parliament enacted, among other things, section 111(2) and (3), the constitutionality of which the Appellant challenged before the High Court. As already pointed out, Professor *Shivji* pressed us to hold that the subrule was, by necessary implication, repealed by the section.

In spite of the soldierly courage which he demonstrated while arguing this point, Mr *Mwidunda* has not succeeded to persuade us that rule 11(3) of the Rules is still in force. We entertain no doubt that Prof *Shivji*'s contention that the subrule is no longer in force is incontrovertible. Why do we hold that view? That we will tell. It is an established principle of common law that rules must be read together with their relevant Act. See *AG v De Keyser's Royal Hotel* [1920] AC 508, 551, per Lord Moulton. Rules cannot repeal or contradict express provisions in the Act from which they derive authority: see *Ex parte Davis* [1872] LR 7 Ch. 526. Dealing with that point in that case, James LJ said, at 529: "If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule *must give way to the plain terms of the Act*" (the emphasis is ours).

It is also a well-established principle of law that where an Act passed subsequently to the making of the rules is inconsistent with them, the Act must prevail unless it was plainly passed with a different object and then the two will stand together: *Britt v Buckingham CC* [1964] 1 QB 77, 78. In their book, *Interpretation of Statutes and Legislation* (7 ed) at 157, Mahesh Prasad Tandon and Rajesh Tandon make the same point by saying: "Where a later enactment or a subordinate legislation is so inconsistent with or repugnant to an earlier enactment or subordinate legislation that the two cannot co-exist, then the latter one would effect repeal of the former by implication".

A later Act can, by implication, restrict the scope of a regulation which has been brought into force under an earlier Act: *Kruse v Johnson* [1898] 91, 94, per Lord Russell of Killowen CJ. We readily agree with Prof *Shivji* that section 111(2) of the Act has, by necessary implication, repealed rule 11(3) of the Rules. If Parliament had intended that the High Court continue having the power it had under the subrule, it could easily have added a provision in the section identical with or similar to the subrule or one saving the subrule. It seems clear that the law-making authority wanted to abolish the power and make it a rule without exception that each petitioner, regardless of his financial standing, must deposit the sum of five million shillings as security for costs before his petition can be fixed for hearing. We have no doubt that the subsection and the subrule are inconsistent with each other, and, therefore, they cannot co-exist or stand together.

For the reasons we have given, we have reached the unhesitating conclusion that, contrary to the views expressed by Kyando and Ihema JJ on the point in their ruling, section 111(2) of the Act has, by necessary implication, repealed rule 11(3) of the Rules, and, therefore, the High Court no longer has the power to prevent or mitigate the rigours of the subsection by directing either that a petitioner give such form of security as it considers fit, or that the petitioner be exempted from payment of any form of security for costs. Therefore, unless we are satisfied that the subsection is not, as submitted by Mr *Mwidunda*, violative of the Constitution, a parliamentary election petition cannot, under any circumstances, be heard or tried before the petitioner pays into the High Court, as security for costs, a sum of five million shillings in respect of his petition. It must also be correct to say, as we do, that the provisions of subrule (4) of rule 11 of the Rules have also, by necessary implication, been repealed by section 111(2) of the Act. It will be recalled that subrule (4) exempted a petitioner who was granted legal aid under the Legal Aid Scheme of the Faculty of Law. University of Dar-es-Salaam, the Tanganyika Law Society or the Women

Lawyers' Association from paying security for costs in respect of his petition. It means that now even such petitioners must deposit a sum of five million shillings as security for costs. Having arrived at these conclusions, we must now turn our attention to the question whether subsections (2) and (3) of section 111 of the Act are unconstitutional.

Keeping in view the principles of constitutional interpretation we alluded to earlier, can it be said that those statutory provisions are violative of article 13 of the Constitution? Prof *Shivji* valiantly attacked Kyando and Ihema JJ's conception of the right of access to justice. Referring to the requirements for paying or depositing security for costs under Order XXV, rule 1(1) of the Civil Procedure Code and section 111(2) of the Act, the Learned Judges said: "It is pertinent to note that in both situations the party required to pay or deposit security for costs will have already accessed to the court by filing his/her pleadings and paid the necessary court fees".

With great respect to the Learned Judges, we cannot agree that access to justice constitutes mere filing of pleadings and paying the required court fees. The right to have recourse or access to courts means more than that. It includes the right to present one's case or defence before the courts. It cannot, therefore, be correct to say that once he files his petition a petitioner in an election petition has enjoyed the whole of his right of access to justice. Access to justice is not merely knocking on the door of a court. It is more than that.

Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of State interest: see *Pumbun*'s case (*supra*) Under the Constitution, an individual's fundamental right may have to yield to the common weal of society. What is observed by Dr Durga Das Basu in his book *Shorter Constitution of India* (12 ed) at page 104, in connection with the Constitution of India is entirely applicable to our own Constitution. The learned author states:

> "There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control".

Personal freedoms and rights must necessarily have limits, for, as Learned Hand also rightly remarked in his eloquent speech on "The Spirit of Liberty", cited by Khanna J in his judgment in *His Holiness Kesavananda Bharati Sripadanagalavaru v State of Kerala and another* [1973] Supp SCR l: "A society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few …".

Prof *Shivji* submitted, as will be recalled, that section 111(2) of the Act is arbitrary and violates the principle of equality because it unreasonably classifies petitioners into two groups: those who can cause the registrar of the High Court, by paying a deposit of the sum of five million shillings as security for

costs, to fix the hearing dates of their petitions, and those who can only sit by as they watch the files of their petitions accumulate dust because they cannot pay the deposits and there are no statutory provisions which empower the court to waive the requirement to make the deposits. While he appeared to concede that section 111(12) of the Act constitutes a restriction on the right of access to courts, Mr *Mwidunda* contended that, having been passed to protect Respondents from frivolous or vexations petitions, and to ensure that those litigants recovered their expenses incurred while defending themselves if eventually the petitions are dismissed, the statutory provision cannot be said to be arbitrary or unreasonable. What is the test of reasonableness in this context? We find the observations of the Supreme Court of India in *State of Madras v VG Row* [1952] SCR 597 very helpful, if may we respectfully say so, in answering that question. Speaking by Patanjali Sastri CJ, the court said, at 607:

> "The test of reasonableness … should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict".

We also find very useful the following passage from the judgment of Barnett J in *Harvest Sheen Ltd*'s case (*supra*) at 13:

> "[T]he court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access [to the courts] left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved …".

Applying the test stated in these two passages, we are of the settled opinion that section 111(2) of the Act is arbitrary. According to subsection (1) of the section, an election petition may be presented by, among others, a person who lawfully voted or had a right to vote at the election to which the petition relates. Many of such voters would be persons who cannot possibly raise even one-tenth of the required five million shillings as security for costs or for any other purpose. Bearing in mind the minimum wage in the Civil Service, which we can take judicial notice of wider section 58 of the Evidence Act 1967, a minimum wage-earner will require literally more than all his eight years' wages to pay five million shillings. When this fact is borne in mind, it cannot, in our opinion, be disputed that it is utterly impossible for an indigent voter to pay five million shillings as required by section 111(2) of the Act. The statutory provision, therefore, effectively denies access to justice to indigent petitioners. Is the infliction of this extreme disability on an indigent voter or candidate justified? We have no hesitation in answering that question in the negative. Mr *Mwidunda* strenuously contended that the provisions of the statutory provision are justified on the ground that they prevent the filing of frivolous or vexatious petitions and also they ensure that Respondents in election petitions recover their litigation expenses in the event the petitions are unsuccessful. We find no merit in this argument. First, fundamental rights and costs of litigation should not be weighed in the scales against each other. Secondly, we think that the answer to the learned Senior State Attorney's argument is partly to be found in a statement by Lord Macaulay in his criticism of a preamble of a Bengal Regulation of 1795 which purported to justify court fees on the ground of

discouraging frivolous variety of litigation. The statement, quoted by CB Srinivasan in his book *Towering Justice* at 380 reads:

> "It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice".

Thirdly, as was pointed out by Mr Justice (retired) Chandrachud in his article "Fundamental Rights in Their Economic Social and Cultural Context", published in the journal of *Developing Human Rights Jurisprudence* at 142: "The fact that a forum for justice is misused does not justify the closing of the doors of justice".

Abolishing the right of an indigent petitioner to apply to the High Court for a direction that either he give some other form of security, or he be exempted from payment of any form of security for costs, and repealing the provisions of rule 11(4) of the Rules which provided that no security for costs were payable by a petitioner who had been granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar-es-Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers Association amount, in practical terms, to closing the doors of justice to such seekers of legal remedies. To such petitioners, the right of access to justice becomes meaningless. Be that as it may, there appears to be no explanation why the so-called protection of Respondents is not made available to Respondents in litigation not arising from elections.

The repeal of rule 11(3) and (4) of the Rules has, as we have endeavoured to demonstrate, effectively classified those who are aggrieved by the results of a parliamentary election and have a right to file a petition before the High Court into two distinct groups, namely, those who, because they can afford to pay a deposit of five million shillings, will be able to have their petitions heard by the court, and those who, as a result of their poverty, the doors of justice will be firmly shut against them. It is not a principle of law that all laws must be of universal application or that the state has no power of distinguishing or classifying persons or things for the purpose of legislation. What the law demands is that any classification or differentiation must have a rational nexus to the object sought to be achieved by the legislation in question. What is forbidden by article 13 of the Constitution is class legislation and not reasonable classification. The legislative power to make differentiation or classification is important, for, as Prof MP Jain states in his book, *Indian Constitutional Law* (4 ed) at 472:

> "All persons are not by nature, attainment, or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate".

It is, of course, for the courts to decide whether a classification adopted by a law is reasonable or not. The judicial antennae must be sensitive to any classification with a view to ensuring that the classification is rational. To be assured of a bright future a country must have its foundations of justice and equality truly

and firmly laid. It is salutary to remember – and here gratefully adopt the words of Rahman J in *Farooque*'s case (*supra*) at 28 as our own:

> "If justice is not easily and equally accessible to every citizen there then can hardly be a rule of law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a *sine qua non* for the maintenance of the rule of law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the rule of law".

Frivolous or vexatious litigation is, undoubtedly, a detestable thing. But the right way to deal with that evil is not to close the doors of justice, but to depend upon courts invoking their inherent or statutory jurisdictions to strike out actions of that nature. The doors of justice must always be left open to the poorest man or woman in the country. Section 111(2) of the Act is likely to stultify *bona fide* petitions from indigent persons.

Having paid due attention to counsel's arguments, we are satisfied, for the reasons we have endeavoured to give, that Kyando and Ihema, JJ, erred in holding, as they did, that section 111(2) of the Act is not unconstitutional. In our view, the statutory provision is a class legislation. It is also arbitrary and the limitation it purports to impose on the fundamental right of access to justice is more than is reasonably necessary to achieve the objective of preventing abuse of the judicial process. Plainly, Parliament exceeded its powers by enacting the unconstitutional provision. Legislative competence is limited to making laws which are consistent with the Constitution. These conclusions are sufficient to dispose of the appeal, but we consider it useful to say a word or two on the arguments addressed to us concerning the exemption granted to the Attorney-General by section 111(3) of the Act.

The importance of the role of the Attorney-General in his capacity as the guardian of public interest cannot, in our opinion, be over-emphasized. But the problem arising from section 111 of the Act is not that the statutory provision purports to exempt the Law Officer from giving security for costs, but, by repealing rule 11(3) of the Rules, that it purports to deprive a petitioner of his right, under the subrule, to apply for an exemption. As far as legislative discrimination is concerned, what is decisive is not the phraseology of the statute but the effect of the legislation. However, since we have held that subsection (2) of the section is unconstitutional, it follows, as day follows night, that rule 11(3) is still in force, and, therefore, a petitioner still has a right to apply for an exemption. In practical terms, therefore, an ordinary petitioner cannot be said to be subjected to discrimination by section 111(3) of the Act. In the circumstances, we agree with Kyando and Ihema JJ, though for different reasons, that the subsection is not violative of the provisions of article 13(2) of the Constitution.

For the foregoing reasons, in our opinion, this appeal must succeed. Allowing the same with costs, we reverse the decision of the High Court and declare that section 111(2) of the Elections Act 1985, is unconstitutional and, therefore, devoid of any legal force *ab initio*, that is to say, from the date of its enactment. For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared, the provisions of rule 11(3) of the Elections (Elections Petitions) Rules, 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the court in favour of petitioners. One of the results of section 111(2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still five hundred shillings. Bearing in mind the decline of the value of the shilling which has taken place since 1971, when the Rules were made, it cannot be disputed that that sum is now too little to serve any useful or practical purpose in terms of providing security for costs, but it is not within the competence

of this Court or any other court, for that matter, to amend the rule.

For the Appellant:
Information not available

For the State:
Mr Mwidunda and *Mr Salula*

Niazsons (K) Ltd v China Road and Bridge Corporation (K)

[2001] 2 EA 502 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	2 March 2001
Case Number:	157/00
Before:	Tunoi, Bosire and O'kubasu JJA
Sourced by:	LawAfrica
Summarised by:	W Amoko

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[1] Arbitration – Stay of proceedings – Time for application – Necessity for the application to be made before taking a step in the proceedings – Whether a defendant can simultaneously make an application for stay and file a written statement of defence – Section 6 – Arbitration Act of 1996.

[2] Civil practice and procedure – Preliminary objections – Nature of a preliminary objection – Point of law – Whether the matters raised were proper preliminary objections.

Editor's Summary

NKL, the Plaintiff/Appellant, was a local company while CRBC, the Defendant/Respondent was a foreign registered company. By a subcontract agreement in May 1996, NKL undertook to execute roadworks on a 52-kilometre stretch of road. NKL claimed that despite having completed the works and certification of the same, CRBC had failed to settle the sums demanded or admit liability. CRBC entered appearance and simultaneously applied for stay of the proceedings, and the parties submitted to arbitration. CRBC then raised three preliminary objections going to the validity of the dispute resolution clause given its reference to a repealed Act: (i) as CRBC had not filed a defence, default judgment ought to be entered against it; (ii) there was no dispute to be referred to arbitration and (iii) CRBC was not ready and willing to submit to the arbitral process, all of which were overruled by the High Court. On appeal by NKL.

Held – (Tunoi JA dissenting) As there can be no parallel proceedings before the court and an arbitral tribunal over the same subject matter given the terms of section 6 of the Civil Procedure Act (Chapter 21) and section 6(2) of the Arbitration Act 4 of 1995, it not open for a party to take out an application for stay of proceedings under section 6(1) of the Arbitration Act and simultaneously file a written statement of defence. The provisions of Order 9, rule 3 of the Civil Procedure Rules do not apply to a situation where a party applies for stay of proceedings in view of an arbitration clause. They only apply in a case where a defendant is indolent. *Joab Henry Omino v Lalji Meghi Patel and Co Ltd* appeal number 119 of 1997 (ur) followed.

A preliminary objection is a pure point of law which is resolved without considering the merits of the application before the court. Under section 6 of the Arbitration Act a court considering an application for stay must decide whether the party applying has taken a step in the proceedings, whether there are any impediments on the validity, operation or performance of the arbitration agreement and whether the suit concerns a matter agreed to be referred. The issues of the validity of the dispute resolution clause, or whether it was incapable of being performed, required the court to consider the merits of the stay application and therefore were improperly raised and the Judge had erred in considering them. *Mukisa Biscuit Co v West End Distributors* [1969] EA 696 followed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Davis v Mistry [1973] EA 453

LZ Engineering Construction Ltd v Municipal Council of Mombasa HCCC number 3986 of 1983 (ur)

Mukisa Biscuit Co v West End Distributors 1969 EA 696 – **F**

Omino v Lalji Meghji Patel and Co Ltd [1997] LLR 574 (CAK) – **F**

Tononoka Steels Ltd v Eastern and Southern Africa Trade and Development Bank [2000] 2 EA 538 (CAK)

United Kingdom

Czarnikow and Co Ltd v Roth Schmidt and Co [1922] 2 KB

Lee v the Showmen's Guild of Great Britain [1952] 2 QB 329

London and North Western and Great Western Joint RLY Cos v JH Billington Ltd [1899] AC 79

Judgment

BOSIRE JA: Niazsons (K) Ltd, the Appellant, was subcontracted by China Road and Bridge Corporation (K), the Respondent, to execute roadworks on a 52 km stretch of the Garsen-Hola road at an agreed contract price of KShs 473 665 086-10 and other mutually agreed terms which were reduced into writing. Among those terms is Clause T, which provides thus:

"T Arbitration

(a) All disputes and differences in connection with this subcontract and with the execution thereof, shall be first settled between the Contractor and Subcontractor by friendly and amicable negotiation. If no settlement can thus be reached, the disputes and differences shall be submitted for arbitration.

(b) Either the Contractor or the subcontractor is Plaintiff, the arbitration shall take place in Nairobi, Kenya, and be conducted by the Institute of Engineers of Kenya. The procedural law and rules for Arbitration shall be the Arbitration Act Chapter 49 of the law of Kenya. The appointed (sic) of Arbitration shall be the Chairman of the Institute of Engineers of Kenya.

(c) The award or decision of the Institute of Engineers of Kenya shall be accepted as final and binding for both the contractor and the subcontractor and neither the contractor nor the Subcontractor shall seek recourse to a law court or other authorities to appeal for revision of the decision.

(d) All arbitration expenses shall be borne by the losing party".

The Appellant as Plaintiff in Nairobi High Court civil case number 126 of 1999, sued the Respondent claiming various liquidated sums of money and damages for alleged breaches of the subcontract aforesaid. In its plaint dated 8 February 1999 the Appellant has averred, *inter alia*, that it executed part of the contracted works whereupon certificates of satisfactory completion were duly issued. It was therefore entitled to payment for the same, but the Respondent as the main contractor has failed or refused to make payment.

The Respondent was served with summons to enter appearance and the plaint; it appeared, but it did not file a written statement of defence on the ground that doing so would disentitle them to a stay of proceedings under section 6 of the Arbitration Act of 1995. Instead it filed an application for orders that the proceedings in the suit be stayed with a direction that the parties submit themselves to arbitration in terms of Clause T, of the subcontract, aforesaid. The application was initially expressed to be brought under section 6(1)(*a*) and (*b*) and 6(2) of the Arbitration Act Chapter 49 Laws of Kenya and Order L, rule (1) of the Civil Procedure Rules, but the application was later amended to read section 6(1)(*a*) and (*b*) and section 6(2) of the Arbitration Act 1995, rule 2 of the Arbitration Rules 1997 and section 3A of the Civil Procedure Rules (*sic*) Chapter 21 Laws of Kenya.

At the bearing of the application the Appellant through its counsel, Mr R *Billing*, raised a preliminary objection to it on three main grounds. First that clause T aforesaid is null and void because it relied on a repealed Act to wit the Arbitration Act Chapter 49 Laws of Kenya. Second, that section 6 of the 1995 Arbitration Act unlike section 6 of the former Arbitration Act, which it repealed and replaced, does not bar a Defendant in a suit from filing its pleadings. And because the Respondent, on the mistaken belief that it did, was in default by failing to file its written statement of defence in the suit within the prescribed time or at all, the Appellant was entitled to an *ex parte* judgment in default of defence. Third, that even assuming that the matters between the parties could be referred, there was no discernible dispute or difference which could be referred. Moreover, he further urged, the Respondent by its conduct, was not ready and willing to submit to the arbitral process.

In answer to those submissions Mr *Wena* who appeared with Mr *Miller* for the Respondent, as Defendant in the suit, submitted on the authority of *Joab Henry Onyango Omino v Lalji Meghji Patel and Co Ltd* civil appeal number 119 of

1997, that in view of the pending application for stay of proceedings the Appellant was not entitled to judgment in default of defence. Besides, he said, section 6 of the 1995 Arbitration Act, did not change or affect the parties' contractual obligations as the dispute between them arose after the repeal and replacement of section 6 of the Arbitration Act Chapter 49 Laws of Kenya.

In *Joab Henry Onyango Omino v Lalji Meghji Patel and Co Ltd* (*supra*), this Court held, *inter alia*, thus:

> "[T]he Appellant made his application for stay of the proceedings in the superior court under section 6(1) of the Act as is outlined above. Having thus made that application, as long as the same remained, undetermined, its effect was to suspend the filing of defence by the Appellant to the Respondent's claim against him with the result that the default judgment entered against him cannot have been regular".

The Respondent's case in the present appeal as in the case cited above is based on an arbitration agreement which was made under the repealed Arbitration Act Chapter 49 Laws of Kenya.

Onyango Otieno J who heard the matter did not agree with the Appellant's counsel and consequently overruled the preliminary objection and thus provoked this appeal. There are of appeal, but considering what I propose to say judgment I do not need to set them out here in full more so because Mr *Billing*'s submissions which I have already set out and which he rehashed at the hearing of the appeal, summarize the Appellant's case.

Mr Cecil *Miller* appeared with Mr *Wena* for the Respondent in the appeal. In his submissions Mr *Miller* stated that in view of the fact that the Arbitration Act 1995, has no express provision for appeals, Clause T, aforesaid, accords with the law. In the alternative, he submitted that the alleged offending parts of the said clause are severable without rendering the clause inoperative on the essential aspect of arbitration. In support of the latter submission he relied on the case of *Lee v The Showmen*'s *Guild of GB* [1952] 2 QB 329 (CA) which is in the Appellant's list of authorities. Mr *Miller* also urged the view that the material before the trial court clearly showed the existence of a dispute or difference between the parties; and that all along the Respondent has been ready and willing to submit to arbitration. It was his view, also, that section 6 of the current Arbitration Act like section 6 of the repealed Act, does not permit the taking of any step in the proceedings by a defendant who desires a stay of a suit pending a reference to arbitration. In his view, therefore, the Appellant is not entitled to judgment in default of defence.

This is an interlocutory appeal. Both the suit and the application for stay of its proceedings are pending before the superior court. Much or the submissions by counsel on both sides relate to the merits or otherwise of the suit and the application. I am alive to the fact that as a court with only appellate jurisdiction, we cannot properly express any concluded view on any of the issues touching on the merits of the suit and the application as doing so will, in my view, infringe on the jurisdiction of the trial court, and may inhibit it in exercising its discretion in the matter. And yet that is what counsel on both sides appear to urge us to do. Their respective submissions which I adumbrated earlier are clearly on the merits or otherwise of the application for stay which as I stated earlier is still pending in the superior court.

The jurisdiction and powers of this Court are set out under section 3 of the Appellate Jurisdiction Act Chapter 9 Laws of Kenya. Subsection (2) thereof enacts thus:

> "For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court".

As I stated earlier Onyango Otieno J heard the Appellant's preliminary objection. In considering that objection he had three options. He could dismiss the objection, in which case he would thereafter proceed to hear the Respondent's application for stay of proceedings. He could also decline to entertain it and proceed on to hear the stay application. He could also sustain the objection in which case he would strike out the application for stay. The first two options do not pose any problems. Suppose, instead of dismissing the preliminary objection, as he did, he upheld it, how would he proceed thereafter? Regardless of the merits of the Respondent's case, Onyango Otieno J had no jurisdiction at that stage to consider the merits or otherwise of the respective cases of the Appellant and the Respondent. The stage for doing so had not been reached as the Respondent had not and has not filed its written statement of defence. All he would properly do was to direct the Respondent to file his defence and specify the time within which to do so. Consequently even assuming that Onyango Otieno J was wrong in dismissing the Appellant's preliminary point our jurisdication only extends to vacating his order of dismissal of the preliminary point and substituting therefor an order either dismissing or striking out the application for stay of proceedings and directing the Respondent to file its defence within a specified period. That is not however, the Appellant's case.

As indicated earlier the Appellant's case is that the Learned Judge of the superior court erred not only in dismissing its preliminary objection but also in failing to find that the failure by the Respondent to file a written statement of defence within fourteen days of entering appearance entitled it as Plaintiff to an *ex parte* judgment in default of defence. By that contention which was also its counsel's submission, the Appellant seems to suggest that section 6(1) of the Arbitration Act 1995, permits parallel proceedings both before ordinary courts and a domestic tribunal.

The policy of the law, as I understand it, is that concurrent proceedings before two or more fora are disapproved. If any authority is necessary, there is the clear enactment in section 6 of the Civil Procedure Act which provides that:

> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

But the Appellant cited section 6(2) of the Arbitration Act of 1995, as permitting concurrent proceedings both before the ordinary courts and before a domestic tribunal. The wording of that subsection is in effect analogous to a reference of disputes to arbitration under Order 45 of the Civil Procedure Rules. It does not at all contradict the provisions of section 6 of the Civil Procedure Act. It merely clarifies to the parties concerned that should they wish to resolve the matters in dispute between them before a domestic tribunal they should feel free to do so notwithstanding that a suit is pending in court and provided that the reference is made by consent. If they decide to do that, the proceedings before the court must of necessity be stayed. It is therefore my

view, and I so hold, that section 6(2) of the Arbitration Act of 1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the Respondent to take out an application for stay of proceedings and at the same time file a written statement of defence. As stated in the *Joab Omino* case (*supra*) the bringing of an application for stay of proceedings under rule 6(1) of the Arbitration Act of 1995, the Respondent‘s duty to file a written statement of defence was suspended.

Besides, default of defence as provided under Order 9A, rule 3 of the Civil Procedure Rules does not envisage a situation as exists in the present case. It envisages a case where a Defendant is indolent. To deny a litigant as the Respondent in the present appeal a chance to put forward a defence whether before the court or before a private tribunal as the Appellant seeks to do, more so in a case where the claim is enormous, will be tantamount to offending the *audi alteram partem* principle. The bearing it was accorded before Onyango Otieno J and before us is merely a hearing on preliminary issues and not on the merits or otherwise of its case.

The Respondent’s case in the court below is principally based on clause T. The main issue in the appeal hinges on the legality or otherwise of that clause. The Appellant’s main argument is that the said clause is against public policy to the extent that paragraph (*c*) thereof ousts the jurisdiction of the courts to deal with any disputes between the parties arising from the subcontract aforesaid. It cannot be gainsaid that in an appropriate case an offending part of a contract or a clause in a contract may be severed off if doing so will not alter the nature of the agreement or clause. In *Lee v The Showmen*’s *Guild of Great Britain* (*supra*) Denning LJ remarked, in pertinent part, thus:

> “if parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, *then the agreement is to that extent contrary to public policy and void: see Czarnikow and Co Ltd v Roth Schmidt and Co* [1922] 2 KB 478, 488 …” (emphasis supplied).

Whether or not severance is possible in a particular case is clearly a matter for the trial court as in some cases to come to a decision it might call for the examination of facts and evidence in general.

Section 6(1) of the Arbitration Act of 1995, under which the Respondent’s application for stay of the Appellant’s suit was brought provides as follows:

> “6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds–
>
> (*a*) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (*b*) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration”.

Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an Applicant is obliged to do is to bring his application promptly. The court

will then be obliged to consider three basic aspects. First, whether the Applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.

The superior court dealt, in part, with the issue regarding the validity of the arbitration agreement, and more specifically the question whether the repeal of the Arbitration Act Chapter 49, Laws of Kenya, which was to govern the arbitral proceedings between the parties, rendered the arbitration agreement null and void. That court did not however, deal with the issue the Appellant's counsel raised in the appeal namely, whether, in view of the fact that Clause T (*c*) of the arbitration agreement, which *prima facie*, tends to oust the jurisdiction of the courts, the agreement is not rendered invalid for being against public policy. This latter issue may not be decided here without prejudicing the pending application for stay in view of the wording of section 6(1) of the 1995 Act. The said section envisages that all the issues a court is called upon to consider before a decision are dealt with at the same time. A piecemeal approach to the application, I think, is inappropriate, expensive and may in some cases be prejudicial to either party.

I think that once an application under section 6(1) of the Arbitration Act, has been made it is incumbent upon the judge seized of the matter to deal with it as a whole, to discover whether any of the legal impediments set out in the section exist as to disentitle the Applicant to a stay. Determination of some of the issues which were raised call for the examination of the evidence. It is for that reason that I think that the Appellant should not have raised the three points it did, *in limine,* but should have made them part of its grounds for opposing a stay as the three grounds are an integral part of the issues the court is obliged to consider and rule on in an application under that section. A finding as to whether or not there exists a dispute capable of being referred to arbitration cannot in my view be the subject matter of a preliminary objection. Likewise the finding one way or the other whether an arbitration agreement is inoperative or incapable of being performed also required an examination of the evidence. It is my view that the Learned Judge erred in allowing the Appellant to raise the three points *in limine.* That is the more so because on the authority of the case of *Mukisa Biscuit Co v West End Distributors* 1969 EA 696, a preliminary point raises purely points of law. Law JA observed at 700 that: "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".

And Newbold P at 701 observed that:

> "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 fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues".

Having come to the foregoing conclusion, I eschew any attempt at expressing any view touching on the merits of the application. I also do not find it necessary

to consider the various other authorities which were cited as they touch on the merits or otherwise of the application for stay.

In the result, I would dismiss the appeal with costs to the Respondent. I would not however certify costs for two counsel.

(O'kubaso JA concurred in the judgment of Bosire JA.)

TUNOI JA (dissenting): Niazsons (K) Ltd, the Appellant and the Plaintiff in the suit, is a limited liability company incorporated in Kenya under the Companies Act Chapter 486 Laws of Kenya. It carries on the business of civil engineers and contractors and as it is apparent from this litigation it specialises in roadworks. The Respondent is a foreign entity incorporated in the Peoples' Republic of China and duly registered under the same Act. It is one of the major civil engineers in the country.

This is about the fourth time this matter is coming to this Court, twice as an appeal and twice as an application. So, the facts giving rise to the dispute are well known to us. The claim arises from a subcontract agreement made between the parties in writing and dated 12 May 1996, whereby the Appellant undertook to execute roadworks of 52 kilometres stretch of the Garsen-Hola road from Km 223 at Garsen up to Km 171 towards Hola direction. The Appellant avers that it having fully observed and fulfilled all the terms of the subcontract the Respondent despite demands made and notice of intention to sue having been issued, has failed, neglected or refused to pay the sums demanded or to admit liability. Therefore, on 8 February 1999, the Appellant filed a suit in the High Court of Kenya at Nairobi seeking judgment in respect of sums certified as payable to it by the Respondent under a road-building contract and special damages in the sum of KShs 115 161 458-93 as well as a sum of KShs 459 946 413 or such other sums as may be determined by the court. It also sought an injunction in respect of breach of the terms and conditions of the subcontract agreement.

The Respondent entered appearance on 16 February 1999, and on the same day applied by a notice of motion for stay of proceedings pending reference to arbitration in terms of an arbitration clause contained in the contract between the parties. The notice of motion was later amended to be a chamber summons.

When the application came for hearing before Onyango Otieno J Mr *Billing*, for the Appellant, raised a three-pronged preliminary objection grounded mainly on the construction of Clause T of the subcontract agreement which refers to arbitration. The Clause reads as follows:

> "T. Arbitration
>
> a. Disputes and differences in connection with this Subcontract and with the execution thereof, shall be first settled between Contractor and Subcontractor by friendly and amicable negotiation. If no settlement can thus be reached, the disputes and differences shall be submitted for arbitration.
>
> b. Where the Contractor or the Subcontractor is Plaintiff, the arbitration shall take place in Nairobi, Kenya, and be conducted by the Institute of Engineers of Kenya. The procedural law and rules for Arbitration shall be the Arbitration Act Chapter 49 of the Laws of Kenya. The appointment of the Arbitrator shall be by the Chairman of the Institute of Engineers of Kenya.
>
> c. Award or decision of the Institute of Engineers of Kenya shall be accepted as final and binding for both the Contractor and the Subcontractor and neither

the contractor nor the Subcontractor shall seek recourse to a law court or other authorities to appeal for revision of the decision.

d. Arbitration expenses shall be borne by the losing party".

Mr *Billing* submitted firstly, that the Respondent in filing the application seeking reference to arbitration it had taken steps in the proceedings and therefore under section 6(1)(*a*) of the Arbitration Act of 1995 ("the Act") it was precluded from seeking a reference to arbitration; secondly, that there is no dispute to be referred to arbitration as the Appellant had filed a request for judgment as no defence was lodged within the prescribed time; and, thirdly, that Clause T aforesaid is null and void because it relied on a repealed Act.

Mr *Wena*, for the Respondent, attacked the preliminary objection largely basing his arguments and the decision of *Omino v Lalji Meghji Patel and Co Ltd* [1997] LLR 574 (CAK) which held that:

> "When an application under section 6(1) of the Act is made by a party to arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement for if it does, then it is for the opposing party to show cause why effect should not be given to the agreement. Indeed, once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law, that choice should not easily be brushed aside".

Mr *Wena* submitted further that in view of the stay application the Appellant was not entitled to judgment in default of defence. It mattered not that section 6 of the former Arbitration Act had been repealed.

The Learned Judge in a reserved ruling overruled the preliminary objection and the Appellant being lodged this interlocutory appeal.

When appeal was called to hearing Mr *Billing* sought leave to file a supplementary record of appeal incorporating an amended memorandum of appeal. The newly introduced paragraph reads as follows:

> "9. The Learned Judge erred in failing to give interlocutory judgment in favour of the Appellant against the Respondent in the sum of KShs 609 727 755-87 together with the interest thereon".

The new prayer is in the same terms. As Mr Miller did not oppose the supplementary record of appeal and the amendment, the same were duly admitted as part of the record of appeal.

On appeal before us, three main grounds of appeal were urged on behalf of the Appellant. Its first and major contention is that Clause T aforesaid was void in that it was an attempt to oust the jurisdiction of the court, that is, to prevent there being any appeal or application under the Act or to set aside the award. To support his argument Mr *Billing* relied on the decision of this Court in *Tononoka Steels Ltd v Eastern and Southern Africa Trade and Development Band* [2000] 2 EA XXX (CAK) and he referred to the following passage in the judgment of Lakha JA:

> "It appears from this that the Respondent in the instant appeal, the original Defendant, instead of pleading as it did in paragraph 7 of the defence that the Kenya Court had no jurisdiction and that the suit accordingly should be dismissed for want of jurisdiction, should have made an application under section 6 of the Arbitration Act 1995 for a stay of proceedings. No such application was made in this case. The Respondent followed a wrong procedure and it is manifest from the record that section 6 of the Arbitration Act was not referred to by counsel and is not referred to by the Learned

> trial Judge in his ruling. Indeed, it was not mentioned in the arguments on this appeal, but being a matter of jurisdiction is clearly one which should now be taken. If an application had been made at the proper time under section 6 it seems probable that the Court would have been satisfied as to the requisite matters set out in the section and would have made an order staying the proceedings. As, however, no such application was made, I am of the opinion that the order made should be quashed".

Mr *Miller* argued that clause T aforesaid offended no known provisions of law and did not in any way oust the jurisdiction of the court. Moreover, under section 35 of the Act, recourse to the High Court against arbitral awards has been provided; and, in any case, he averred, even if he was wrong the offending clause is severable from the rest of the clause without rendering the subcontract inoperative on the aspect of arbitration.

The fundamental point which is being urged on behalf of the Appellant is that such an agreement as contained in Clause T aforesaid ousts the jurisdiction of the court and is therefore void. The Respondent's case, in effect, principally hinges on the said Clause T.

Ordinarily, such an arbitration clause *simpliciter* does not oust the jurisdiction of the court. But, if it purportedly attempts to do so, it would be contrary to public policy. In *Lee v the Showmen*'s *Guild of Great Britain* [1952] 2 QB 329 Romer LJ said:

> "The courts jealously uphold and safeguard the *prima facie* privilege of every man to resort to them for determination and enforcement of his legal rights. As an example of this, it has been held that any attempt by a testator to divert from the courts the power of deciding questions of construction that may arise on his wills and vesting that power in his executors instead will fail … on the ground that they are contrary to public policy".

Romer LJ also thought that it may well be that the same considerations of public policy would act as a fetter on attempts to oust the jurisdiction of the courts on questions of law by contractual consideration. It is discernible, therefore, as we said in the *Tononoka* case (*supra*) that it is a well settled general rule recognised in the English courts that all agreements purporting to oust the jurisdiction of the courts are prohibited.

The vital words which appear in the subcontract clause c. of the Arbitration Clause state: "[N]either the contractor nor the subcontractor shall seek recourse to a law court or other authorities to appeal for revision of the decision".

These intrusive words which do not normally appear in an arbitration clause are clear and decisive. They evince, in my view, intention of the parties beyond doubt in agreeing not to resort to a court of law thus ousting its jurisdiction.

What is contended is this: the intrusive words referred to hereinbefore unequivocally oust the jurisdiction of the court. The effect of Clause T is to vest in the Institute of Engineers of Kenya the exclusive power of interpreting the subcontract between the Appellant and the Respondent who had contractually debarred themselves from resorting to the courts. I, therefore, am persuaded by this contention and I have no hesitation in concluding that the Clause seeks to oust the jurisdiction of the court. It is also my view that Clause T is incapable of being severed from the rest of the Clause and yet still leave intact the arbitration clause. The arbitration clause would be extinguished completely. If that is so, and I so hold, then there is ample authority of this Court in the case of *Davis v Mistry* [1973] EA 463 that the jurisdiction of the court can only be ousted by an Act of Parliament. As the Clause, in my judgment, sought to oust

the jurisdiction of the court, it is void and for that reason I would think that on that point the Learned Judge, with respect, was wrong.

Section 6(1)(a) and (b) of the Act, so far as relevant, reads:

> "6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall … stay the proceedings and refer the parties to arbitration unless it finds–
>
> (*a*) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (*b*) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".

The language of section 6(1)(*a*) and (*b*) upon which this appeal also largely turns, is different from that contained in section 6 of the repealed Arbitration Act Chapter 49. Having held, as I have, that the arbitration clause is void the court, in my view, ought to have refused to stay. In failing to refuse a stay, therefore, the Learned Judge was, with respect, in error.

Secondly, it was submitted by Mr *Billing* that there was not in fact a dispute between the parties with regard to the matters to be referred to arbitration and the Court must therefore refuse a stay. He referred us to the Certificates issued by the Engineer. I have carefully perused these certificates. It is manifestly clear that there is no identification of any dispute whatsoever arising from them nor is there any evidence as to the extent or value of any purported dispute. For example, the Respondent does not challenge the validity or otherwise of Certificates 2b (which is certificate number 21), 3 and 4 worth KShs 29 134 142-29 and Certificate on VOP for KShs 8 438 073-80. It appears to me, therefore, from a consideration of the available material on record that there is no evidence that the Respondent:

> "(a) objected to the Respondents;
>
> (b) disputed the Certificates or any parts thereof entitling the Respondent to withhold payment; or
>
> (c) relied on any mistake on the part of the Engineer".

Moreover, there is no evidence on the material before this Court that the Respondent had invoked or relied on the Arbitration Clause before the suit was instituted. It is plain that if anything, the Respondent in his affidavit sworn in support of its application for stay, deponed that it was only after the Respondent was served with summonses on 9 February 1999, that it instructed its lawyers to set the arbitration process in motion.

Most arbitration clauses usually start: "If any dispute or difference shall arise between the parties … then the matter goes to arbitration". The issue is what happens when there is no dispute between A and B, but just declines to pay? This pertinent issue was adequately dealt with by the Earl of Halsbury LC in the House of Lords in the case of *London and North Western and Great Western Joint RLY Cos v J H Billington Ltd* [1899] AC 79 at 81 when he said:

> "That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the County Court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to be absolutely untenable".

If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute or raise a dispute. See *The Law and Practice of Commercial Arbitration in England*, by Sir Mustill and Prof Boyd at 96.

It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a dispute calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying.

As there was in my view no or any genuine dispute between the parties, a stay on the Respondent's application ought to have been rejected by the Learned Judge.

It was submitted by the Respondent that the Appellant was not ready or willing to invoke the arbitration clause upon a dispute having arisen. In other words, the Appellant must unequivocally elect to have the dispute decided by arbitration. But, in the instant case there is no evidence that the Respondent proceeded to make any appointment of an arbitrator as provided for in the arbitration clause. It was only on 12 February 1999, after the institution of the suit in court by the Appellant. Such an appointment was invalid as it was contrary to the arbitration clause which provided that the appointor of arbitrators shall be the chairman for the Institute of Engineers of Kenya. Accordingly, the appointment made by the Respondent was invalid and any award by such persons would also be invalid. There was, therefore, no valid appointment of any arbitrator under the clause when the application for stay was made. I think that willingness to arbitrate manifests itself, if the Respondent does what it is obliged to do in the arbitration, for example make valid appointments of arbitrators in terms of the arbitration clause. When it does not do so at all, as here, can it then be said that the Respondent was ready and willing for such an arbitration? With respect, the answer to this would, in my view, be in the negative.

The fact that an application for stay has been made, as in this case, does not mean that there is an automatic enlargement of time for filing the defence. As was said by Cockar J (as he then was), in *LZ Engineering Construction Ltd v Municipal Council of Mombasa* High Court civil case number 3986 of 1983 (ur) – "Filing of an application for stay of proceedings does not automatically enlarge time for filing defence".

With respect, I agree. There is no request for an enlargement of time for the filing of defence either without prejudice or in the event of the application for stay failing. In addition, there is no evidence to show that the Respondent applied either to the Appellant or to the court for filing one without prejudice or for an extension of time for the filing of the defence. Nor does it appear that there is anything in the language of the summons to indicate that the Respondent desired any time for the filing of the defence to be extended in the event of the application for stay being refused.

Finally, though this is an interlocutory appeal both parties have submitted on issues touching on all aspects of the suit and have actually asked and beseeched us to dispose of the appeal and the dispute between the parties conclusively. In the particular circumstances of this appeal and the case in its entirety, this Court

has power to do so and it cannot be said, in earnest, that it is infringing on the jurisdiction of the trial court.

The Appellant was entitled in law to have judgment entered for it when it made its request for it on 11 March 1999, after the expiry of the time for filing defence on 3 March 1999, in terms of Order VIII, rule 1(2) of the Civil Procedure Rules.

Accordingly, I would allow this appeal with costs, set aside the order of the superior court given on 15 April 1999, and enter interlocutory judgment in favour of the Appellant against the Respondent in the sum of KShs 609 727 755-87 together with interest thereon. I would also order the Respondent to pay the costs in the superior court.

As the other members of the court are of a different view, the orders of the court shall be as proposed by them.

For the Appellant:
Mr R Billing

For the Respondent:
Mr Wena and Mr C Miller

Ochieng v Uganda
[2001] 2 EA 514 (SCU)

Division:	Supreme Court of Uganda at Mengo
Date of judgment:	17 January 2001
Case Number:	25/00
Before:	Wambuzi CJ, Oder, Karokora, Mulenga and Kanyeihamba JJSC
Sourced by:	B Tusasirwe
Summarised by:	HK Mutai

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[1] Criminal evidence – Confession – Appellant assaulted on arrest and at barracks – Claim that the confession was made involuntarily – Alibi – Whether the Appellant's alibi was evaluated properly – Whether the confession was admissible.

[2] Criminal procedure – Charge and caution statement – Confession – Proper manner of recording charge and caution statement – Investigating officer not to record accused's statement.

Editor's Summary

On 16 November 1994, the deceased, an expectant mother, went missing after leaving her home to collect firewood. The next day, following a search, her naked body was found at the place where she had gone to collect firewood. A report of the death was made to the nearby police station and also to the Pabo Labala military barracks. A general parade was called at the barracks and the Appellant was found to be missing. He was subsequently arrested at Amuru and brought to the Pabo barracks before

being handed over to the police on 25 November 1994. The Appellant was beaten on arrest and again at the barracks where he allegedly confessed to the second-in-command that he had killed the deceased. The Appellant was later charged with the murder of the deceased. At his trial the prosecution sought to adduce in evidence a charge and

caution statement made by the Appellant in which he allegedly confessed to the murder. The Appellant claimed that the statement was involuntary and that he had made it only after being beaten on arrest at the barracks and threatened with a pistol by an Army Captain at the time of the alleged statement. After a trial-within-a-trial, the trial Judge held that the statement was admissible. Based on that statement, the trial court found the Appellant guilty and sentenced him accordingly. The Appellant's appeal to the Court of Appeal against conviction and sentence was dismissed. He now appealed to the Supreme Court on the grounds, *inter alia*, that the Court of Appeal erred (i) in finding that the charge and caution statement was properly administered, (ii) in holding that the repudiated confession could sustain the conviction and (iii) in rejecting his alibi. The Appellant's counsel contended that the Appellant's testimony to the effect that he was attached to the Lubiri barracks in Kampala and that he had been under arrest on the date of the murder had been ignored.

Held – Where an allegation of torture was made, the burden of proving that the statement was voluntary rested on the prosecution; *Kato v Uganda* criminal appeal number 158/71 (ur) followed. In this instance, there was undisputed evidence that the Appellant had been assaulted on arrest and later on in the barracks where he first allegedly confessed to the crime.

It was improper for an investigating officer to record a charge and caution statement and there was a need to take the safeguard of ensuring the voluntary character of a statement by the interposition of a disinterested person who had not taken part in the investigations and whose knowledge of the case was limited to what the prisoner told him; *Njuguna v Regina* [1954] EACA 316 followed. In the recording of an accused's statement it was improper to ask the accused whether he or she admitted the charge and it would be preferable that the accused be asked whether he or she wished to say anything about the charge; *Beranda v Uganda* [1974] EA 46 followed. By reading the police file before taking the Appellant's statement, the officer in this instance had placed himself in the position of an investigating officer. It was also irregular for the officer to ask the Appellant whether he admitted the charge.

The treatment accorded to the Appellant's alibi defence by the courts below was unsatisfactory. There was insufficient evidence adduced regarding the barracks where the Appellant was stationed and the possibility that the Appellant had been in custody at the time of the murder had not been ruled out.

The appeal would accordingly be allowed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Beranda v Uganda 1974 EA 46 – **F**

Bogere Moses and another v Uganda criminal appeal number 1 of 1997

Haji Musa Sebirumbi v Uganda criminal appeal number 10/89 (ur)

Kato and another v Uganda criminal appeal number 158/71 (ur) – **F**

Njuguna and others v Regina [1954] EACA 316 – **F**

Judgment

WAMBUZI CJ, ODER, KAROKORA, MULENGA AND KANYEIHAMBA JJSC: The facts of this appeal are simple. Mary Ojok, an expectant mother, left her home in the morning of 16 November 1994 to collect firewood at Labalo Okalo Chwan Village, Pabo Division in Gulu District. She did not return. The following day a search was mounted and her dead body was found on 17 November 1994 where she had gone to collect firewood. The body was naked and her head crushed. According to Dr Anywar of Gulu Hospital who conducted the post mortem examination on the deceased, the cause of death was severe internal and external bleeding, brain damage following a crushed head.

A report of the death was made to RCs and to Pabo Labala Military detachment. On receiving the report of the death of a woman half a mile away from the Barracks, Sergeant Wilfred Otika (PW2) called all the soldiers to a general parade. One soldier was missing with his gun. The missing soldier was the Appellant. He was arrested 2 days later at Amuru and was brought to the barracks and subsequently handed over to the police.

A charge and caution statement was taken from the Appellant in which he admitted the offence and this formed the basis of his conviction for murder by the High Court sitting at Gulu (Malinga J). His appeal against conviction was dismissed by the Court of Appeal hence the appeal to this Court.

There are four grounds of appeal.

"1 The Learned Justice of Appeal erred in law by finding that the charge and caution statement was properly administered and voluntarily made.

2 The Learned Justices of Appeal erred in law by finding that the conviction was sustainable upon the Appellant's repudiated confession.

3 The Learned Justices of Appeal erred in fact and law in rejecting the Appellant's alibi.

4 The Learned Justices of Appeal failed to properly evaluate the evidence on record and as a result came to an erroneous judgment".

The appeal to the Court of Appeal was more or less on the same grounds but in relation to the trial court. The four grounds of appeal really relate to two issues, the confession of the Appellant and the Appellant's alibi.

In respect of the charge and caution statement, Mrs Luswata *Kawuma,* counsel for the Appellant, submitted that the statement had not been properly taken. The caution had not been properly administered. The police officer who recorded the statement perused the file before recording the statement. Learned counsel further submitted that the Appellant was beaten on arrest at the barracks and threatened by a soldier who had a pistol at the time of the alleged statement and accordingly the alleged confession was wrongly admitted in evidence as it was involuntary. She criticised the Court of Appeal for failing to re-evaluate the evidence which in her view would have led the exclusion from the evidence of the confession. Learned counsel submitted that without the confession there was no evidence to support the conviction.

Mr *Wagona*, counsel for the Respondent, supported the decision of the trial court, which was confirmed by the Court of Appeal. It was admitted that the Appellant had been beaten on arrest and in the barracks but learned counsel submitted that at the police station when the statement was recorded he was not assaulted nor threatened and that the effect of torture and threats to which

the Appellant had been subjected before had been removed and were not acting on his mind.

Learned counsel argued that the confession was made voluntarily and therefore was properly admitted in evidence. The Court of Appeal had so found and in learned counsel's view, the finding of the Court of Appeal was supported by the evidence.

The trial court record indicates that the Appellant was arrested at Amuru and he was taken to Wilfred Otika who had sent for him after learning of his arrest. This was the same officer to whom the report of the killing had been made and who had notified other army units of the Appellant's absence from his detachment. This officer had visited the scene and had seen the dead body. He testified: "When the accused was brought from Amuru I asked him. He admitted having killed the woman. He did not know her name but he did want to have sex with her but she refused …".

Cross-examined on the matter he said:

> "When the accused was brought from Amuru he was under arrest and his hands were tied. He had been beaten in our unit. In Amuru he was just arrested. I was the second-in-command. The O/C gave the order to beat the accused. Accused was beaten by other askaris RPs. I was present when he was beaten …".

Another witness for the prosecution, Walter Ocaka (PW3) testified that when the Appellant was brought to Pabo his hands were tied and "had stick marks on him". To this extent, this witness contradicted Otika's evidence to the effect that the Appellant was beaten only at Pabo barracks.

The Appellant gave evidence on oath at the trial-within-a-trial to determine the admissibility of the alleged confession. He alleged he was beaten on arrest at the Bus Park, he was beaten in the barracks at Pabo and he was beaten when his statement was being recorded. He also alleged being threatened with a pistol by an army captain when his statement was being recorded.

In his ruling on the admissibility of the statement the Learned trial Judge said:

> "The accused admits to thumb printing some document said to be his statement at the police station. He has alleged that he was tortured. The police witness (PW4) denies that the accused was tortured. There has not been shown that the accused was tortured. I therefore find that statement was made without torture. I therefore rule that the statement is admissible".

This ruling causes us some concern. First, although the point has not been raised by counsel, it would appear that the Learned trial Judge by his statement that "it was not shown that the accused was tortured" had the effect of shifting the burden of proof to the accused to show that the statement was not voluntary. With respect the burden was on the prosecution to show that the statement was voluntary. See *Kato and Another v Uganda* criminal appeal number 158/71 (ur).

Secondly the ruling does not appear to take into account the undisputed evidence that the Appellant was assaulted on arrest and at the barracks and that he confessed to the murder at the barracks. The Learned trial Judge does not say anything, expect impliedly, about the claim by the Appellant that he was threatened with a pistol by an army office at the time of recording the charge and caution statement.

On the issue of the admissibility of the charge and caution statement, the Court of Appeal said,

> "It was the contention of the learned counsel that any impression which might have created fear in the mind of the Appellant by the treatment he had received from soldiers, had been fully removed by the time he was taken before Thomas James Ongaba for his charge and caution statement within the meaning of section 26 of the Evidence Act. We agree with the learned counsel on this point".

There was evidence that the Appellant was assaulted on arrest and also in the barracks and that he confessed to the killing to the second-in-command, Wilfred Otika, that was around 19 November 1994. This army officer sent the Appellant under guard to the police on 25 November 1994. The Appellant's alleged confession was recorded by the police 7 days after the alleged torture by the army men and the confession to them by the Appellant. On that evidence alone it is a question of fact whether by the time the Appellant made the alleged confession the fear induced by the previous beatings had been removed. The Court of Appeal did not refer to the confession to the army men. The question which was not resolved is whether the Appellant was not merely repeating to the police what he had told the army men. He claimed in his evidence to the trial court, "I told the police that I did not know why I was arrested. Then the Captain pulled out his pistol and told me to repeat what I had stated at Pabo".

Neither the High Court nor the Court of Appeal commented on this evidence. There are other unsatisfactory aspects about the recording of the charge and caution statement. First of all in his own evidence D/ASP Ongaba stated, "When the file was brought to me together with the accused, I read the file. The file was being handled by another officer. I first went through the statements of the witnesses …".

There are a number of cases in which it had been held that it is improper for an investigating officer to record a charge and caution statement. In *Njuguna and others v Regina* [1954] EACA 316 the Court of Appeal for Eastern Africa, referred to the need to take a very reasonable safeguard to ensure the voluntary character of a statement such as the interposition of a disinterested person who has not taken part in the investigations and whose knowledge of the case is probably limited to what the prisoner tells him. The Court concluded, "This Court has said more than once that is in inadvisable, if not improper, for the police officer who was conducting the investigation of a case to charge a suspect and record his cautioned statement".

If therefore, the officer in the case before us, read the police file before recording the statement, he was in the same position as an investigating officer.

Also details in a statement are relevant to the question whether or not the statement was made by the accused and whether it is true. Where the person recording the statement is conversant with the facts of the case, it is difficult to dismiss off hand a claim by the accused person that he signed or thumb printed a prepared statement.

We must mention here that a conflict in evidence is relevant to the issue whether the statement is true. According to the statement of the Appellant,

> "I confess on 15 November 1994 at 15.00 hours I murdered Mary Ajok. I have to say this. I had left the detach, I had gone to drink 'wiri' and when I was coming back I found this woman collecting firewood near a certain garden. I went to her. As I was drunk I demanded to play sex with her. She pulled her … I then threw away her axe. I took a piece of firewood she had collected and hit her three times. I went to the Barracks and kept quiet …".

According to the post mortem report however, "She had crushed head at the back. A cut wound involving the nose and upper lip. Skull was broken as was the upper jawbone. She was not lame. Cause of death was severe internal and external haemorrhage and brain damage. Sharp instrument was used".

The question is what caused the injuries? Was it a piece of wood as the Appellant's statement indicates or a sharp instrument as the post mortem report indicates?

Secondly, it was irregular for Ongapa to ask the Appellant if he admitted the charge. In his own words Ongapa testified "I cautioned him … that you are charged that … you murdered one Mary Ajok. Do you admit the charge?"

Again for an accused person who is already known to have admitted the charge to be asked if he or she admitted the charge could be tantamount to asking him or her to state what he or she previoulsy stated.

In the guidelines issued by the Chief Justice to magistrates as well as police officers in relation to recording extra-judicial statements, referred to with approval in *Beranda v Uganda* [1974] EA 46, and which were also referred to by the Court of Appeal, it is suggested, and we agree, that the accused should be asked whether he or she wishes to say anything about the charge.

With regard to the second issue in this appeal, the Appellant's alibi, learned counsel for the Appellant submitted that the Appellant's alibi was not evaluated. The Appellant claimed he could not have been at the scene of crime as he was stationed in Lubiri barracks in Kampala, which he left on 8 November 1994 on a two weeks leave. He was arrested and on the alleged date of the crime, on or about 15 November 1994, he was in custody. Learned counsel submitted that there was no evidence of arrest to contradict the Appellant's version.

Learned counsel for the Respondent supported the decision of the courts below arguing that if the confession is believed it destroys the alibi.

We are uneasy about the way the alibi of the Appellant was handled in the courts below. The trial Judge had this to say,

> "The accused set up a defence of alibi. In his sworn evidence the accused stated that he was arrested on 6 November 1994 and has remained in custody ever since and so he could not have committed the crime. The accused bears no burden to prove the alibi …
>
> The prosecution led the evidence of PW2 Sgt. Otika that the accused confessed to him that he murdered the deceased. The prosecution also tendered in evidence the cautioned statement of the accused Exhibit P2A in which the accused confessed to the murder. I have already come to the conclusion that the confession was true for the reasons already given. This confession therefore places the accused squarely at the scene of the crime and therefore negatives his alibi which, I therefore reject …".

With respect, the Learned trial Judge erred to take into consideration the confession to Sergeant Otika in view of the evidence of torture of the accused.

Secondly, this Court has in a number of cases dealt with the expression "putting the accused at the scene" or words to that effect, in relation to *alibis.* See *Bogere Moses and Another v Uganda* criminal appeal number 1 of 1997 and *Haji Musa Sebirumbi v Uganda* criminal appeal number 10/89 (both unreported).

In this connection the Appellant testified,

> "I used to reside in Lubiri in Kampala. I was a soldier of First Division. I was arrested at Pabo. I was on pass leave from Lubiri. I left Lubiri on 8 November 1994. I was on 2 weeks pass leave. I was going to my home in Atiak. On arrival in Gulu I went to

> the barracks and got an army vehicle going to Bibia. I stopped at Pabo. I went to buy cigarettes and the vehicle left me there. I went to wait for a vehicle at the park. The LDU came to me. They were drunk. They asked me to identify myself. I showed them my pass leave. They arrested me. They beat me there and then at the Bus Park. One of them hit me with a magazine of … SMG and one … ammunition broke in my chin damaging one of my teeth. It was about three days after I had left Lubiri. They took me to the Barracks at Pabo. They were stepping on my chest. From Pabo I was brought to Gulu Police. I was not informed why I was arrested. They recorded my statement. Some army people including a captain came to intervene …".

The Prosecution led evidence of Otika (PW2), the second-in-command at Pabo to the affect that the Appellant did not appear at the general parade he called on 17 November 1994. The trial court took the fact as circumstantial evidence indicating guilt.

The Court of Appeal dealt with the issue this way,

> "We agree that the confession made by the Appellant was properly received in evidence as it was voluntarily made. The confession, therefore, destroyed the Appellant's defence of alibi. He must have lied when he denied having been at the scene of crime"

There is no evidence as to when the Appellant was last seen by anyone at the barracks at Pabo either before or after the alleged disappearance from there. The Appellant claimed,

> "I am RA12522 Sgt. Mateo Ochieng. I am 27. I am an NRA soldier attached to the first division in Kampala Lubiri barracks. On 8 November 1994 I was at the Lubiri Barracks and I was given 14 days pass leave to come home.
>
> I travelled by a lorry …".

And he gave details of his travel and subsequent arrest. The question to ask is where was the Appellant stationed at the material time, at Lubiri in Kampala or at Pabo in Gulu district?

Apart from the Appellant's own evidence there is no credible evidence to resolve the issue one way or the other. The commanding officer did not say when the Appellant was last seen in the barracks at Pabo before or after the incident. The possibility that the Appellant was stationed at Pabo barracks only on paper was not ruled out.

There is no evidence of arrest and the possibility of the Appellant having been under custody as he claims was not ruled out.

With the greatest respect to the courts below the question whether the alibi did raise a reasonable doubt was not considered. We have no doubt that had the courts below treated the alibi and the charge and caution statement as they should, they would have come to a different conclusion. In the circumstances and for the reasons given in this judgment we think that it will be unsafe to allow the conviction to stand. Accordingly the appeal is allowed, the conviction is quashed and the sentence set aside. It is ordered that the Appellant be set free forthwith unless he is otherwise lawfully held.

For the Appellant:
Mrs L Kawuma

For the State:
Mr Wagona

Pharmaceutical Manufacturing Co v Novelty Manufacturing Ltd
[2001] 2 EA 521 (CCK)

Division: Milimani Commercial Courts of Kenya at Nairobi

Date of judgment: 10 May 2001

Case Number: 746/98

Before: Ringera J

Sourced by: LawAfrica

Summarised by: W Amoko

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[1] Passing off – Evidence – Proof of passing off – Whether evidence of consumers is required in order to prove allegations that products have been confused.

[2] Practice – Pleading – Whether defence must specifically traverse allegations contained in plaint – Consequences of failure to do so – Order VI, rule 9(1) and (3) – Civil Procedure Rules.

[3] Trade mark – Breach of trade mark – Appropriate relief.

Editor's Summary

The Plaintiff instituted proceedings against the Defendant for infringement of trade mark and passing off. In its plaint, the Plaintiff alleged, *inter alia*, that it was the registered proprietor of a trade mark consisting of the word "Trihistamin", which included the pharmaceutical and veterinary substances for that word, and set out the manner in which it was alleged that the Defendant was passing off its product "Tri-histina" as the Plaintiff's "Trihistamin", in particular with regard to the packaging. The Defendant's defence withheld comment on the alleged trade mark, admitted that he manufactured the product "Tri-histina" which contained three antihistamines and then in effect admitted the rest of the Plaintiff's case against him. At trial the Plaintiff produced a renewable certificate of seven-year registration, which had expired, but could not establish whether it had been renewed.

Held – As the defence did not sufficiently traverse the allegations of fact made by the Plaintiff on the registered trade mark, its manufacture and distribution, the reputation its product enjoyed and the manner in which it was marketed, by dint of Order VI, rule 9(1) and (3) of the Civil Procedure Rules those allegations were deemed admitted.

The name of the Defendant's product so nearly resembled the Plaintiff's trade mark as to be likely to deceive or cause confusion in the course of trade in relation to the pharmaceutical and medical preparations and substances to which the trade mark was registered. Infringement of trade mark is a tort of strict liability and so the defence of want of intent was not available. The right not to have a trade mark infringed was statutory and acquiescence could not constitute an estoppel. The Plaintiff's claim for infringement of trade mark had been made out and the appropriate reliefs were an injunction to restrain the Defendant from manufacturing, selling, supplying or distributing "Tris-histina" and damages for the infringement of the trade mark.

There was no evidence before the court upon which it could determine that the Defendant was passing off its product as the Plaintiff's. In absence of evidence by people using the products, that they had bought the cough syrup off the counter and had been deceived or misled by the Defendant's product get-up

or packaging into purchasing its products as the Plaintiff's, the court's impression of the products itself was irrelevant. Such impressions only became relevant when evaluation of the evidence of consumers of the products in issue was necessary. Accordingly, the Plaintiff had failed to make out its claims of passing off.

Plaintiff's claim allowed in part.

Case referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed and "**LLR**" means LawAfrica Law Reports; "**O**" means overruled)

London Overseas Trading Co Ltd v The Raleigh Cycle Co Ltd [1959] EA 1012

Judgment

RINGERA J: The Plaintiff has in a plaint filed in court on 19 November 1998 initiated an action for infringement of its trade mark and passing off against the Defendant. The allegations underpinning the action are contained in paragraphs 3–14 of the plaint, which state as follows:

"3 The Plaintiff is and was at all material times the registered proprietor of the trade mark number 25979 registered on 5 October 1979 consisting of the word 'Trihistamin' registered in class 5 (Schedule III) in respect of Pharmaceutical and veterinary substances and of the trade mark number 41768 for the same word and in the same class registered on 20 June 1995.

4 The registration set out in paragraph 3 is and was at all material times valid and subsisting.

5 The Plaintiff manufactures and distributes products including 'Trihistamin' in the form of syrup.

6 The product 'Trihistamin' is a cough and cold syrup, which has been marketed in Kenya in its present form since 1994. It has been actively and extensively promoted since its launch and has become widely known by the public.

7 'Trihistamin' Syrup is marketed in a pink pack bearing a highly distinctive label comprising the word 'Trihistamin' on a red background and the picture of a young girl at the middle on a light background. The pink colour is dominant upon the pack design.

8 The reputation of 'Trihistamin' in Kenya is considerable and the product is recognisable and is recognised by its get-up as aforesaid.

9 The Defendant is manufacturing and selling in Kenya pharmaceutical product known as 'Tri-histina'.

10 The name 'Tri-histina' so similar to the name 'Trihistamin' as to be an infringement of the Plaintiff's trade mark.

11 Furthermore the get-up of the pack in which the Defendant markets 'Tri-histina' is designed so as to pass off the product as that of the Plaintiff.

12 The Defendant has wrongfully sold and passed off pharmaceutical products not manufactured by the Plaintiff as and for the pharmaceutical products.

Particulars of passing off

The mark 'Tri-histina' is so similar to the Plaintiff's mark as to be an attempt to pass off its product as that of the Plaintiff.

a) The logo on 'Tri-histina' consists of a young girl at the middle of the pack of the same complexion as that one on 'Trihistamin'.

b) The dominant colour featuring on the 'Tri-histina' pack is pink, which is also the dominant colour featuring on the 'Trihistamin'.

c) On the 'Tri-histina' pack directly below the picture of the young girl are written the words 'An effective remedy for colds and coughs'. On the 'Trihistamin' packs are the words 'Effective remedy for cough and cold' written and placed in the same position.

13 The said acts and conduct of the Defendants were at all material times and are calculated to deceive and mislead the trade and the general public and to pass off the Defendant's prodquct as that of the Plaintiff.

14 By reason of the matters aforesaid the Plaintiff has been injured in their reputation and have suffered and will continue to suffer loss and damage. The Plaintiff at the trial herein will seek to recover in respect of all the wrongful acts of the Defendant, although unable at present to give particulars thereof".

The Plaintiff is praying for the following relief:

"a) An injunction to restrain the Defendant whether by itself, its directors, officers, servants or agents or any of them or otherwise howsoever from doing the following acts or any of them, that is to say manufacturing, selling, supplying or distributing a pharmaceutical product under the name Tri-histina or any colourably similar name and/or which is confusingly similar in get-up to the pharmaceutical products manufactured by the Plaintiff under the trade mark 'Trihistamin'.

b) Destruction upon oath of all containers marked as set out in paragraph 12 of the plaint or of any further colourable imitation thereof and of any other representation thereof the use of which would be a breach of the first injunction prayed for and verification upon oath that the Defendant no longer has in its possession custody or control of articles so marked.

c) An enquiry, as to damages or at the Plaintiff's option an account of profits and payment of all sums found due upon taking such enquiry or account.

d) Costs and interest".

The Defendant filed a defence on 6 January 1999. In the said defence, the Defendant withholds comment on the contents of paragraphs 3, 4, 5, 6, 7 and 8 of the plaint and puts the Plaintiff to their strict proof. Then it admits that it manufacturers an expectorant syrup containing three antihistamine products for cough symptoms. After this admission, the Defendant states its case in paragraph 5–9 of the defence. The said paragraphs read as follows:

"5) The Defendant states that the Tri-Histina is not a product to be bought off the shelf as it contains Part 1 Poison as per the Provisions of Pharmacy and Poisons Act (Chapter 244 Laws of Kenya).

6) The Defendant further contends that the product Tri-Histina can be sold only to Pharmacies and to Medical Practitioners who in turn can sell or prescribe to the particular individual. The Public cannot buy it in open market.

7) The Defendant denies that the name 'Tri-Histina' is an infringement of the Plaintiff's trade mark as the same is totally distinct to the same 'Trihistamin'

8) The Defendant states that it has manufactured and sold its product to Hospital, Medical Practitioners and Pharmacies since 1980 and has not designed and cannot design to pass off the same as that of the Plaintiff to the aforesaid persons who have specialised knowledge in the field of medicine.

9) In view of the premises the Defendant states that the product which is a Part 1 Poison is not capable of being sold and passed off as the product of the Plaintiff and denies the averment made by paragraph 12 of the plaint as well as denies emphatically the particulars of passing off made therein".

The Defendant then denies paragraphs 13 and 14 of the plaint and places the strictest burden of proof thereof on the Plaintiff. It rounds off with the averment that the plaint is misconceived in law and liable to be struck out. From the pleadings the Plaintiff framed the following issues for trial.

"1 Is the Plaintiff the registered proprietor of the trade mark 'Trihistamin'?

2 Does the Plaintiff manufacture and distribute the product 'Trihistamin'?

3 (*a*) Is 'Trihistamin' a cough and cold syrup marketed in Kenya since 1972?

(*b*) Has it been extensively promoted since its launch to become widely known to the public?

(*c*) Is the reputation of 'Trihistamin' considerable in Kenya?

4 Is 'Trihistamin' syrup marketed in a get-up as set out in the plaint at paragraph 7?

5 Does Defendant's product infringe the Plaintiff's trade mark?

6 Is the Defendant's product passed off as the Plaintiff's as alleged in the plaint at paragraph 12?

7 Are the acts of the Defendant calculated to deceive the general public?

8 If so, can it be sold to public in open market or to Pharmacies and Medical Practitioners?

9 Does the product Tri-histina contain Part 1 Poison under the Pharmacy and Poisons Act?"

I tried the action on the 26 March 2001. The Plaintiff called two witnesses: Kumar Shah, a director of the company and Joseph Nzavi Kivunge, the medical representative of the company. Mr Shah testified that when he Kumar Shah, a director of the company and Joseph Nzavi Kivunge, the medical representative of the company. Mr Shah testified that when he bought the company in 1988 one of the products it had was a registered trade mark in "Trihistamin". He produced the registration certificate as exhibit 1. The mark was registered for seven (7) years from 19.4.79 but was renewable. He testified that his product is a cough and cold syrup, which should be available on prescription only but was sold across the counter in many pharmacies. He also testified that the Defendant was selling a product called *Tri-histina*, which was said to be a remedy for colds and coughs. He produced the packaging of the two products as exhibit 2. He further testified that after suit was filed the Defendant changed its get-up slightly by removing the inscription "An effective remedy for colds and coughs". He said the Defendant's product was cheaper than his by about 40% and that had an effect on their sales. The witness testified that he did not see any substantial difference between the two names and he considered the Defendant was infringing his trade mark. He further testified that confusion of the two products was taking place because doctors write in short form *Trihist* on the prescription. Because of the price differential, the witness said, chemists have an incentive to stock the Defendant's product. He stated that on both packaging there was a young Asian girl and a white panel with an inscription of "Effective remedy for and coughs".

On cross-examination by Mr *Mbaabu*, counsel for the Defendant, the witness said he had formulae for his drug but no patent. He said he had no problem with somebody else manufacturing the same drug but under a different name. He said the name of his product was derived from its composition of three antihistamines. The word "tri" originally referred to the three antihistamines. He said both products could lawfully only be sold through a prescription but did not agree that people cannot buy them across the counter. He testified that

in this country a lot of medical products are sold across the counter without prescription in disregard of the law. In his view, if the law on dispensing of drugs was followed there would be no problem or confusion. He admitted that the trade mark registration produced as exhibit 1 had expired. He was not sure whether it was renewed. Pressed further on the point, the witness stated they had another document showing the registration had been renewed but he did not know in which year. He admitted that when they bought the Plaintiff's company the packaging into 100 and 60ml bottles was already in existence.

Shown exhibit 2, the witness stated that the Defendants original packaging has a distinctive deep green colour at the top but it was otherwise like that product. The other distinction is that it has the name of the Defendant on it. He said they used to sell 60 000 to 80 000 bottles in the market but he had no statistics on sales after the introduction of the Defendant's product in the market. He nonetheless was of the view that with the introduction of a similar product, their turnover was bound to be affected.

Joseph Kivunge testified that he had been in the employment of the Plaintiff company as medical representative for twelve years. His job involved going round pharmacies marketing the Plaintiff's products including "Trihistamin". He became aware of the Defendant's product "Trihistamin" two to three years back. Although both products should he dispensed on prescription they are sometimes sold over the counter. The Plaintiff's product is more expensive. From his observations around the country, the sales of "Trihistamin" has dropped. On cross-examination by the Plaintiff's advocate, the witness maintained that he saw the Defendant's product around 1998. He was not aware that the Defendant's product had been on the market from the 1980's. They started manufacturing their product in the name of "Tri-histina" in early 1980's. At that time, the Plaintiff's product "Trihistamin" was also on the market. At that time, their product was packaged in five-litre bottles. He was not aware how Plaintiff's product was packaged. They added 60 and 100ml bottles in early 1990's. Exhibit 2 represented their original packaging as introduced in the mid-1990's when they started packaging their product in cartons. He identified the Plaintiff's original product and packaging as per the same exhibit 2. He could not tell whether the Plaintiff's product in this packaging entered the market before or after theirs. He introduced the packaging in exhibit 3 in 1998.

The product is sold through prescription. It cannot be bought across the counter if the pharmacist is not present. He denied that it was possible for the two products to be confused as a result of doctors' writing being illegible or in shorthand. That was because if writing was illegible or in shorthand and the pharmacist did not know what was prescribed, he should get in touch with the doctor and confirm the prescription. He was clear that there were no chances of deception in this particular drug. His product contains three antihistamines. That is the basis of his first name of "tri". In his manufacturing and selling of his product, he had not intended to copy the Plaintiff's trade mark. He denied his product was cheaper than the Plaintiff's product by about 40%. His sales have been going down due to recession.

On cross-examination by Mr *Le Pelly*, counsel for the Plaintiff, the witness admitted that a recession does not prevent people from catching colds. He maintained that he did not copy the Plaintiff's product and if there were any similarities, that was pure coincidence. He stated that the date of exhibit 2 was 1998.

After the conclusion of the evidence, the advocates made submissions. Mr *Mbaabu* for the Defendant submitted that since the unchallenged evidence was that the Defendant started manufacturing the product complained of in the 1980's the Plaintiff cannot now be heard to complain. Their acquiescence has denied them a proper case against the Defendant. It was also clear, he submitted that the trade mark expired after 7 years and the Plaintiff could not base his claim on expired trade mark. As regards the passing off aspect of the action, counsel submitted that such an action could not he maintained in respect of prescription drugs. Flouting of the law by pharmacies and pharmacists cannot form the basis of a passing off action. He invited me to take judicial notice that pharmacists are trained persons and, accordingly, no confusion could be forthcoming. He also submitted that for the Plaintiff to base its claim of passing off on certain names, the Plaintiff must prove a proprietary right in such names. That was not done here. Moreover the court was not told that the colour and entire packaging was registered. On the issue of name, he urged me to find that they are not similar. In his view, since the first three letters, "tri", mean "three" and both the Defendant and the Plaintiff have confirmed their products contain three antihistamines, the court should find that the words are used merely to identify what is contained in the product. The product cannot be known by any other name. If the evidence were considered in its totality, there was neither an infringement of a trade mark nor a passing off. Mr *Le Pelly*, for his part, submitted that no issue was raised in the pleadings about the renewal of the trade mark and Plaintiff had also pleaded a 1995 registration. He further submitted that the right claimed to be infringed is not an equitable but a legal right under the Trade marks Act. In his view, the reasons for the original name have no effect on the registration. In his view the word "Tri-histina" is an infringement of "Trihistamin" as it contains all letters except one and the first seven letters are in the same order. He relied on the case of *London Overseas Trading Co Ltd v The Raleigh Cycle Co Ltd* [1959] EA 1012 and Kerly *Law of Trade Marks* (12 ed) 1986. As regards the passing off aspect, Mr *Le Pelly* submitted that the Defendant had not stated when he started producing his 100ml bottles but the original one was in 1998. In his view, the new bottles must be later than that. He claimed that in the premises he had proved his case.

Mr *Mbaabu* submitted that the *Raleigh* case (*supra*) was distinguished as the products in issue were generally available on the market and the pronunciation of the two names were also very close, unlike the situation in the present case.

I now turn in a consideration of the issues for trial in light of the pleadings, evidence and submissions on record. It is clear from the statement of defence read out hereinabove that the Defendant has not traversed or sufficiently traversed the allegations of fact made by the Plaintiff in paragraphs 3,4,5,6,7 and 8 of the plaint. Accordingly, by dint of Order VI, rule 9(1) and (3) of the Civil Procedure Rules, those allegations of fact are deemed to be admitted. Given that state of affairs, I am impelled to answer issue numbers (1), (2), (3) and (4) in the affirmative. As regards issue number 5, I accept the Plaintiff's evidence that the words "Trihistamin" (which is the Plaintiff's registered trade mark) and "Tri-histina" (which is the name of the Defendant's product) are substantially similar. Indeed counsel for the Plaintiff was able to point out that all letters except one in the names are the same and that the first seven letters are in the

same order. Even the Defendant's witness did not deny the similarity. I accordingly find that the Defendant's name of its product, that is "Tri-histina" so nearly resembles the Plaintiff's registered trade mark of "Trihistamin" as to be likely to deceive or cause confusion in the course of trade in relation to pharmaceutical and medical preparations and substances in respect of which it is registered. It is a clear infringement of the Plaintiff's trade mark. The only question is whether the Defendant's professed want of intent to copy Plaintiff's trade mark or the Plaintiff's acquiescence in the Defendant's use of the offending word for a long time affords any defences to the action. In my view, both of them don't. Registration of a trade mark confers the right to exclusively use the mark. Infringement of the trade mark is a tort of strict liability. Intention and motive are irrelevant considerations. And as the right is a statutory one, acquiescence cannot constitute an estoppel or any other defence, which the statute itself does not recognise. I accordingly find that the Defendant has no defence to the Plaintiff's claim for infringement of a registered trade mark. So issue number 5 is also answered in the affirmative.

Issue numbers 6, 7, 8 and 9 I think can be dealt with together. They boil down to whether the Defendant has been passing off his goods as those of the Plaintiff. The evidence is equivocal on the issue. On the one hand, both the Plaintiff's and the Defendant's evidence is in agreement that the products in contention are not ordinary goods. They are prescription drugs, which can only be lawfully prescribed by a qualified medical practitioner and dispensed by a qualified pharmacist. On the other hand, there is divergence of evidence on whether the said drugs are sold across the counter. The Plaintiff's two witnesses maintain they are but the Defendant's only witness testified that they are not. These partisan witnesses all appeared sincere and none of them gave me cause to doubt their credibility. The Plaintiff did not call any patients or sick persons as witnesses to testify on whether they have purchased the drugs across the counter and whether in doing so they have been deceived or misled by the product's get-up or packaging into purchasing the Defendant's product as that of the Plaintiff. In the absence of such evidence, it is unnecessary for me to express any view on my personal impression of the overall appearance of the get-up of the two products. I think such impressions would only have been useful in my evaluation of the evidence of the consumers of the products in question. And of course it is out of the question that a qualified pharmacist can dispense the Defendant's product as that of the Plaintiff. On my evaluation and consideration of the above state of evidence, I find that the Plaintiff has not on a balance of probability proved that the Defendant has passed of its "Tri-histina" cough expectorant as and for its "Trihistamin" syrup.

To summarise, the Plaintiff succeeds in its trade mark infringement action but fails in its passing off action. The final question is what relief the court should grant in view of the mixed success of the Plaintiff. Obviously any relief or part thereof which was predicated on a successful passing off action is not now open. In the premises, there will be judgment for the Plaintiff against the Defendant for (*a*) an injunction to restrain the Defendant whether by itself, its directors, officers, servants, or agents or any of them or otherwise howsoever from doing the following acts or any of them that is to say, manufacturing, selling, supplying or distributing a pharmaceutical product under the name "Tri-histina" or any colourably, similar name, and (*b*) an enquiry as to damages for the infringement by the Defendant of the Plaintiff's trade mark. As regards costs, both parties have partially succeeded. I think the just order to make in the circumstances is that each party should bear its own costs of the action.

Those then are the orders of this Court.

For the Plaintiff:
Mr Le Pelley

For the Defendant:

Mr Mbaabu

Prime Salt Works Ltd v Kenya Industrial Plastics Ltd

[2001] 2 EA 528 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	11 May 2001
Case Number:	186/00
Before:	Omolo, Lakha and Keiwua JJA
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Conduct of suit – Judge hearing Plaintiff only – Defendant not given opportunity to present case – Judge giving judgment after Plaintiff's testimony – Whether procedure proper.

[2] Natural justice – Court hearing Plaintiff – Defendant not given opportunity to cross-examine Plaintiff – Judgment given after Plaintiff heard – Whether rule of natural justice violated.

Editor's Summary

The Appellant and the Respondent entered into a contract of sale whereby the Appellant agreed to buy and the Respondent to sell 1 000 tonnes of crude salt for US$ 79 201-50. The Respondent filed suit in the High Court alleging that the Appellant had paid US$ 3 414 and claiming the balance of US$ 75 787-50 together with damages for breach of contract. The Appellant had also filed suit number 601 of 1999 against the Respondent. The two suits were consolidated.

In the afternoon of 25 May 2000 the matter came up for hearing before the Commissioner of Assize whereupon the Respondent, as the first witness, testified until 5:00pm. The matter was adjourned until the following day, when the Respondent should have been cross-examined. Instead, the learned Commissioner delivered judgment for the Respondent as prayed and dismissed the Appellant's case.

The Appellant appealed to the Court of Appeal arguing that the Commissioner had contravened the law in adopting an improper procedure and denying the Appellant a chance to present his case.

Held – The Appellant had clearly been deprived of the opportunity to present its case in the fullest sense. The rule of natural justice that no man shall be condemned unheard had been violated. *Local Government Board v Arlidge* [1915] AC 120 followed.

There was no law or rule of law excluding the Appellant from being heard in the circumstances of the case.

Although the Respondent was not responsible for the action taken by the Commissioner, there was nothing in the conduct of the Appellant that would justify depriving it of costs of the appeal.

Case referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

United Kingdom

Local Government Board v Arlidge [1915] AC 120

Judgment

OMOLO, LAKHA AND KEIWUA JJA: We are concerned in this matter with an appeal from the judgment of Hewett Esq (a Commissioner of Assize, as he then was) given on 26 May 2000 whereby he entered judgment for the Respondent in the sum of US$ 75 787-50 plus interest and costs. As this case was consolidated with High Court civil case number 601 of 1999 in which the Appellant was the Plaintiff, that case was also dismissed with costs.

At the very outset, we observe that the appeal is a somewhat unusual one against the decision of one who is now a judge of the superior court. It is an unusual one because it is not an appeal which raises any point of law as regards the correctness, or otherwise, of the conclusions reached by the Learned Judge; it is based entirely on the contention that the Learned Judge, in hearing the case, went wrong in law as a matter of procedure as regards the hearing and that the error of law lies not so much in the result of the proceedings, as in the way in which the proceedings were conducted.

The facts of the case may be briefly stated. By a contract made between the Plaintiff and the Defendant, the latter agreed to buy and the Plaintiff agreed to sell 1 000 tonnes crude salt. In breach of the contract, the Defendant paid only US$ 3 414 leaving a balance of US$ 75 787-50. As a result, the Plaintiff sued the Defendant for balance of purchase price, The hearing came up before the Learned Judge in the afternoon of 25 May when the Plaintiff called its first witness. His evidence-in-chief concluded at 5:00pm when the case was adjourned to the following day. When it came up (hopefully) for cross-examination and further evidence, the Learned Judge instead delivered judgment for the Plaintiff as prayed and dismissed the Appellant's case number 601 of 1999.

In these circumstances on the brief and simple facts that we have related, it was contended on behalf of the Appellant that it was not given a reasonable or any opportunity to present its case and was condemned unheard.

What is said on the other side? The advocate for the Respondent, apart from submitting that the Respondent was not to blame for what had happened and should therefore not be made liable for the costs of the appeal, had nothing to say.

We have carefully considered the events of 25 and 26 May 2000 and it seems to us to be totally unarguable that the Appellant was given such opportunity. The Appellant was clearly deprived of the opportunity of getting its tackle in

order and being able to present its case in the fullest sense. We have said one hardly needs authority for that, but in *Local Government Board v Arlidge* [1915] AC 120 at 132, the point was well made by Viscount Haldane LC when he said:

> "My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made".

Implicit in the concept of fair adjudication lie two cardinal principles, namely that no man shall be a judge in his own cause and that no man shall be condemned unheard. These two principles, the rules of natural justice, must be observed by courts save where their application is excluded expressly or by necessary implication. In the instant case it has not been suggested that the rule has been excluded.

In our judgment, the rule of natural justice that no man shall be condemned unheard was clearly violated. The effect of failure to accord any or any adequate (as in this case) hearing prior to a decision may be repaired by the original decision being followed by a full and fair hearing or a rehearing.

It was submitted on behalf of the Respondent that it should not be made liable to pay the costs of the appeal because the decision of the superior court was not the result of any submission they had made or any fault on their part. That is true. But the Appellant has not been at any fault either and the Appellant has had to come to this Court to rectify the error of the court below. There is nothing in the conduct of the Appellant that would justify depriving it of costs arising from its success in obtaining the decree appealed against to be set aside. In our judgment, the correct exercise of the discretion would be to award to the Appellant the costs of the appeal. This does not include the costs of the abortive trial before the superior court which is dealt with hereafter.

For these reasons, we have come to the conclusion that this is a case in which the judgment appealed from must be set aside as we hereby do. We order that the appeal is allowed with costs and the case is remitted to the superior court to be tried afresh before another judge in accordance with law. The costs of the abortive trial shall be in the discretion of the judge on the fresh hearing.

For the Appellant:
Information not available

For the Respondent:
Information not available

Sharma v Uhuru Highway Development Ltd
[2001] 2 EA 530 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	16 February 2001
Case Number:	133/00
Before:	Gicheru, Akiwumi and Keiwua JJA
Sourced by:	LawAfrica
Summarised by:	HK Mutai

[1] Advocacy – Professional practice – Taxation of costs – Sections 48 and 49 – Advocates Act (Chapter 16) – Rule 13 – Advocates (Remuneration) Order.

Editor's Summary

The Appellant herein was at one time the advocate for the Respondent. In December 1997, the Appellant sent a letter to the Respondent enclosing a fee note for some Shs 500 million and demanding payment within 30 days. Upon the Respondent's failure to comply, he filed his bill of costs in a miscellaneous civil case in the High Court and sought taxation thereof under paragraph 13(3) of the Advocates (Remuneration) Order. In October 1999, the Respondent filed an application seeking to strike out the miscellaneous case. The application was fixed for hearing on 13 October 1999, a date that had already been set aside for taxation before the deputy registrar. The Respondent's application was based on the ground that the case was improperly before the court as no plaint had been filed in compliance with the mandatory provisions of the Advocates Act (Chapter 16). The Judge upheld the application and struck out the case as having been brought prematurely.

The Appellant appealed primarily on the ground that sections 48 and 49, Advocates Act did not apply and that the case was correctly brought under rule 13 of the Advocates (Remuneration) Order.

Held – The proceedings before the High Court Judge were a nullity as the matter had already been fixed for taxation before the deputy registrar and there were no grounds conferring jurisdiction on the Judge to hear the matter and no steps had been taken to divest the deputy registrar of his jurisdiction.

Rule 13(3) of the Advocates (Remuneration) Order deals with the subject of taxation of costs whereas section 48 of the Advocates Act is concerned with the recovery of costs, and the Appellant, having decided to approach the matter by way of rule 13, had no obligation to comply with section 48.

Paragraph 13(3) not being in conflict with sections 48 and 49 of the Advocates Act, and section 48 not forbidding the taxation of costs before any action for the recovery of those costs, the superior court had erred in striking out the Appellant's miscellaneous case.

Appeal allowed.

Judgment

GICHERU JA: Section 44(3) and (4) of the Advocates Act, Chapter 16 of the Law of Kenya (1992 Revised Edition), hereinafter called the Act, is in the following terms:

> "44(3) An order made under this section may authorize and regulate–
>
> (*a*) the taking by an advocate from his client of security for payment of any remuneration to be ascertained by taxation or otherwise, which may become due to him under any such order; and
>
> (*b*) the allowance of interest.
>
> (4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order".

Rule 13(1), (2) and (3) of the Advocates (Remuneration) Order provides that–

> "13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of

the client, but where a client applies for taxation of a bill which has been rendered in summarised or block form the taxing officer shall give the advocate an opportunity to submit an itemised bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarised or block form –

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof".

By a Miscellaneous Case entitled:

"Misc. Civil Case No. 81 of 1999

In The Matter of: The Advocates Act

and

In The Matter of: The Taxation of Costs between Advocate and Client

versus

Uhuru Highway Development Ltd Client",

the Appellant submitted his itemised bill of costs to the taxing officer for taxation as between himself and his client, the Respondent herein, on 29 January 1999. The amount charged in that bill, besides VAT at 16% and disbursements, was KShs 865 654 448. After service of the notice of taxation and itemised bill of costs in the Miscellaneous Cause referred to above, the Respondent by a chamber summons dated 1 October 1999 and taken out under Order VI, rule 13(1) of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Chapter 21) of the Laws of Kenya, sections 48 and 49 of the Act and all the other enabling provisions of the law sought to have the said Miscellaneous Cause struck out for the reason that there was no compliance with section 48 of the Act which required the Appellant to commence his proceedings in this regard by way of plaint. This, the Appellant had not done. Hence, the Miscellaneous Cause in which he submitted his itemised bill of costs to the taxing officer for taxation as between him and the Respondent, according to the Respondent, disclosed no reasonable cause of action and was an abuse of the process of the court.

Proceedings relating to the Respondent's chamber summons were concluded in the superior court on 19 May 2000 culminating in the Appellant's miscellaneous civil case number 81 of 1999 being struck out with costs to the Respondent herein. In striking out the Appellant's miscellaneous cause, the superior court observed that taking into account the provisions of sections 48 and 49 of the Act, before any bill of costs is filled by an advocate, the latter must first file a plaint against his client who then shall have an opportunity to file a defence and thereafter directions may be sought from the court whether the bill of costs may be filed before or after the determination of the suit and subsequent thereto, the provisions of rule 13 of the Advocates (Remuneration) Order would come into operation as the said rule cannot stand alone.

Aggrieved by the decision of the superior court, the Appellant has appealed to this Court putting forward 30 grounds of appeal which in the main gravitates on the non-applicability of sections 48 and 49 of the Act to this miscellaneous case number 81 of 1999 which, according to him, was correctly filed under rule 13 of the Advocates (Remuneration) Order. The submission of counsel for the

Respondent was that rule 13 of the aforesaid Order was inconsistent with the Act and the non-compliance with section 48 of the Act in particular by the Appellant laid bare his Miscellaneous Cause for striking out.

Section 48(1) and (2) of the Act provides that:

> "48(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarised form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.
>
> (2) Subject to subsection (1), a suit be brought for the recovery of costs due to an advocate in any court of competent jurisdiction".

and section 49 of the Act provides that:

> "49. Where, in the absence of an agreement for remuneration made by virtue of section, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof–
>
> (*a*) no judgment shall be entered for the Plaintiff expect by consent, until the costs have been taxed and certified by the taxing officer;
>
> (*b*) unless the bill of costs on which the suit is based is fully itemized, the Plaintiff shall file a fully itemized bill of the costs within fourteen days from the date of service of the defence, or such further period as may be allowed by the court, and shall serve a copy thereof on the Defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the Plaintiff shall, subject to the court's pecuniary jurisdiction, be deemed to be increased accordingly and all consequential amendments to the pleadings may be made;
>
> (*c*) no court or filing fee shall be payable on filing a bill of costs required by this section, but, if thereby the amount for which judgment is prayed in the plaint is deemed to be increased under paragraph (b), the Plaintiff shall pay to the court such court or filing fee as may be appropriate to the increase; and
>
> (*d*) at any time after the bill of costs has been filed, and before the suit has been set down for hearing, any party to the action may take out a summons for directions as to whether such bill should be taxed by the taxing officer before the suit is heard".

I have deliberately set out in full the provisions of the aforesaid sections to demonstrate that those sections relate to the bringing of a suit for the recovery of costs by an advocate against his client. As is evident from the title to the Appellant's miscellaneous case number 81 of 1999 together with the itemised bill of costs thereto, the Appellant was not suing for the recovery of costs against the Respondent but was applying for taxation of his bill of costs as between him and the Respondent in terms of rule 13 of the Advocates (Remuneration) Order which he was legitimately entitled to as is set out at the beginning of this judgment. That rule is not in conflict with sections 48 and 49 of the Act as its objective is different from that of the aforesaid sections. The superior court cannot have been right in striking out with costs the Appellant's miscellaneous case number 81 of 1999 as is indicated above. I would therefore allow this appeal, set aside the order of the superior court dated 19 May 2000 striking out the Appellant's Miscellaneous Cause aforementioned and order that the same be reinstated and the bill of costs in respect thereof proceed to taxation

by the taxing officer of the superior court. I would also award the costs of this appeal and of the application in the superior court to the Appellant. As Akiwumi and Keiwua, JJA agree, it is so ordered.

KEIWUA JA: The Appellant appeals from the decision of the superior court, O'Kubasu J (as he then was) delivered on 9 May 2000 in which the Learned Judge found that:

> "Having considered the submissions made and particularly the provisions of sections 48 and 49 of the Advocates Act, I am satisfied that Mr Sharma did not comply with these mandatory provisions of the Advocates Act and hence miscellaneous civil case (application) number 8 of 1999 was certainly brought to court prematurely. It therefore follows that the advocates/Respondent's miscellaneous civil case (application) number 81 of 1999 is hereby struck off (out). It is further ordered that the advocate Respondent do pay the costs of this application to the client/Applicant. Order accordingly".

The Learned Judge had before him an application brought by the Respondent for stay and striking out of the said miscellaneous civil case number 81 of 1999, which had been instituted by the Appellant under paragraph 13(3) of the Advocates (Remuneration) Order, for the taxation of the Appellant's bill of costs as against the present Respondent, for whom the Appellant had acted as its advocate in the same suit. Paragraph 13 of that order is as follows:

> "13(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applied for taxation of a bill which has been rendered in summarised or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarised or block form.
>
> 13(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and to be heard
>
> 13(3) The bill of costs shall be filed in a Miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof".

The Learned Judge had this to say in relation to paragraph 13 of the Advocates (Remuneration) Order:

> "Mr Imanyara submitted that it was mandatory for the advocate/Respondent to commence proceedings by way of plaint before filing his bill of costs and that no plaint had been filed as there was no suit before the court. Mr Sharma found this to be a very strange proposition and in his view Mr Imanyara was not only wrong but rather digging his own grave and in any case what Mr Sharma had done by filing a miscellaneous (case) application number 81 of 1999 was in accordance with rule 13 of the Remuneration Order. Mr Imanyara contends that the provisions of section 48 are clear and unambiguous and hence in his view recovery of costs can only be commenced by a way of plaint. Even Mr Sharma conceded he had not filed a plaint.
>
> In this matter, Mr Sharma contends that rule 13 of the Advocates (Remuneration) Order allows him to proceed the way he did while Mr Imanyara contends that what Mr Sharma did was not in compliance with the provisions of section 48 of the Advocates Act. From what is before me it is not in dispute that there is no plaint filed. Mr Sharma by his own admission did not file a plaint".

The Learned Judge also set out section 48 of the Advocates Act which reads as follows:

> "48(1) Subject to this Act no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarised form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint for believing that the party chargeable therewith is about to quit Kenya, or abscond from the local limits of the court's jurisdiction in which event action may be commenced before expiry of the period of one month.
>
> (2) Subject to subsection (1) a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction".

Insofar as section 48(1) of the Act requires an advocate to allow the expiry of thirty days after the bill of costs had been delivered to the client, before the institution of a suit for recovery of such costs, the Learned Judge observed:

> "With reference to the service of the itemised bill of costs dated 6 January 1999, it should be pointed out that all attempts to serve this document occurred well after the said bill had been filed on 29 January 1999, and consequently did not comply with the provisions of section 48(1) of the Advocates Act".

The basis of this appeal is a letter dated 18 December 1997. That letter was from the Appellant to the Respondent and had enclosed the Appellant's fee note in the sum of KShs 500 million. That letter made it clear that if no payment is received within thirty days thereof proceedings for the recovery thereof would be instituted by the Appellant. The Respondent having not complied, the Appellant filed the bill of costs in High Court Miscellaneous civil case number 81 of 1999 in terms of paragraph 13(3) of the Advocates (Remuneration) Order, which case, according to the record or proceedings of that case, was variously due for taxation before the deputy registrar of the court on 27 April 1999, when the notice of taxation was to issue and on 11 May 1999, when the bill was by consent listed to come for taxation but nothing appears to have happened that day. The next recorded event was on 24 May 1999, when the bill was by consent of the parties fixed for taxation for 13 October 1999. Before that date arrived, the Respondent on 4 October 1999, filed its application dated 1 October 1999 for stay of the taxation and for striking out the miscellaneous case and that application had been listed for hearing on 13 October 1999, the date the bill was due for taxation. The next recorded event was on 13 October 1999 when the file was in that court's daily cause list listed before the Learned Judge and with no indication as to what happened with the taxation which had been set to begin before the deputy registrar on that same date.

I think that approach was quite irregular. The taxation date had, long before the application to stay and strike out the miscellaneous case, been fixed before the deputy registrar. In my judgment both the miscellaneous case embodying the bill of costs for taxation together with the application to stay that case, ought in the first place to have been placed before the deputy registrar of the superior court and the prayer for stay urged and if granted it was only then, the balance of the application to have the case struck out, should have been referred to the Learned Judge. In the absence of such an order from the deputy registrar of jurisdiction to have the bill of costs taxed or to confer jurisdiction to the Learned Judge because what had been appears to me to have been a nullity.

I will now deal with the substantive arguments regarding the application to have the miscellaneous case struck out. That application was made on the ground that there was no cause of action disclosed, in that the Miscellaneous

case had been brought prematurely without compliance with section 48 of the Advocates Act. That section, it was urged before the Learned Judge, makes it mandatory that proceedings for the recovery of costs by an advocate from a client must be by plaint. The Learned Judge upheld the Respondent's contention that the Miscellaneous case had been filed prematurely and struck it out. In his view, it was only by plaint filed pursuant to section 48, that an advocate may recover his costs.

Arguments before us, centred on whether paragraph 13(3) of the Advocates (Remuneration) Order is in conflict with section 48 of the Advocates Act. It appears to me that these two provisions cannot be in conflict. Insofar as paragraph 13(3) of the Advocates Act is concerned, it deals with the subject of taxation of costs while section 48 of the Act is concerned with the recovery of costs and that much is quite clear from the marginal notes to section 44 of the Act and that to paragraph 13 of the said order are respectively: "Chief Justice may make orders prescribing remuneration" and "Taxation of costs as between advocate and client on application of either party".

In my judgment, the Appellant having already approached the matter by means of a miscellaneous case as authorised by paragraph 13(3) of the Advocates (Remuneration) Order, itself an off-shoot of section 44 of the Act, there was therefore no more obligation on the part of the Appellant to comply with section 48.

Accordingly, the finding by the Learned Judge that there was no cause of action in the Miscellaneous case because it had been instituted without a plaint, cannot be correct because the miscellaneous case filed under paragraph 13(3) of the Advocates (Remuneration) Order had nothing to do with the recovery of costs which is what this section 48 of the Act is all about. I would therefore set aside that finding and would allow the appeal with costs and costs of that case in the superior court. I would reinstate the bill of costs filed in the superior court on 29 January 1999, so that it can proceed to taxation by the deputy registrar of that court.

AKIWUMI JA: The Appellant, MG Sharma, Esq, who was at one time the advocate of the Respondent, Uhuru Highway Development Limited, filed in pursuance of paragraph 13 of the Advocates (Remuneration) Order, which I shall hereinafter refer to as "the Order", by way of a miscellaneous cause as provided for in that paragraph: miscellaneous civil case number 81 of 1999, for taxation by the Taxing Officer of the High Court, his advocate and client bill of costs which was not only in respect of matters in the High Court but also, of matters in this Court. The total amount charged in the Bill of Costs was the enormous sum SKhs 865 654 448. By consent of the advocates of the Appellant and the Respondent, the Bill of Costs was fixed for taxation on 13 October 1999. This did not take place as on that date, without it being included in the cause list for that day as a matter before the Taxing Officer, rather, an application by the Respondent to strike out the Appellant's miscellaneous civil case number 81 of 1999, which I shall hereinafter refer to as "the cause", was fixed for hearing not before the Taxing Officer as should have been the case, since the taxation was pending before him, but before O'Kubasu J as he then was. He adjourned the hearing of the application to a date to be taken at the registry. The application then came before him on 2 December 1999, which he proceeded to hear and concluded with his ruling of 19 May 2000. He adjourned the hearing of the application to a date to be taken at the registry. The

application then came before him on 2 December 1999, which he proceeded to hear and concluded with his ruling of 19 May 2000. O'Kubasu J, not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and (2) and 12 of the Order, from a decision of the Taxing Officer who was dealing with the taxation, and the taxation not begin a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent's application to strike out the cause. This by itself, makes his hearing of, and his ruling of 19 May 2000, on the Respondent's application, a nullity from the word go. It would have been different if the Appellant had brought a suit in the High Court by way of a plaint, for the recovery of costs due to him, under section 48 of the Advocates Act hereinafter referred to as "the Act". This not having been the case, O'Kubasu J lacked jurisdiction to entertain the Respondent's application and which lack in my view, vitiates the whole of the proceedings before the Learned Judge. Although this was not raised before O'Kubasu J, it is a fundamental matter which this Court can consider *suo moto*, and I will on this ground alone, allow the appeal.

The Appellant has appealed to this Court against this null and void ruling and it would have been unnecessary for me to deal any further with the appeal, except that since it raises important legal issues, l feel obliged to make a few comments thereon.

As already adverted to, the Appellant's Bill of Costs had been brought under paragraph 13 of the Order, the side note to which paragraph, is in the following significant terms: "Taxation of costs as between advocate and client on application of either party".

Consistent with this side note, subparagraph (1) of paragraph 13 empowers the Taxing Officer only to tax costs and nothing else "as between advocate and client without any order for the purpose upon the application of the advocate", which as I will explain later, he can do. Subparagraph (2) then provides that notice of the data fixed for the taxation, as occurred in this case, shall be given to the advocate and his client. Subparagraph (3) then goes on to stipulate how a Bill of Costs shall be filed namely, that: "The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate may be entitled to an instruction fee in respect thereof".

It was in pursuance of the provisions of paragraph 13 of the Order, that the Appellant filed the cause which runs into 73 pages, and due notice of the date of its taxation given in accordance with paragraphs 70 and 72 of the Order.

However, an issue which I think convenient to deal with now relates to the ambit of the Order itself. In paragraph 2 of the Order, it is provided that:

> "This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in the subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act".

Although the paragraph clearly covers issues relating to the taxation of an advocate's bill of costs, a question that arises from this paragraph, is whether the seventy three pages of the cause, should have included as they did, the Appellant's Bill of Costs in respect of matters which he handled on behalf of the

Respondent in this Court. The answer to this question, in my view, is, yes! Rule 108 of the Rules of this Court deals with the question as follows:

> "108(1) The registrar shall be taxing officer with power to tax the costs as between party and party of or arising out of any application or appeal to the Court.
>
> (2) Such costs shall be taxed in accordance with the rules and scale set out in the Third Schedule hereto.
>
> (3) The remuneration of an advocate by his client in respect of any such application or appeal shall be subject to taxation in the superior court of the Partner State in which he was retained and shall be governed by the rules and scales applicable to proceedings in that court".

Other paragraphs of the Order which should be borne in mind and which limit the jurisdiction of a judge of the High Court and also define his appellate jurisdiction in respect of the taxation of costs, which was the only issue before the Taxing Officer, are paragraph 10, and the pertinent parts of paragraphs 11 and 12 already alluded to, which are as follows:

> "10 The taxing officer for the taxation of bills under this Order shall be the registrar of district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; expect that in respect of bills under Schedule IV the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.
>
> 11(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
>
> (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge upon objection referred to such judge subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
>
> 12(1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court".

Now to the Respondent's application to strike out not the cause, but what was incorrectly described as "the advocates/Respondents Misc. Civil Application".

The main ground on which the application to strike out was founded and indeed, the one on which the Learned Judge based his ruling striking out the cause, was that the Appellant should have abided by the provisions of sections 48 and 49 of the Act, whereby, the Appellant could only file his Bill of Costs which was not done, in a suit after such a suit for the recovery of any costs, as opposed to the taxation of a bill of costs, had been instituted by means of a plaint. The Appellant's bill of costs, had been instituted by means of a plaint. The Appellant's Bill of Costs should also be served on the Respondent one month before the proceedings under the plaint could commence. But was the Appellant's Bill of Costs intended to be filed in a suit before it had been taxed? I would say, no! And that being the case, could the Appellant file a miscellaneous cause for the taxation of his Bill of Costs? I would say, yes! However, the Learned Judge, taking only into account the position when a suit for the

recovery of costs has been instituted and not giving proper consideration of the mere taxing of bills of costs, expressed his view this way:

> "Taking into account the provisions of section 48 and 49 of the Act, it is clear that before any Bill of Costs is filed by an advocate he or she must first file a plaint against his or her client. The client then has an opportunity to file a defence and it is only after the filing of a defence that directions may be sought from the court whether the Bill of Costs may be filed before the determination of the suit".

The provisions of section 48 of the Act which must now be set out, are as follows:

> "48(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarised form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.
>
> (2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction".

The phrase "subject to this Act", appearing in section 48(1) of the Act, which is concerned with the recovery of costs by advocates, is the same phrase employed in section 68(1) of the English Solicitors Act of 1957, from which the Act is derived, in respect of actions to recover Solicitors' costs. In my view, this phrase applies as it does, to section 63 of the Solicitor's Act in respect of a remuneration agreement between a Solicitor and his client, in the same way as it does to section 46 of the Act which also deals with an agreement between an advocate and his client with respect to remuneration, and both of which relate to circumstances excluded from the ambit of sections 48(1) and 68(1) respectively, of the Act and the Solicitor's Act. (See *Halsbury's Statutes of England* (3 ed) Solicitor's Act of 1957, section 68 notes 71). Paragraph 13 of the Order is not affected by section 48(1) of the Act and *vice versa*.

But how then does paragraph 13 of the Order come into play? Under section 48 of the former Advocate Act of 1961, which was repleaded and replaced by the Act, the Chief Justice by virtue of the wide powers conferred on him by that section, promulgated the Order, which has in pursuance of section 24 of the Interpretation and General Provisions Act, survived the repealed Advocates Act of 1986. The section provides that:

> "Where an Act or part of an Act is repealed subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder".

The Order has not only, survived the repealed Advocates Act, but also, the all-embracing words of its section 48(1) under which the Order was promulgated and which words have been maintained in section 44(1) of the Act, is as follows:

> "The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious".

And now, if I may go back to section 48(1) of the Act, it is clear from its wording, that it only relates to proceedings for the recovery of costs. Paragraph 13 of the Order on the other hand, does not deal with the recovery of costs, but only with the taxation of costs the result of which could be the basis of a suit for the recovery of costs. And no where does, section 48 of the Act which deals with actions for the recovery of costs, forbid the taxation of costs before any action for the recovery of costs, can be instituted; and in any case, the taxation of costs under paragraph 13 of the Order does not by itself, amount to a judgment. What was before the Taxing Officer was a taxation of costs which can be undertaken as it was done, under paragraph 13 of the Order and which step is in no way inconsistent with, or forbidden by, section 48 and 49 of the Act. In any case, the cause was not, and cannot even be said, was purported to have been, brought under section 48 of the Act. Indeed, all that section 48(1) of the Act requires to be done before a suit for the recovery of costs, is instituted, relates to the prior service of the Bill of Costs and not its taxation, on the client by advocate, and not at all, to the taxation of his Bill of Costs. This interpretation of section 48(1) of the Act, applies with equal force to section 49 of the Act which is derived from section 48 of the Act, and which comes into play only where suit has already been brought by way of a plaint, by an advocate for the recovery of any costs and a defence is filed disputing its reasonableness or quantum. The Learned Judge erred in holding in his ruling that in accordance with sections 48 and 49 of the Act, there can be no taxation of costs before a suit for the recovery of costs can be instituted.

For the foregoing reasons, I will allow the appeal with costs for the Appellant.

For the Appellant:
Information not available

For the Respondent:
Information not available

Simiyu v Housing Finance Co of Kenya
[2001] 2 EA 540 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	30 November 2001
Case Number:	937/01
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	M Kibanga

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[1] Damages – Compensation by way of damages – Whether fact that mortgagor can be adequately compensated by way of damages enough to deny mortgagor temporary injunction.

[2] Equity – Mortgagor's equitable right of redemption – Sale of property without proper notice to mortgagor – Whether mortgagor's equitable right of redemption extinguished by sale of property for value without notice.

[3] Mortgage – Mortgagee's statutory power of sale – Land irregulaly sold because improper notice given by the mortgagee and the auctioneer – Sections 6, 74 and 77 – Registered Land Act (Chapter 300).

[4] Statutory notice – What constitutes proper notice of intended sale – Notice by mortgagee and notice by auctioneer – Whether date that time begins to run is material – Whether temporary injunction grantable where notice defective.

[5] Temporary injunction – Application for temporary injunction under Civil Procedure Rules – Order 34, rules 1, 2, 3 and 9 – Civil Procedure Rules.

Editor's Summary

The Plaintiff had mortgaged the suit property under the Registered Land Act (Chapter 300) ("the RLA") for a financial facility with the First Defendant. From 1998 to 2001 she made irregular instalment payments to the First Defendant and by May 2001 she was in major arrears. The First Defendant decided to exercise its statutory power of sale to recover its money. It then engaged the Second Defendant, an auctioneer, to sell the land under section 74 of the RLA. On 18 May 2001 the Second Defendant held a public auction to sell the Plaintiff's land and the same was sold to the Third Defendant, who had been the Plaintiff's tenant on the suit premises.

The Plaintiff then filed suit seeking a permanent injunction restraining the Defendants from, *inter alia*, transferring or alienating the land, on the ground that the sale was irregular and unlawful.

Simultaneously with the plaint, the Plaintiff filed an interlocutory application seeking a temporary injunction to restrain the Defendants from dealing in any manner with the suit land pending the hearing and determination of the matter.

The main ground upon which the Plaintiff relied in the application was that the First Defendant had not served the Plaintiff with the three months' notice required under section 74(2) of the RLA and that the Second Defendant had not notified her of the sale under rule 15(*d*) of the Auctioneers Rules.

The First and Second Defendants replied that they had sent the notice to the Plaintiff under a certain post office box number. The Plaintiff denied that that was her post office box number and produced evidence to show her correct number.

The First Defendant argued that even if the sale was irregular, the Plaintiff had a remedy in damages under section 77(3) of the RLA.

Held – There was no proper statutory notice or notification of sale to the Plaintiff because the post office box number used by the First and Second Defendants did not belong to the Plaintiff. In any event, the statutory notice was defective as it gave the Plaintiff a period of three months from the date of the notice and not from the date of service of the notice as required under section 74(2) of the RLA. Further, the auctioneer did not give the mortgagor 45 days' notice as required under rule 15(*d*) of the Auctioneer Rules.

Although any person aggrieved by an irregular exercise of the power to sell mortgaged property shall have a remedy in damages against the person exercising the power (section 77(3) of the RLA), the irregularities in the exercise of

the power of sale which are remediable in damages do not comprehend failure to serve an adequate statutory notice.

David Ngugi Mbuthia v Kenya Commercial Bank and Lucy Mussundi HCCC number 304 of 2001, *Captain Patrick Kanyagia and Another v Damaris Wangechi and 2 Others* CA number 150 of 1993 and *Trust Bank Limited v Kiran Ramji Kotedia* CA number 61 of 2000 explained.

Without compliance with statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the mortgagor's capacity of redemption is extinguished in any sale conducted in breach thereof. In view of the above considerations the Plaintiff had made out a *prima facie* case with a probability of success that the sale would be declared null and void.

Any injury that the Plaintiff might suffer as a result of the illegal sale could be adequately compensated by way of damages. However, it was not mandatory that an injunction could not issue where damages could be granted and the court had discretion in the matter. Where, as in the instant case, the Defendants had flagrantly disregarded mandatory provisions of the law, equity could come to the aid of the Plaintiff in favour of an injunction. *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, *Giella Cassman Brown Ltd* [1973] EA 358 and *Wairimu Muriithi V City Council of Nairobi* CA number 5 of 1979 followed.

Conditional interlocutory injunction granted to the Plaintiff.

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Captain Kanyagia v Wangechi CA number 150 of 1993 – **E**

Giella v Cassman Brown and Co Ltd [1973] EA 358 – **F**

Mbuthia v Kenya Commercial Bank and another [2001] LLR 1005 (CCK) – **E**

Mureithi v City Council of Nairobi [1979] LLR 12 (CAK) – **F**

Oyunge v Industrial and Commercial Development Corporation CA Nai 16 of 1980

Trust Bank Ltd v Kotedia civil appeal number 61 of 2001 – **E**

United Kingdom

American Cynamid Co v Ethicon Ltd [1975] AC 396 – **F**

Ruling

RINGERA J: By a plaint filed in court on 20 June 2001, the Plaintiff prayed for a declaration that the sale and purported transfer of her property known as Land Reference Number Nairobi/Block 72/731 at a public auction on 18 May 2001 was irregular and unlawful and therefore a nullity and a permanent injunction restraining the Defendants, their agents, servants or employees or any other persons claiming through them from transferring, alienating, registering, selling, charging, mortgaging and/or dealing in any manner with the suit property pending the hearing and determination of the suit. The Plaintiff also claimed

damages. The sale sought to be impugned was effected by the Second Defendants, who are auctioneers, on the instructions of the First Defendant in the exercise of their statutory power of sale. The auction purchaser was the Third Defendant. In the body of the plaint it was alleged that the said sale was fraudulent in that the Plaintiff had not been served with the statutory notice and the notification of sale as required by law; that the sale was pre-arranged between the Second and Third Defendants in collusion with each other; and the property was sold at a gross undervalue.

Simultaneously with the plaint, the Plaintiff filed an interlocutory application seeking a temporary injunction to restrain the Defendants from dealing in any manner whatsoever with the suit property pending the hearing and determination of the suit. The application was supported by the Plaintiff's affidavit which essentially endeavoured to substantiate that she had not been served with any statutory notice or notification of sale and that her property had been sold to the Third Defendant who was her tenant in the suit premises. The Plaintiff swore that she came to know of the sale when the said tenant failed to vacate her premises as earlier agreed and also failed to pay the rent for the month of June 2001 and she subsequently discovered that the premises had been sold to him. The auctioneer informed her that the notification of sale had been left with the Third Defendant who undertook to pass them to her and had assured the auctioneer that he had been authorized by the Plaintiff to receive any correspondence on her behalf. The Plaintiff swore that the Third Defendant's representations to the auctioneer were false. She further stated that although the Third Defendant knew her residence and other contacts he never sent the statutory notices to her. In those circumstances she verily believed that the conduct of the Third Defendant was fraudulent. She also made further inquiries from the post master at Nyayo Stadium post office as to whether any registered mail bearing her name had been forwarded to her address which is post office box number 3894 Nairobi. She reiterated that she had not been served with the mandatory statutory notice by the First Defendant as required by law and that the Second Defendant had not served her with a notification of sale as required by law. She was advised, and she verily so believed, that in those premises the sale of her property was illegal and unlawful and unless the Defendants were restrained from transferring the suit property, she would suffer irreparable loss and damage. She stated that the property is her sole source of income and its market value was KShs 3,5 million.

The application was opposed. The First and Second Defendants filed grounds of opposition and replying affidavits. In the said affidavit sworn by Jacinta Wambua, the First Defendant's Deputy Manager (Legal), it was deponed that the Plaintiff was erratic and irregular in servicing her mortgage account thereby causing substantial arrears to accumulate, that she was served with a statutory notice duly issued on 2 May 2000 by M/s Wambugu and Company, Advocates, that subsequently a notification of sale was also served on her through her last known address and also by service on the suit property. It was further deponed that the Plaintiff's property was valued at an open market value of KShs 2 500 000 and at a forced sale value of KShs 2 million. It was knocked down to the Third Defendant for KShs 2 million. It is denied that there was collusion between the Defendants as the sale was conducted publicly after due advertisement. It is further denied that the sale was at a gross undervalue as what was realized represented the forced sale value. The affidavit also contained

argumentative points of law to the effect that Plaintiff's equity of redemption was extinguished upon the conclusion of the auction sale to the purchaser, that the balance of convenience was against granting an injunction as the First Defendant stood to be sued for breach of contract if it was restrained from proceeding with the transfer, that the Plaintiff had not shown she would suffer any or irreparable damage that could not be satisfied with an award of damages, that the First Defendant was entitled to exercise its statutory power of sale due to the Plaintiff's default on the monthly repayments and that in any event the Plaintiff's indebtedness to the First Defendant was not denied. It was also contended in the affidavit that the Plaintiff's undertaking as to damages was a futile attempt to frustrate the transfer as the Plaintiff had all along been unable to service her mortgage account.

And in a further replying affidavit sworn by the auctioneer on 25 October 2001, the said auctioneer swore that he served the requisite notification of sale upon the Plaintiff on the charged property and by registered post through her last known address as given to him by the Plaintiff's advocates who informed him that address had been given by the First Defendant as the address given by the Plaintiff. The auctioneer swore the auction was attended by several people and he accepted the highest bid in the sum of KShs 2 million from the Third Defendant and Rita Chebet Ruto. He declared them the auction purchasers after their confirmation that they had a 25% deposit for their bid. He further swore that the auction was not stage managed and there was no collusion between himself and the auction purchasers as they were unknown to him prior to the auction.

The Plaintiff did also put a supplementary affidavit sworn on 9 July 2001. In it she admitted she was erratic and irregular in servicing her mortgage account but explained that her inability to service the loan was caused by her poor health for which she incurred huge medical expenses and she did inform the First Defendant of her predicament. She denied ever receiving any statutory notice from M/s Wambugu and Company, Advocates. She annexed correspondence marked to show that her address has never been 3898 but 3894. She also deponed that she believed her advocate's advice that her equity of redemption had not been extinguished since the process of the auction was tainted with fraud in that the requisite notices to her were addressed to the wrong addresses, the notices had been deliberately served on a tenant who was interested in the suit premises and failed to hand them over to her and failing to protect her interest in that the sale was advertised in a paper with limited readership and thereby excluding potential buyers. She further expressed her belief that the First Defendant was duty bound to comply with the requirements of issuing the requisite notices and that failure to do so rendered that sale null and void. She also swore that she has a purchaser who is ready and willing to purchaser the property at a higher consideration and that her application was not meant to delay the realisation of the security and it was not made in bad faith.

The application was canvassed before me on 26 October 2001. The Plaintiff's advocate, Mr *Mogiro*, took the court through the affidavits and submitted that the Plaintiff had established a *prima facie* case with a probability of success that the sale was null and void *ab initio* as neither the statutory notice nor the notification of sale had been served on the Plaintiff. He relied on the case of *Trust Bank Ltd v Kotedia* civil appeal number 61 of 2001 for the proposition that

without service of the statutory notice a sale can be set aside. He argued that although the subject matter thereof was land governed by the Transfer of Property Act (TPA) the case was persuasive authority in the instant case where the subject matter was land registered under the Registered Land Act. In support of the submission that the statutory notice had not been served, he pointed out that the statutory notice relied upon by the Plaintiff and which is exhibited as "JMW 3" in the affidavit of Jacinta Wambua purported to have been forwarded by registered post to PO Box 3898 which was not the Plaintiff's address. He also pointed out that no certificate of posting had been annexed to show that the letter was registered for posting. Counsel also criticized the notice as improper in that it gave the Plaintiff's notice to redeem within three months from the date thereof instead of three months from the date of receipt thereof. As regards the notification of sale, he pointed out the same was forwarded through post office box 3898 which was not the Plaintiff's address and a copy thereof was served on Rita Ruto, the Third Defendant's wife. He submitted that in the circumstances there was no service on the Plaintiff. He also submitted that fraud had been shown in that the Third Defendant's wife received notification of sale from the Second Defendant but did not hand it over to the Plaintiff.

Mr *Kimani*, the First and Second Defendants' advocate, vigorously opposed the application. He pointed out that there was no denial that the Plaintiff was in arrears. He submitted that due statutory notice had been served on the Plaintiff through her post address of Box Number 3898 which was the address given to the First Defendant by the Plaintiff. He However conceded that there was no proof in the affidavits by the Defendants that the Plaintiff had furnished such address to the First Defendant. He argued that the correspondence relied upon to show that post office box number 3898 was not the Plaintiff's was not on official letterheads of the post master contrary to the usual practice. He further submitted that the notification of sale was also served as it had been served on the wife of the Plaintiff's tenant and also through postal address Box 3898. Mr *Kimani* also contended that even if there had been irregularities in the service of the notices such irregularities would not be a ground for vitiating an auction sale. He argued that the chargor's equity of redemption was extinguished when there was a valid contract of sale. He relied on the cases of *Mbuthia v Kenya Commercial Bank and another* [2001] LLR 1005 (CCK) and *Captain Kanyagia v Wangechi* CA number 150 of 1993. He pointed out that a valid contract of sale had been executed and drew the court's attention to exhibit "DWW 2" in the Auctioneers affidavit. He argued that the auction purchasers are not bound to inquire whether the power of sale had arisen or whether there were irregularities. They are innocent purchasers for value and without notice. In his view, the chargor's remedy in the event of irregular exercise of the power of sale was damages. He invoked the provisions of section 77(3) of the Registered Land Act (RLA). Furthermore, counsel argued, an injunction could not issue where the Plaintiff could adequately be compensated in damages. He relied on the cases of *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and *Mureithi v City Council of Nairobi* [1979] LLR 12 (CAK). He argued that the Plaintiff here had not shown that she would suffer an irreparable injury unless an injunction were granted. He submitted that her loss, if any, would be the difference between the sale price of KShs 2 million and the estimated market value of either KShs 3,5 million as per the Plaintiff or KShs 2,5 million as per the Defendant. Such loss could be compensated by HFCK which is a large financial institution. Counsel also argued that even the balance of convenience favoured the First

Defendant. He pointed out that Rita Chebet Ruto, one of the joint auction purchasers had not even been joined in the suit and yet any orders made would affect her adversely. He referred to the case of *Oyunge v Industrial and Commercial Development Corporation* [CA Nai 16 of 1980] where the Court of Appeal wondered how it could make an order adversely affecting a person who was not a party to the application and who had not been heard. It was further argued that the Plaintiff had not come to equity with clean hands. It was pointed out that in 1998 she only paid four instalments, in 1999 she made three, in 2000 she made only one instalment and in year 2001 up to 31 May she had made only two instalments. Counsel submitted that in those circumstances, the Plaintiff was unworthy of equitable relief. He urged that the application be dismissed.

Mr *Mogiro* in reply distinguished the case of Elijah Ondari Oyunge on the grounds that the objection to the auction sale had been made six months after the sale whereas in the instant matter, the objection was made within 31 days after the auction sale. He also argued that the Plaintiff was not aware that Rita Chebet Ruto was one of the auction purchasers and ventured to suggest that the affidavit of the auctioneer filed on 25 October 2001 must have been an afterthought. On the postal address of the Plaintiff, he submitted that his client could not answer why the post master's letters were not on headed paper. As far as she was concerned, she applied for information and got it from an official whose name and stamp were indicated in the correspondence. He also argued that the First Defendant had not shown how it had obtained the address used to forward letters to the Plaintiff. He argued that the requirement of service of statutory notice was substantial requirement for the validity of any sale. Without proof of such service and also of service of notification of sale, the Plaintiff could not be said to have been given an opportunity to redeem the charge. Those omissions could not be treated as mere irregularities: they were fundamental omissions which went to the root of the contract of sale and the question of the Plaintiff being compensated in damages should not arise in those circumstances.

At the end of the submissions I asked what was the Plaintiff's address according to the instrument of charge or any other notified communication thereafter. Mr *Mogiro* informed me that according to the charge, it was post office Box Number 46730 Nairobi. Mr *Kimani* informed me that according to the certificate of lease, it was post office Box 34353 Nairobi, according to the letter sent to the post master it was post office box 15451 Nairobi; and according to the supplementary affidavit sworn on 9 July 2001 it was PO Box 3894.

I have now considered the affidavit evidence and submissions by the advocates of the parties. It appears to me that the first question to answer in this application is whether or not the Plaintiff was served with either the statutory notice required by law or with a due notification of sale and the effect, if any, of any want of service of the same on the contract of sale entered between the chargee and the auction purchaser for the sale of the charged property. In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or of law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here. Bearing that in mind, I am inclined to the opinion that post office box number 3898 through which both the statutory notice and the notification of sale were purportedly sent to

the Plaintiff was probably not her address and that her address at the time the said documents were purportedly sent to her was probably post office box number 3894. In forming such an opinion, I have placed heavy reliance on the letters from the post master to the Plaintiff dated 8 June and 9 July 2001 and exhibited as "MKS 7" and "MKS A" in the Plaintiff's affidavits of 20 June and 9 July 2001 respectively. Although the said letters are not on official letterheads, they bear the stamp and name of the post master concerned and I am inclined to view them as *bona fide* official letters.

Being of that opinion, it must follow that I do find that the Plaintiff was probably not served either with the statutory notice relied upon by the First Defendant for the exercise of its statutory power of sale or the notification of sale required by the auctioneer's rules. Let me also at this stage express the definite view that the statutory notice was in any event defective as the same did not give the Plaintiff a period of three months from the date of service to redeem the charged property as is required by section 74(2) of the RLA. Is such an omission an irregularity which is remediable in damages or is it a fundamental omission which goes to the root of the exercise of the power of sale? I have considered the cases referred to me by both counsel. In the *David Ngugi Mbuthia* case (*supra*) I found that under the provisions of section 69B(2) of the Indian Transfer of Property Act (TPA) want of service of or service of an inadequate statutory notice would not be a ground for nullifying an auction sale made in purported exercise of a statutory power of sale. I found that the remedy of a person damnified by such exercise of power was an action in damages against the chargee. I also found that service of a notification of sale which did not indicate any specific time or times for viewing the property and all the information required to be in the letter of instruction was not such a fatal non-compliance with the auctioneer's rules that a subsequent sale based on such notification would be invalidated. This case does not assist the Defendant's, herein for two reasons. First it is not authority on the effect of want of service of or service of a defective statutory notice under the RLA. Secondly, it did not address the issue of the effect of total want of service of a notification of sale. It addressed the issue of the effect of service of a notification of sale which was insufficient in some respects which I considered minor. *Captain Patrick Kanyawa and another v Wangechi and others* (*supra*) is authority for the proposition that a person in possession of charged land pursuant to a contract of purchase with the chargor cannot lawfully resist a claim for eviction by a *bona fide* purchaser for value of the said land from the chargee in exercise of the latter's statutory power of sale. The case also contains dicta to the effect that both under the TPA and the RLA the equity of redemption is extinguished as soon as the mortgagee either sells the mortgaged property by public auction or enters into binding contract in respect thereof. There is also other dicta therein that no duty is cast in law on an intending purchaser at an auction sale to inquire into the rights of the mortgagee to sell. In the premises the *ratio decidendi* of the case does not assist the Defendants but the dicta may. I will revert to it later. The Plaintiff for her part relied on *Trust Bank Ltd v Kiran Ramji Kotedia* (*supra*). It is authority for the proposition that under the TPA where a chargee has placed reliance on the service of a notice to the chargor to redeem the charge pursuant to the provisions of section 69A(1)(*a*), the statutory power of sale is only exercisable after a valid notice has been served upon the chargor in the mode recognised by law. If such notice is not so served, the chargor may be entitled to an injunction to stop the intended auction sale. The case is not authority on the effect of want of service of a valid notice on a subsequent sale.

From the above consideration of the cases cited, it is apparent that none of them deals with the issue of the effect of want of service of or service of an inadequate statutory notice and/or notification of sale on a public auction sale of charged land registered under the RLA. In those circumstances one is obliged to consider the matter further on the basis of first principles. In this connection, I think both sections 74 and 77 of the Act are pertinent. Section 74 insofar as it is material provides :

> "(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.
>
> (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may:
>
> (*a*) …; or
>
> (*b*) sell the charged property: …".

And section 77 in pertinent part provides:

> "(3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power".

My interpretation of these two provisions is this. The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding payment of such debt and the chargor has failed to comply within three months of the date of service of such notice. The irregularities in the exercise of the power of sale which are remediable in damages do not in the premises comprehend failure to serve an adequate statutory notice. The statute has in effect commanded that a defaulting chargor be given in the first instance, an opportunity to redeem the charge within three months of the date of service of a notice to that effect. If he does not do so then the charged property may be sold through a licensed auctioneer.

That brings me to a consideration of the Auctioneers Act of 1996. Rule 15(*d*) of the Auctioneers Rules require that once an auctioneer has been instructed to sell the charged property he should give in writing to the owner of the property a notice of not less than 45 days within which the owner may redeem the property by payment of the amount set forth in the letter of instruction. Thus the chargor who does not comply with the terms of the statutory notice is given at least some more 45 days within which to redeem his property.

The above understanding of pertinent provisions of the RLA and the Auctioneers Rules leads me to the conclusion that the service of both an adequate statutory notice and a notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the RLA. Without compliance with those statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly be contended that the chargor's remedy if any such sale has taken place is in damages as provided in section 77(3) of the Act. Without

compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor. Taking that view of the matter, I find that the Plaintiff has shown a *prima facie* case with a probability of success at the trial that the sale of her property may be declared illegal, null and void as she craves.

The second condition for the grant of an interlocutory injunction is that the Applicant should normally show that unless the injunction is granted, he would suffer an irreparable injury which cannot adequately be compensated in damages. I think the position was succinctly stated in the speech of Lord Diplock in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 which was cited with approval by Madan JA (as he then was) in the case *Mureithi v City Council of Nairobi* (*supra*).

The Learned Lord of Appeal in ordinary had delivered himself as follows:

> "The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial … If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage".

In the matter at hand, I accept the submissions on behalf of the First and Second Defendant that the Plaintiff's injury or loss is perfectly capable of being adequately compensated in damages. As I have often held, once property has been charged to secure financial accommodation it *ipso facto* becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages. Indeed the chargor is put on notice when he executes a charge that default in payment of the charge debt or any part thereof on due date(s) would result in the security being sold. When he subsequently defaults and the security is sought to be realized or is realized he cannot properly be heard to complain that he has been exposed to an injury which cannot adequately be compensated in damages. I also accept that HFCK is in a position to pay any such damages as the Plaintiff may be entitled to in the action. However, as I understand the law, it is not ordained that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. In my view the court has and must exercise a judicial discretion in the matter. In exercising such a discretion it is entitled to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged. If, for example, it is shown that the Respondent has behaved in a high-handed or overbearing manner or that he has flagrantly disregarded clear and mandatory provisions of law, equity may yet come to the assistance of the Applicant. To hold otherwise would be to confer a *carte blanche* on those who are rich enough to pay all quantums of damages to ride roughshod over the rights of other persons. In the instant matter, having regard to the apparent disregard of the law on the part of the First Defendant in not sending any or any adequate statutory notice or notification of sale and considering the adamancy of its counsel in the course of argument that due notices were sent, I am inclined to protect the Plaintiff's proprietary rights by the grant of an injunction in order to give notice to the Defendant that it cannot violate its chargor's rights at the peril of damages only. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils.

The last matter for consideration is the terms, if any, on which I should grant the interlocutory injunction. I think the first one is the usual one that the Applicant should file a written undertaking as to damages. She should be able to do so within 7 days of the making of the order. The second one which commends itself to me in the circumstances of this case is payment of arrears of mortgages. As of 27 June 2001, the Plaintiff's account was in arrears of KShs 2 335 105-67. They must have increased since then. And of course it is obvious that the Plaintiff's past record of repayment has been downright deplorable. If the Plaintiff is to benefit from equity, she must do equity by clearing her arrears and maintaining the normal monthly repayments.

On consideration of all those matters, the orders of this Court are that the Plaintiff is granted an interlocutory injunction as prayed on the following terms:

(a) a written undertaking as to damages is filed within 7 days of today;

(b) the First Defendant is to furnish the Plaintiff with an up-to-date statement of mortgage account within 7 days of today and the Plaintiff is to clear the outstanding arrears as per such statement within 120 days of today;

(c) the Plaintiff to commence payment of normal monthly repayments with effect from 31 December 2001 and thereafter on the last day of each succeeding month;

(d) in default of compliance with any or all of the above conditions, the injunction to be discharged on application by the First Defendant; and

(e) the First Defendant is granted liberty to apply.

Orders accordingly.

For the Plaintiff:
Mr Mogiro

For the Defendants:
Mr Kimani

Standard Chartered Bank v Law Society of Kenya
[2001] 2 EA 550 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	15 May 2001
Case Number:	520/97
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Appeal – Stay of execution – Whether an order can be stayed when there is no proper application in the same court.

[2] Civil procedure – Taxation – Order by Court of Appeal – Whether High Court can set aside an order of taxation by deputy registrar of the same court pursuant to Court of Appeal ruling.

Editor's Summary

Pursuant to a Court of Appeal decision, the Second Defendant submitted a party and party bill of costs relating to High Court proceedings for taxation by

the deputy registrar of the High Court. The First Defendant, LSK, lodged an objection to the taxation and requested reasons for the decision while the Second Defendant, M, applied to execute the decree. LSK subsequently filed a reference from the decision of the taxing officer, which was out of time. They then sought to extend time but the registry declined their application on the grounds that M had already applied for warrants of attachment.

Auctioneers were appointed and LSK's property proclaimed. LSK then filed the current application under certificate of urgency seeking a stay of execution of the aforesaid decree, setting aside of the decree and taxation of costs in favour of M's advocate. The appliacation was based on the grounds that M's advocate did not possess a current practising certificate which therefore disentitled him to costs, and that there was a pending reference from the decision of the taxing officer.

It was argued for M that the High Court had no power to stay or set aside a decree for costs issued by the Court of Appeal and that LSK's remedy was to make an application in the Court of Appeal. LSK countered that all questions relating to the execution of the decree should be dealt with in the court executing the decree and not by a separate suit.

Held – Rule 105 of the Court of Appeal Rules only applies to taxation of costs incurred in the Court of Appeal. Hence a decree extracted after taxation by the deputy registrar of the High Court regarding costs incurred therein is not a Court of Appeal decree within the meaning of rule 105.

Where the Court of Appeal makes an order in respect of High Court costs and such costs are subsequently taxed by the deputy registrar of the High Court, the resulting order on taxation is subject to all the incidents of such an order as if the same had been made pursuant to a decree of the High Court itself. The High Court therefore has jurisdiction to stay or set aside such an order.

The fact that there is no valid application touching the decree of costs does not oust the court's inherent jurisdiction to grant a stay if sufficient cause is shown.

Per curiam: For the decree to be set aside, there should be a proper reference from the decision of the taxing master under rule 11(2) and (3) of the Advocates (Remuneration) Order.

Application granted.

No cases referred to in ruling

Ruling

RINGERA J: In High Court civil case number 520 of 1997 (OS) which was an interpleader action between Standard Chartered Bank of Kenya Limited and the Law Society of Kenya and the administrators of the estate of Maxwell Maurice Ombogo (deceased) the High Court ordered that two nominees of the Law Society of Kenya (the LSK) be signatories of two bank accounts at the Standard Chartered Bank in the name of Maxwell Maurice Ombogo a deceased advocate, instead of the administrators of the deceased's estate. It further ordered that the costs of the interpleader be in the cause. On appeal from that decision by the Administrator of the estate, the Court of Appeal in civil appeal number 162 of 1999, allowed the appeal, set aside the order of the High Court

and substituted there for an order that the deceased's two accounts at Standard Chartered Bank, Kenyatta Avenue Branch, being account numbers 014-42-255 327 and 014042 025 5327 be managed and operated as shall be directed in the final grant of letters of administration of the estate of the deceased. The court also ordered that the Appellant should have the costs of the appeal to be paid by LSK which should also pay the costs of the interpleader both in the said court and in the High Court. That decision was delivered on 31 July 2000. The formal order was issued on 1 March 2000 (*sic*). Pursuant to this Court of Appeal judgment, the Administrators of the estate of the deceased filed a bill of costs in respect of the proceedings in the High Court on 1 September 2000. The bill was taxed by the deputy registrar in his capacity as the Taxing Officer and he delivered his ruling on 2 November 2000 in which the bill was taxed in the sum of KShs 571 980 against the LSK. A certificate of taxation was issued on 29 November 2000. On 6 November 2000 M/s Owino Okeyo and Company, Advocates, who were acting for the administrators of the estate in the proceeding lodged all objection to the taxation and requested for the reasons for the decision.

On 8 November 2000 M/s Okwach and Company, Advocates, for the LSK, gave to the deputy registrar notice of objection to the taxation and requested for a certified copy of the ruling on taxation and/or the reasons therefore as required by paragraph 11(2) of the Advocates (Remuneration) Order to enable them to file a reference therefrom in the High Court. On 1 December 2000 M/s Owino Okeyo and Company, Advocates filed an application for execution of the decree against the LSK. On 13 December 2000 the deputy registrar in a letter to M/s Owino Okeyo and Company, Advocates which was also copied to Okwach and Company, Advocates intimated that the ruling was ready and could be collected on payment of court fees in the sum of KShs 90. M/s Okwach and Company, Advocates collected their copy of the ruling on 24 January 2001. Apparently they then proceeded to court to file a reference under regulation 11(2) and (3) of the Advocates (Remuneration) Order on the following day but the court file could not be traced. They complained in writing on 31 January 2001 and on 6 February 2001, the deputy registrar answered that the file had never been untraceable. Be that as it may be, the said advocates filed a reference from the decision of the taxing officer on 21 February 2001. The objection was based on several grounds including wrongful exercise of discretion by the taxing master, the excessiveness of the amounts allowed on taxation and the fact that it had come to the knowledge of the Defendant that the Plaintiff's advocate did not hold a valid practising certificate under the Advocates Act during the time of the litigation and as such was not entitled to claim any fees as an advocate. They prayed for the objection to be allowed and the taxed costs to be set aside altogether. That application had a date for hearing on 13 April 2001. On realising the application was out of time, the advocates sought to file an application for extension of time. That application was dated 2 March 2001. Apparently, the registry declined to accept this application on the grounds that M/s Owino Okeyo and Company, Advocates had applied for warrants of attachment. They wrote a letter of complaint to the deputy registrar on 8 March 2001 and the auctioneers were commanded to sell by public auction the LSK's property upon giving 15 days previous notice. The warrants were to be returned on 8 April 2001. The said property was proclaimed on 12 March 2001 for sale within 7 days of the proclamation. Apparently, this alarmed LSK very much. So on 15 March, they filed under a certificate of urgency the

application which is now before me. The application seeks a stay of execution of the decree issued on 2 March 2001 and the setting aside of the decree in favour of and taxation of costs payable to Owino Okeyo, Advocates. The application is expressed to be made under Order XXI, rule 22(1) and rule 91 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and sections 31 and 40 of the Advocates Act. The application is made on the grounds that (i) The sum sought to be recovered under the decree are costs that were taxed in favour of Mr *Owino* who purportedly acted for the decree holder whereas it has been established that the said Mr *Owino* was not holding an annual practising certificate under the Advocate's Act and was accordingly an unqualified person not entitled to costs as an advocate, and (ii) the LSK had filed a reference under regulation 11(2) and (3) of the Advocates (Remuneration) Order challenging the taxed costs.

The application has been canvassed before me at length by Mr *Okwach*, advocate for the LSK, and Mr *Owino*, advocate for the Administrators of the estate of the deceased. From their submissions, two principal issues emerge for determination. Firstly, whether this Court has jurisdiction to entertain the application for stay of execution and setting aside the decree for costs issued in favour of the Administrators of the estate of the deceased by the Court of Appeal and secondly, if the court has such jurisdiction, whether it ought to be exercised in favour of the Applicant in all the circumstances of this case.

Mr *Owino* submits that the decree on taxation which is sought to bc set aside and whose execution is sought to be stayed is a decree of the Court of Appeal which has merely been sent down to the High Court for execution and as such it cannot be stayed or set aside by the High Court. He relies on section 4 of the Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya and rule 105 of the Court of Appeal Rules. Section 4 of the Appellate Jurisdiction Act provides that any judgment of the Court of Appeal given in exercise of its jurisdiction under the Act may he executed and enforced as if it were a judgment of the High Court. And rule 105 of the Court of Appeal Rules provides as follows:

> "105(1) When making any decision as to the payment of costs, the court may assess the same or direct them to be taxed and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed.
>
> (2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree".

Mr *Owino* submits that the certificate of taxation given on 2 November 2000 and the order of the Court of Appeal for costs form the decree. This is not a decree of the High Court but a decree of the Court of Appeal which the High Court can do nothing about. In his view, the Applicant's remedy, if any, is to go to the Court of Appeal and make an appropriate application thereon.

Mr *Okwach* for his part submits that all questions relating to the execution of a decree should be dealt with by the court executing the decree and not by a separate suit. He relies on sections 29 and 34 of the Civil Procedure Act. He also submits that upon the Court of Appeal giving an order for costs, the decree is extracted by the High Court and the taxation is done by the taxing master of the High Court. The decree is incomplete until taxation is done by the High Court and the only way to challenge the taxation is by a reference from the decision of the deputy registrar to the High Court and not to the Court of

Appeal. In those circumstances, he contends, there is jurisdiction to stay or set aside the decree on taxation.

I have considered the above submissions and I confess they have given me anxious moments and some unusual equivocation on a point of law. Is the decree sought to be executed a decree of the Court of Appeal or of the High Court? Mr *Owino*'s argument that it is a decree of the Court of Appeal is on the face of it quite attractive. It runs like this. On 31 July 2000 the Court of Appeal delivered a judgment in the exercise of its jurisdiction under the Appellate Jurisdiction Act. That judgment was embodied in an order formally issued on 1 March 2001 (which is inadvertently typed as 1 March 2000) by the deputy registrar of the court. By that order, the costs of the interpleader proceedings in both the Court of Appeal and the High Court were to be paid by the Law Society of Kenya. The court did not assess the costs. Accordingly, by virtue of rule 105(1) of the Court of Appeal Rules, the decision of the court operated as a direction that the costs be taxed. Further, by virtue of subrule (2) of the same rule, for purposes of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree. So decree of the court in the instant mater is the order given on 31 July 2000 and the Certificate of Taxation by the deputy registrar given on 2 November 2000. It is plainly a decree of the Court of Appeal.

If I understood Mr *Okwach* correctly, and I think I did, his stand was that since the decree of the Court of Appeal is incomplete until taxation of costs has been done by the deputy registrar of the High Court, the decree sought to be executed though a decree by the Court of Appeal is, by its very peculiar nature of being perfected by an order on taxation made by the deputy registrar in his capacity as the taxing master of the High Court, subject to the normal incidents of a High Court order on taxation. Such an order, he contended, is only challengeable by way of a reference from the deputy registrar to the High Court, not to the Court of Appeal. This view of the matter would appear to be lent credence by the court forms employed in this matter. The Certificate of Taxation issued on 29 November 2000 is issued by the deputy registrar of the High Court in High Court civil case number 520 of 1997, the application for execution filed in court on 1 December 2000 is expressed to be an application for execution in High Court civil case number 520 of 1997 and the warrant of attachment bespeaks of the judgment debtor being ordered by decree of this Court passed on 2 November 2000 to pay to the Plaintiff/decree holder the sum of KShs 571 980. And the warrant of attachment is issued in HCCC No 520 of 1997. So Mr *Okwach*'s argument that the final decree is issued by the deputy registrar of the High Court and is challengeable by a reference to a judge of the High Court is also rather attractive.

One must therefore examine these rival submissions carefully. Now, a careful consideration of rule 105 seems to indicate it is inapplicable to directions for the taxation of costs incurred in the High Court and the taxation thereof by the taxing officer of that court. This is so because the rules in Part V of the Court of Appeal Rules which part when read in its totality appears to apply only to fees and costs incurred in the Court of Appeal. This appears to be made even clearer by rule 108(2) which mandates the registrar to tax the costs in accordance with the rules and scales set out in third schedule. That schedule obviously has no application to High Court costs. And rule 109 fortifies that view

further by providing for an appellate machinery from the registrar to a judge and then to the court. In rule 2, "court" is defined as the Court of Appeal, "judge" means a judge of the court acting as such and "registrar" means the registrar of the court and includes a deputy registrar thereof.

Let me also state that I have been unable to locate any Court of Appeal rule which would apply to the taxation of costs incurred in the High Court in the event of a successful appeal whereby the costs of the action in the High Court are awarded to the Appellant. In light of the above considerations, the attractiveness of Mr *Owino*'s argument to the effect that the decree in question is a Court of Appeal decree within the meaning of rule 105 which the High Court can do nothing about dissipates somewhat. Had the bill of costs taxed been one in respect of the proceedings in the Court of Appeal, counsel's argument would have been unanswerable. In the premises, I prefer the submissions of Mr *Okwach* over those of Mr *Owino*. In my opinion, where the Court of Appeal makes an order in respect of High Court costs and such costs are subsequently taxed by the deputy registrar of the High Court, the resulting order on taxation is subject to all the normal incidents of such an order (including objections thereto and a reference therefrom to a judge of the High Court) as if the same had been made pursuant to a decree of the High Court itself. Accordingly, I hold that I have jurisdiction to entertain an application to stay and/or set aside such an order. Were a different view to be taken of the matter, the extraordinary spectacle of parallel streams of challenging the High Court deputy registrar's decision on taxation would result. Under one stream, if the decision on taxation was made pursuant to an order for costs in the High Court made by the Court of Appeal, the challenge thereto would be to a single judge of appeal and ultimately to the full court. Under the other stream, if the decision of taxation was made pursuant to an order of the High Court itself, the challenge thereto would be to a judge of the High Court by way of reference and ultimately, to the Court of Appeal itself. This is a spectacle which in the absence of any clear statutory provision, compelling the same must be avoided by the court.

Having settled the issue of my jurisdiction, I next ask myself whether I should exercise the same in favour of staying and/or setting aside the decree on taxation? Mr *Owino* argues that no stay can be granted in the circumstances of this case because the LSK has not shown that there is any application pending before the Court of Appeal touching the decree and the application filed in this Court on 21 February 2001 by way of a reference from the decision of the court's taxing officer is not a valid application which can be looked at because it was filed out of time and no extension of time to file same has so far been obtained. In his submission, to grant a stay in such circumstances would be to do so *in vacuo*. That may very well be so. I However, in view of the strong desire of the LSK to challenge the decision of the taxing master on the very substantial grounds that no costs are payable in view of Mr *Owino*'s lack of a practising certificate at the material time when the disputed costs were incurred and/or the excessiveness of the taxed costs given the subject matter of the suit a desire which is manifested in the correspondence exhibited in the affidavits on record as well as in the applications on record I think there is sufficient cause shown in this case for the court to invoke its inherent jurisdiction under section 3A of the Civil Procedure Act, which jurisdiction is craved by the Applicant on the face of the present application, to make such orders as would meet the ends

of justice. The ends of justice in this case would, in my opinion, be met if execution were stayed to enable the LSK prosecute its objection to the decision of the taxing officer for I do not see that the Respondent would in that event suffer any prejudice which cannot be compensated by an award of costs.

Should I also set aside the decree as prayed by the Law Society of Kenya? I think before I answer that question, I should mention that objection was taken that the Applicant sought to stay and/or set aside a decree issued on 2 March 2001 which does not exist. That is correct. However, from the record, it is clear that that date is a typographical error. It is the sort of error which the court can correct even on its own motion. It is clear from the record that the decree questioned is the one given on 2 November 2000. I correct the error on the application accordingly. Be that as it may, I am clear that that decree cannot be set aside on the present application as to do so would amount to overruling the taxing master otherwise than by way of a decision on a proper reference under rule 11(2) and (3) of the Advocates (Remuneration) Order. I refuse to short circuit that procedure. In my view, the LSK have no choice but to prosecute their reference filed in court on 21 February 2001.

In the result, the application insofar as it relates to stay of execution is allowed and it is accordingly ordered that execution of the decree herein given on 2 November 2000 be stayed pending the hearing and determination of the application filed in court on 21 February 2001 and only other application incidental or pertinent thereto which the LSK may make. The prayer for setting aside the decree is refused. The Respondent will have the costs of this application in any event.

Orders accordingly.

For the Applicant:
Mr Okwach

For the Respondent:
Mr Owino

Sula v Uganda
[2001] 2 EA 556 (SCU)

Division:	Supreme Court Uganda at Mengo
Date of judgment:	2001
Case Number:	25/00
Before:	Tsekooko, Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyongo JJSC
Sourced by:	B Tusasirwe
Summarised by:	M Kibanga

[1] Evidence – Defilement – Appellant relying on insufficient identification and alibi – Trial court convicting Appellant while partly relying on demeanor of witnesses – Circumstances under which trial court's findings may be overturned.

[2] Evidence – Unsworn testimony – Child witness giving unsworn testimony – Whether child witness

liable to cross-examination.

[3] Practice – Voir dire *proceedings – Trial Judge recording conclusions only – Whether necessary to record questions and answers – Method of recording* voir dire *proceedings.*

Editor's Summary

The Appellant was the complainant's teacher at a primary school. The complainant was a child. On 6 August 1995 at about 10:30am the Appellant sent for the complaint to go to the Appellant's house near the school and the complainant went, accompanied by some of her school-mates. The Appellant chased away the complainant's mates. Alone with the complainant, the Appellant forced her to have sex with him.

After the defilement, the complainant returned to school and later went home, but she refused to return to the school the following day. She later informed her grandfather (who was her guardian) of the defilement. The Appellant was eventually arrested and charged with defilement, for which the High Court convicted and sentenced him to eight years' imprisonment. He appealed unsuccessfully to the Court of Appeal. He then appealed to the Supreme Court, primarily on the ground that the prosecution evidence was insufficient and did not conclusively identify him as the offender because he (the Appellant) had a twin brother who taught at the complainant's school. He also argued that his defence of alibi explained his whereabouts at the time the offence was committed.

Held – There was sufficient evidence to identify the Appellant as the person who had defiled the complainant. The Appellant did not satisfy the Supreme Court that either the trial Judge or the Court of Appeal had erred in a material respect; *Kifamunte Henry v Uganda* Supreme Court criminal appeal number 10 of 1998 and *Pandya v R* [1957] EA 336 followed. Appeal dismissed.

Obiter dicta: There are two ways of recording *voir dire* proceedings (preliminary proceedings to establish whether a child witness understands the nature of oath and importance of being truthful). Firstly, the trial judge can write down the question put to the witness and the answer of the witness in the first person in the words spoken by the witness, in a dialogue form. The judge can then make his conclusion after the dialogue.

Secondly, the judge can omit to record the questions to the witness but record the answers verbatim in the first person and make his conclusion thereafter; *Gabriel s/o Maholi v R* [1960] EA 159 followed.

Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

Gabriel s/o Maholi v R [1960] EA – **F**

Kifamunte Henry v Uganda Supreme Court criminal appeal number 10/98 – **F**

Pandya v R [1957] EA 336 – **F**

Judgment

TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYONGO JJSC: The Appellant, Kato Sula, was tried and convicted by the High Court on an indictment charging him with the offence of defilement contrary to section 123(1) of the Penal Code. He was sentenced to 8 years' imprisonment. His appeal to the Court of Appeal was dismissed. He appealed to this Court.

We heard the appeal on 27 November 2000 and dismissed it because we found that there was no merit in the appeal and reserved our reasons.We now give the reasons.

It was the prosecution case that the complainant, Agila Gabula (PW5) was a pupil of Yudaya Islamic School. The Appellant, Kato Sula, was her teacher in primary two at the same school. On 6 August 1995, at about 10:30am, the Appellant sent for Agila Gabula to go to his residence which was near the school. Agila was accompanied by some of her schoolmates who included Nabalera Justine (PW1) and one Habibu Kalema, a child and young uncle of Agila. The Appellant chased away the other children including Nabalera Justine but Habib Kalema refused to go away until the Appellant persuaded him to go and collect a Koran from a nearby mosque. When the Appellant was alone with Agila Gabula, he pulled her into his room where he demanded to have sexual intercourse with her. She resisted. The Appellant eventually overpowered her and defiled her. After the defilement, Agila returned to school and later went to her grandfather's home where she lived.

Next day she refused to go back to school. This prompted her grandfather, Jaffali Kimera (PW2) to inquire why she had not gone to school. She replied that she feared to go to school because the previous day the Appellant had defiled her. Jaffali reported the matter to authorities who eventually arrested the Appellant. He was charged with and prosecuted for the offence of defilement. At the trial he raised an alibi to the effect that he was not at the school where Agila Gabula was defiled. He testified and called a witness Fatuma Bukirwa (DW2) to confirm that he was a student in another school. He claimed that because he resembles his brother Wasswa who taught at Yudaya School, he was mistaken for that brother.

The assessors and the trial Judge disbelieved the Appellant but believed the prosecution. They found that there was corroboration of the evidence of the child witnesses Justine Nabalera and Agila Gabula. The Appellant was convicted and sentenced and his appeal to the Court of Appeal was dismissed. He then appealed to this Court on two grounds. The two grounds in effect complained that the prosecution evidence was insufficient and in particular that the evidence did not conclusively establish the identity of the Appellant as the person who defiled Agila Gabula.

The appeal was argued by Mr *Kafuko-Ntuyo,* counsel for the Appellant. We did not call upon Ms *Khisa*, the Principal State Attorney, to reply because we were satisfied that there was overwhelming evidence against the Appellant and that the objections raised in the memorandum of appeal and the arguments thereon had no merit.

The Learned trial Judge and the Court of Appeal accepted the evidence that the Appellant had taught Agila Gabula and Nabalera Justine in primary two for

some time. Agila had therefore known the Appellant and his twin brother Wasswa so well that she (Agila) was able to describe the shape of the head of the Appellant as being distinct and different from that of Wasswa. There was no cross-examination on the evidence of Nabalera to the effect that Agila and herself were accompanied by other schoolmates when they went to the Appellant's residence from where the Appellant himself got a cassava stick and chased the rest of the children away. This happened in midmorning. Defence counsel did not challenge Nabalera's evidence, by way of cross-examination, which clearly means that the identity of the Appellant insofar as Nabalera's evidence goes was not challenged. The evidence of Jaffali was to the effect that he knew the Appellant very well as a teacher at Yudaya School where the two girls were pupils. He testified that after Agila complained of defilement, he and J Lule, PW3, an LC Chairman, went to the residence of the Appellant and discovered that the Appellant had removed all his belongings and fled the area.

The Learned trial Judge in a well reasoned judgment found the prosecution witnesses, especially Agila, to be impressive. He found the Appellant and his witnesses especially Fatuma Bukirwa to be liars. He found her to be shifty and called her a consummate liar. He found that there was corroboration of the evidence of Nabalera and of Agila. The Court of Appeal re-evaluated the evidence and accepted the conclusions of the Learned trial Judge.

We are here now faced with two concurring findings of fact by the two courts below. In order for us to interfere with those findings, we had to be persuaded that either one of the courts or both of them erred in their findings. We note that the trial Judge relied on the impressive demeanour of Jaffali (PW2) and believed him. On the other hand the Judge noted that Bukirwa Fatuma's (DW2) demeanour was not impressive as she was shifty in the witness box. She was a liar. In cases such as this appeal, where the element of demeanour of witnesses for both the state (in this case Jaffali) and for the accused (such as Faturna (DW2)) has influenced the trial Judge and the assessors in assessing the credibility of witnesses, we can only interfere if the Appellant can satisfy us that either the trial Judge and/or the Court of Appeal erred in a material respect. See *Kifamunte Henry v Uganda* Supreme Court criminal appeal number 10/98 and *Pandya v R* [1957] EA 336. We were not persuaded that the courts or either of them erred.

In the circumstances our opinion was that the two grounds must fail. That is why we dismissed the appeal.

Before we take leave of this case, there are two errors which we have noticed on the record that we must correct.

The first matter is the issue of procedure in the conduct of *voire dire.* The inquiry, which is conducted before a child of tender years is allowed to testify, is intended to test first whether the child witness understands the nature of an oath and, secondly if not, it is sufficiently intelligent to understand the duty of speaking the truth. A trial judge's note should reflect this.

The record of the trial court in the instant case on the conduct of the *voire dire* in respect of Nabalera appears as follows:

> "*Voire Dire.*
>
> Court: Questions put to the young witness about whether or not she understands the nature of oath. She does not.

> Court: Questions put to test intelligence of young witness and capacity to tell the truth. She says that those who tell lies go to Hell. She understands the duty of telling the truth. She will therefore give an unsworn testimony".

The witness then gave her evidence after which *Serwanga* counsel for the accused said: "No Cross-examination". The Learned Judge followed the same pattern in conducting the *voire dire* in respect of Agila Gabula (PW5). The record appears as follows:

> "*Voire Dire.*
>
> Court: Question put to her. She does not understand the nature of an oath. So cannot give a sworn testimony.
>
> Court: Questions put to witness unless she appears to understand the duty of telling the truth. She knows that people who tell lies are burnt. She goes to the mosque every Friday. She therefore will give an unsworn statement".

We would like to point out that the procedure adopted is not quite in keeping with the common practice. There are normally two ways of recording proceedings of the *voire dire.* The first method is where the trial judge writes questions down and each question is followed by the answer to it. The answer is written in the first person singular in the words spoken by the witness. Questions and answers are put in a dialogue form. The conclusions of the judge are made after that dialogue.

The second practice is not to record the questions put by the judge but to write down in the first person singular and in a narrative form the answers given by the young witness leaving the questions out unless a particular question has to be recorded. Thereafter the trial judge records his conclusions.

The error in the instant case is that neither the questions put to, nor the answers given by, the child witnesses on the nature of the oath were recorded, and the answers in the second inquiry were paraphrased.

Most of the cases which we have come across show that the common procedure is to record the witness's answers on both inquiries in a narrative form: See *Gabriel S/o Maholi v R* [1960] EA 159 at 160F–G. See also section 38(3) of the Trial on Indictments Decree, 1971 (TID) and section 11 of the Oaths Act (Chapter 52).

The second point we wish to discuss is whether or not a child witness who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined. This is reflected in the judgment of the Court of Appeal where the Learned Justice stated (at 5) that:

> "We note on the record that the complainant made an unsworn statement but was later cross-examined by the defense counsel. We think that this was irregular because a witness who gives a statement not on oath is not subject to cross-examination as there is no oath binding him or her".

The Learned Justices did not refer to any authority in support of that view which, we think, with the greatest respect, is erroneous.

Neither counsel for the Appellant nor the Principal State Attorney was aware of any authority for the view expressed by the Court of Appeal. When we drew the attention of the two learned counsel to the provisions of section 70 of TID 1971 and sections 133 and 136 of the Evidence Act, they appeared to agree that child witnesses who give evidence not on oath are liable to be

cross-examined. But both stated that the practice of not cross-examining such child witnesses is wide-spread. It is because of the widespread misconception that we make these observations which should in future be followed by all courts in this country.

Section 38 of the Trial on Indictments Decree 1971 reads as follows:

> "38(1) Every witness in a criminal cause or matter before the High Court shall be examined upon oath and the court shall have full power and authority to administer the usual oath.
>
> (2) …
>
> (3) Where, in any proceedings a child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, *his evidence may be received*, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

There is nothing in section 38(3) to suggest that a child witness should not be cross-examined on his or her unsworn evidence.

Trials in the High Court are regulated by the TID 1971. Section 70 thereof reads as follows:

> "70. The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution".

Clearly this section does not exclude from liability to cross-examination any child witness for the prosecution. This is the principal authority for saying that child witnesses who give evidence not on oath should be cross-examined to test the veracity of their evidence.

It would appear that the misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in their defence, child witnesses who do not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

By section 41 of the TID it is provided:

> "Every person indicted for an offence shall be a competent witness for the defense at every stage of the proceedings … provided.
>
> (*a*) to (*c*) …
>
> (*d*) Nothing in this section shall affect any right to the accused person to make a statement without being sworn".

The right of an accused person not to be cross-examined when he makes a statement not on oath was originally enshrined in section 210 of the Criminal Procedure Code Act as follows:

> "210(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defense, the court shall again explain the substance of the charge to the accused and shall inform him that he *has the right to give evidence on oath from the witness box and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock*".

When the TID was enacted in 1971, the above provisions were modified and re-enacted in sections 71 and 72 of the TID. In the process of the modification, and re-enactment, and for unknown reasons, the expressions "from the witness

box and that, if he does so, he will be liable to cross-examination" and "from the dock" were omitted in the present sections 71 and 72 of the TID.

Thus by section 71(2) of the TID, it is provided:

> "when the evidence of the witnesses for the prosecution has been concluded and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is sufficient evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each accused persons of his right,
>
> (*a*) to give evidence on his own behalf;
>
> (*b*) to make an unsworn statement;
>
> (*c*) to call witnesses in his defense".

The relevant part of section 72(1) reads: "[T]he accused person may then give evidence on his own behalf or make an unsworn statement …"

In spite of the absence of the expressions referred to above, it is within our experience that the long established procedure previously set out in section 210 of the Criminal Procedure Code is followed in trials in the High Court. We may add that section 126(1) of the Magistrates' Courts Act of 1970 still retains provisions identical to those in section 210 of the Criminal Procedure Code (*supra*). This clearly illustrates the point.

Moreover in the provisions (section 41, 71, 72) it is clear that evidence given on oath by an accused person is distinguished from his "unsworn statement" which is not described as evidence. On the other hand, the unsworn testimony of a child witness is described as evidence in all the relevant provisions.

By virtue of section 116 of the Evidence Act and section 38(3) of TID, 1971 children are competent witnesses and as such sections 133 and 136 of the Evidence Act apply to them. They read as follows:

> "133 The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the court.
>
> …
>
> 136(1) Witnesses shall be first examined in chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined".

We may add that the Oaths Act augments the view that the unsworn statement in court by a child is evidence.

Section 11 of the Oaths Act reads as follows:

> "11(1) Anything to the contrary herein above in this Act notwithstanding, if it shall appear to a court or officer before whom an oath other than a promissory oath … is to be taken or affirmation other than a promissory affirmation is to be made that the person about to take the oath or make the affirmation ought not:
>
> (*a*) by reason of immature age; or
>
> (*b*) or for any other sufficient cause, to be allowed to take the oath or make the affirmation as aforesaid, it shall be lawful for the court or officer, if the court or officer shall in its or his free discretion so think fit, to allow such person, in lieu of taking the oath or making the affirmation, *to give evidence* … without oath affirmation.
>
> (2) It shall be a requirement of the law in any case falling within the provisions of the preceding subsection for the court or officer to enter in the minutes of the

proceedings as the case may be, a note of the fact of the evidence having been given or made without oath or affirmation, and of the reasons therefor".

Furthermore in Uganda, all trials of cases are subject to the provisions of article 28 of the Constitution. This article is about fair hearing. The virtue of fair hearing is that a party in a cause should be in a position to controvert his or her opponent either by contrary evidence or by cross-examining a witness who gives evidence against him so as to test the veracity of the witness who testifies. The article provides in part:

"28(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(3) Every person who is charged with a criminal offence shall:

(*a*) to (*f*) …

(*g*) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court".

These provisions are intended to ensure that an accused person receives a fair trial. There can be no fair trial if an accused is denied the right to cross-examine witnesses who are produced to testify against him or her. The essence of cross-examining a witness of the opposite party is to test the credibility of that witness.

We direct that all courts in this country must follow the guidelines we have given in this judgment. We also direct that the registrars and all officials concerned should ensure that these guidelines are circulated to all courts and to the Director of Public Prosecutions.

For the Appellant:
Mr Kafuko-Ntuyo

For the State:
Principal State Attorney

Supa Brite Ltd v Pakad Enterprises Ltd
[2001] 2 EA 563 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	2 May 2001
Case Number:	287/01
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	W Amokoi

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[1] Passing off – Interlocutory injunction – Test for whether to grant interlocutory injunction – evidence required – Whether evidence of consumers required in order to prove allegations that products had been confused.

[2] Passing off – Nature of tort of passing off – Purposes served and rights and interests protected – Factors to be established in order to succeed in action alleging passing off.

Editor's Summary

The Plaintiff, manufacturer of cleaning materials, instituted action against the Defendant seeking relief on the basis that the latter was passing off some of its

products, namely “Corazzi” and “Panni spunga” by using a colourable imitation of the packaging and mode of packing of the Plaintiff’s own “Spontex”, which was a superior product and in respect of which the Plaintiff enjoyed considerable goodwill. It was further alleged that as a result the Plaintiff had suffered loss and damage. The Defendant denied the allegations of passing off, setting out in its defence the manners in which its products were distinct from the Plaintiff’s “Spontex”. On the Plaintiff’s application for an interlocutory injunction to restrain the Defendant until the hearing and determination of the suit from, *inter alia*, using packaging similar to (or which was a colourable imitation of) packaging used by the Plaintiff, passing off its goods as the Plaintiff’s, or trading in a manner that did not sufficiently distinguish its products from the Plaintiff’s.

Held –To succeed in an action alleging passing off (which is an infringement of the legal principle that no man may sell his goods as those of another) a plaintiff must prove three things namely (a) that he has acquired a reputation or goodwill connected with the goods or services and that such goods or services are known to buyers by some distinctive get-up or feature; (b) that the defendant has, whether intentionally or not, made misrepresentations to the public leading them to believe that the defendant’s goods are the plaintiff’s; and (c) that the plaintiff has suffered (or, in a quia timet action, is likely to suffer) damage because of the erroneous belief engendered by the defendant’s misrepresentation. All these three elements are questions of fact. *Reckitt and Colman Products Limited v Borden Inc and others* [1990] 1 WLR 59 adopted.

The law of passing off protects the proprietary right of goodwill – that is, the benefits and advantages of the good name and reputation of a business. Dictum of Lord Jauncey in *Reckitt and Colman Products Limited v Borden Inc and others* (*supra*) adopted.

On an application for interlocutory injunctive relief in a passing off action, the applicant must show a *prima facie* case with a probability of success, and if the court is in doubt it should decide the case on a balance of convenience. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately be compensated in damages. *EA Industries Ltd v Trufoods Ltd* [1972] EA 420, *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and *Cut Tobacco Kenya Ltd v British American Tobacco (K) Ltd* [2000] LLR 1423 (CAK) followed.

To succeed in its application for injunctive relief, the Plaintiff had to establish a *prima facie* case with a probability of success that (i) it had acquired a reputation or goodwill among the public over “Spontex” which was identified by its packaging; (ii) consumers wishing to buy “Spontex” might be misled by the packaging used by the Defendant on its products; and (iii) that the Plaintiff had suffered damage thereby.

The only evidence on goodwill before the court consisteed of the positive affirmations on oath on behalf of the Plaintiff by its managing director and consultant and a denial, also on oath, by the Defendant’s director. There was no evidence from any consumer or purchaser of “Spontex”. In a case of personal reputation, evidence of goodwill, regardless of the stage of the suit at which the issue comes up for determination, must be offered by members of the public. As the incidence of proof lay upon the Plaintiff, it had not established a

prima facie case with a probability of success on the issue of goodwill and the other factors did not therefore arise for determination.

Application for interlocutory injunction dismissed

Cases referred to in ruling

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Cut Tobacco Kenya Ltd v British American Tobacco (K) Ltd [2001] 1 EA 24 (CAK) – **F**

EA Industries Ltd v Trufoods Ltd [1972] EA 420 – **F**

Giella v Cassman Brown and Co Ltd [1973] EA 358 – **F**

Kentainers Ltd v VM Assani and others HCCC number 1625 of 1996 (ur)

Life Insurance Corporation of India v Panesar [1967] EA 614

United Kingdom

Inland Revenue Commissioners v Muller and Co's *Margarine Ltd* [1901] AC 217

Reckitt and Colman Ltd v Borden Inc and others [1990] 1 WLR 59 – **A**

Ruling

RINGERA J: By a plaint filed in court on 28 February 2001, the Plaintiff originated a passing off action against the Defendant. The substance of the Plaintiff's grievances are encapsulated in the averments made in paragraphs 4, 5, 6, 8, 9, 10, 12, 13,14 and 16 of the said plaint. The same read as follows:

"4 Ever since it started business in 1981 the Plaintiff has been carrying on business of manufacturing and distributing cleaning products and especially dish clothes, dusting clothes, draining mats, scouring pads, scrubbers, floor maintenance pads, foam scourers and sponge cloth. Over the years the Plaintiff has established a research department and a quality control laboratory and has incrementally developed the products it manufactures to ensure that the ultimate consumer receives good value for money and distributes products which are suitable to local conditions. In the process it has become a leading manufacturer and dealer in the said cleaning aids and has built up an enormous goodwill with and trust and confidence of the housewives and consumers.

5 The Plaintiff's products are sold in nearly 400 supermarkets and shops countrywide.

6 One of the items that the Plaintiff has been distributing since 1982 is sponge cloth under the name 'Spontex'. The packaging that it uses has been designed by its manufacturers in France. The manufacturer is the market leader for sponge cloth in Europe. This product is very effective, durable and most suitable for the Kenya market.

8 The Plaintiff's sponge cloth is sold in 3 colours, namely blue, yellow and pink and is packed in 4 different varieties

Standard size	1 pack
Standard size	3 pack
Giant size	1 pack

Giant size	6 pack

The Plaintiff's 6 pack of Spontex sponge cloth is packed with 2 in blue, 2 in yellow and 2 in pink colour.

9 The Defendant has also been selling off and on sponge cloth for at least the past six years. Originally it was packed in a plain cellophane bag with the names Corrazi and Panno and some designs and sold only in one pack of standard size. The pack would contain one piece of either blue or yellow or orange colour. Recently, the Defendant has been selling three-pack standard size in a different packaging with the name Corazzi and called 'Panni spugna'.

10 About two weeks before filing suit on a date the Plaintiff cannot particulars until interrogatories and discovery herein, the Defendant has started selling its sponge cloth in packaging which is a colourable imitation of the packaging which has been consistently used by the Plaintiff for the past 18 years and which has been identified in the public mind to be that of the Plaintiff's goods. The Defendant has further wrongfully introduced a one pack and six pack in a Giant size and has started packing them in the same manner as the Plaintiff.

12 The Defendant's choice of packaging and mode of packing (which is almost identical to that the Plaintiff's uses for Spontex) is calculated to deceive and mislead and has in fact deceived and misled traders and the general public into the belief that the sponge cloth that the Defendant markets is the same as the Spontex being marketed by the Plaintiff and into buying the Defendant's sponge cloth as the Plaintiff's Spontex sponge cloth and the Defendant is passing off his goods as those of the Plaintiff

13 The Spontex sponge cloth that the Plaintiff is marketing is of quality which is superior to that of the Defendant's products in that:

(a) The Plaintiff's sponge cloth is more absorbent than that of the Defendant.

(b) The weight of the Plaintiff's product is higher by 25%. The average weight of the Plaintiff's current Giant sponge cloth is 44 gms as compared to the Defendant's which is only 35 gms.

(c) The Plaintiff's product has much higher quantity of cellulose material or density compared to that of the Defendant and as such it is more durable.

(d) The indentation on the Plaintiff's product on inform on both sides, whereas the Defendant's sponge is indented only on one side and ribbed on the other side further making it less absorbent and less durable.

As a result, the consumers of these products are likely to feel the quality of the Plaintiff's products have deteriorated.

14 As a result of the Plaintiff has suffered and is suffering grievous and irreparable damage and its goodwill is being seriously eroded.

16 Despite notice and demand that the Defendant do stop its said unlawful activity, the Defendant continues it and threatens and intends unless restrained by this Honourable Court to repeat its said unlawful acts and conduct as aforesaid and continues to sell its sponge cloth as that of the Plaintiff Spontex".

The Plaintiff then prays for, *inter alia* the following relief. First, an injunction be issued pending the hearing and determination of this suit to restrain the Defendant whether by itself, its directors, officers, servants or, agents or any, or all of them or otherwise howsoever from:

(i) using packaging for sponge cloths which it is now using or which is similar to or colourable imitation thereof or is similar to or any colourable imitation of the packaging used by the Plaintiff;

(ii) passing off or carrying enabling or assisting other pass the goods of the Defendant as and for the Plaintiff;

(iii) trading in any manner which does not sufficiently distinguish the Defendant's goods from those of the Plaintiff;

and secondly, obliteration upon oath of all packaging material for its sponge cloth which is similar to or any colourable imitation of the packaging material used by the Plaintiff which would be a breach of injunctions prayed for.

Simultaneously with the plaint, the Plaintiff lodged the present application by way of chamber summons expressly to be brought under Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, section 3(1) of the Judicature Act, section 25(8) of the Supreme Court of Judicature Act of 1873 and all enabling powers of the court.

In the application the Plaintiff seeks interlocutory relief in the following terms:

"1(a) A temporary injunction be issued pending the hearing and determination of this suit to restrain the Defendant whether by itself, its directors, officers, servants or agents or any or all of them or otherwise howsoever from:

(i) Using packaging for sponge cloths which it is now using or which is similar to or colourable imitation thereof or is similar to or any colourable imitation of the packaging used by the Plaintiff,

(ii) Passing off or carrying, enabling or assisting others to pass the goods of the Defendant as and for the goods of the Plaintiff,

(iii) Trading in any manner which does not sufficiently distinguish the Defendant's goods from those of the Plaintiff.

(b) Obliteration upon oath of all packaging material for its sponge cloth which is similar to or any colourable imitation of the packaging material used by the Plaintiff which would be a breach of injunction prayed for.

2 The costs of this application be provided for; and

3 Such further or other orders be made as may seen just to the Honourable Court".

The application is said to be grounded on the annexed affidavits of Rameshchandra Somchand Shah and Ndirangu Maina and particularly on the grounds that:

(a) the Defendant has recently changed packaging and mode of packing of the sponge cloth it markets to be almost identical to that of the Plaintiff;

(b) the Defendant is deliberately using the said packaging to enable it pass off its goods as those of the Plaintiff;

(c) the Plaintiff 's goodwill is being greatly threatened;

(d) the use by the Defendant of the packaging material which is similar to or a colourable imitation of the packaging material used by the Plaintiff is causing confusion in the trade and amongst consumers, and

(e) the consumers using the Defendant's sponge cloth which is of a quality inferior to that of the sponge cloth marketed by the Plaintiff are likely, to think that the quality of the Plaintiff's sponge cloth has deteriorated.

Naturally, the application is opposed. There is a defence on record filed on 8 March 2001. The Defendant admits that the Plaintiff is a manufacturer and distributor of the products stated in paragraph 4 of the plaint and that it is the distributor of the sponge cloth known as Spontex. It then denies generally the contents of paragraphs 4, 5, 6 and 7 of the plaint and puts the Plaintiff to strict proof of the same. Then the Defendant proceeds to put its case that it is not passing off its goods as those of the Plaintiff in paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the defence. I think it is convenient if I read those paragraphs in full. They read:

"4 In reply to paragraph 8 and 9 of the plaint, the Defendant avers that it imports and sells sponge cloth from Paolo Corazzi Fibre s.r.l. (a company duly incorported in Italy and a leading manufacturer and distributor of cleaning materials) and sells the same in different names in accordance with the specifications of the said Paolo Corazzi Fibre s.r.l. The said names range from panno spungna, panno scolapiatti, super valzer (yet to be introduced in the Kenyan Market), Toledo (to be introduced in the Kenyan market) to panno.

5 The Defendant avers that the sponge cloths it sells come in various sizes and are packed in ways similar to the specifications of the aforesaid Paolo Corazzi Fibre s.r.l. and in particular the Defendant avers that all its packaging for sponge cloths uses a distinctive configuration of colours that is different from the colours used in the packaging of the Plaintiff's sponge cloths.

6 In reply to paragraph 10 of the plaint the Defendant avers that after carrying out market research and due to factors that had nothing to do with the Plaintiff's trade mark or sponge cloth by the name Spontex, the Defendant introduced into the market giant sponge cloths under the name Panno bearing packaging that is distinct and different from the Plaintiff's packaging of its sponge cloth Spontex.

7 Further and in addition to the foregoing, the Defendant avers that the introduction of the aforesaid Panno giant cloth in the market and the sale of the same in a one pack and a six pack is and has never been wrongful as alleged by the Plaintiff or at all since the Plaintiff does not have exclusive right to sell its sponge cloth in a one pack and a six pack and further since the Plaintiff's trade mark Spontex did not give the Plaintiff nor reserve unto the Plaintiff the exclusive right to package, distribute and sell the said Spontex sponge cloth in a one pack and six pack.

8 Paragraph 12 of the plaint is denied. The Defendant avers that the use of its current label (which is not of a colourable imitation or an imitation at all as alleged of the Plaintiff's sponge cloth) connection with its panno giant sponge cloth is not calculated to lead and has not in fact led to any deception or to the belief that the said Panno giant sponge cloth is Spontex sponge cloth or that the said Panno giant sponge cloth is manufactured by the Plaintiff nor is such use calculated to cause nor must it have caused nor has it in fact caused the said panno giant sponge cloth to be passed off as and for the said spontex sponge cloth.

9 In addition to the foregoing and in further reply to the contents of paragraph 12 of the plaint the Defendant avers that the label of its panno giant sponge cloth is different and distinct from the Plaintiff's label and is incapable of causing any deception or confusion for the following reasons:

(a) The Plaintiff's sponge cloth is sold under the trade mark spontex whilst the Defendant's sponge cloth is sold under the name panno. The words Spontex and Panno are distinct and do not rhyme phonetically or otherwise with each other.

(b) The word panno is clearly Italian in origin and the word Spontex is a derivative of sponge (to denote sponge cloth)

(c) The shape, colour, configuration, overall design and appearance of the Defendant's label is individual and distinct from the Plaintiff's label in that:

(i) At the left-hand corner, it contains in black bold print in a yellow background, the words 'Highly absorbent and durable'.

(ii) At the right hand corner it contains in white print on a blue, yellow and red background the word '*Corazzi*' and immediately below the said word in white print the words '*Cremona – Italy*'.

(iii) In the middle of the label there is a large brown hand of a lady wiping a wall and immediately above the said hand are three large water drops falling onto it. The illustration of the hand in the Defendant's

label covers ½ the total area of the label, the illustration being 315 sq cm and that of the illustration on the Plaintiff's label only covers 104 sq cm.

(iv) The illustration sponge cloth on the Defendant's label is yellow in colour and that in the Plaintiff's label is pink in colour.

(v) The shade of blue used in the Defendant's label is different and distinct from the Plaintiff's label.

(vi) The Defendant's label contains general words descriptive of its products, which the Plaintiff does not have the exclusive right to use with regard to its sponge cloth.

10 The contents of paragraph 13 inasmuch as they refer to the Plaintiff's sponge cloth are denied and the Defendant puts the Plaintiff to strict proof thereof. The Defendant avers that its sponge cloth is of very high quality, having been accepted and distributed all over Europe where it has been accepted as one of the leading sponge cloths.

11 For the reasons aforesaid, the Defendant denies that:

(a) the label of its panno giant pack sponge cloth is a colourable imitation of the Plaintiff's Spontex cloth:

(b) the sale of its sponge cloth is in any way unlawful;

(c) it is passing off its sponge cloth aforesaid for the Plaintiffs sponge cloth;

(d) it has caused the Plaintiff to suffer any loss or damage;

(e) the Plaintiff's goodwill (if any) has been eroded by the Defendant or at all".

The Defendant has also put in a replying affidavit sworn by Ketan Shah, a director of the company.

The application was argued before me on 9 and 19 March 2001 by Mr *Manek* for the Plaintiff/Applicant and Mr *Nyiha* for the Defendant/Res-pondent. Both counsel articulated their respective client's cases with commendable skill and assisted the court a lot with much judicial authority, both reported and unreported. I need not set out the arguments in detail. Both counsel relied extensively on the affidavits filed on behalf of their clients and in particular called upon the court to consider exhibits "RSS 3" (which is the Plaintiff's label), "RSS 4" (which is the Defendant's original label), "RSS 5" (which is a recent label of the Defendant) and "RSS 6" (which is the Defendant's latest label which has given grave concern to the Plaintiff and provoked this suit on the basis that it is an imitation of the Plaintiff's "RSS 3" with minor insertions of detail).

I now venture to consider the application on the material before me in light of the applicable legal principles. If the Plaintiff's case is put in a nutshell, it is this: the Defendant's most recent packaging and the mode of packing its sponge cloth is almost identical to the Plaintiff's and has the deliberate result of enabling the Defendant to pass off its goods as those of the Plaintiff to the detriment of the Plaintiff's established goodwill. The general law on passing off actions is, in my view, most succinctly summarised in the headnote to the case of *Reckitt and Colman Ltd v Borden Inc and others* [1990] I WLR. 59. It reads:

"(1) The Principles of the law of passing off were well established in that no man was to sell his goods as those of another; that the elements which a Plaintiff had to prove were–

(a) that he had acquired a reputation or goodwill connected with the goods or services he supplied in the mind and such goods or services were known to the buyers by some distinctive get-up or feature;

(b) that the Defendant had, whether or not intentionally made misrepresentations to the public leading them to believe that the Defendant's goods or services were the Plaintiff's and

(c) that the Plaintiff has suffered or in a *quia timet* action was likely to suffer damage because of the erroneous belief engendered by the Defendant's misrepresentation, and that all the three elements were questions of fact".

As regards the precise rights which are entitled to be protected by a passing off action, it is settled law that it is the goodwill. The significance of that was well articulated in the *Reckitt and Colman* case (*supra*) by Lord Jauncy at 511. The noble and Learned Lord of Appeal in ordinary himself as follows:

> "The fact that the proprietary right which is protected by the action is the goodwill rather than in the get-up distinguishes the protection afforded by the common law to a trader from that afforded by statute to the registered holder of a trade mark who enjoys a permanent monopoly therein. Goodwill was defined by Lord Macnaughten in *Inland Revenue Commissioners v Muller and Co*'s *Margarine Ltd* [1901] AC 217, 223–224, as 'the benefit and advantage of the good name, reputation and connection of a business'. Get-up is the badge of the Plaintiff's goodwill, that which associates the goods with the Plaintiff in the mind of the public. Any monopoly which a Plaintiff may enjoy in get-up will only extend to those parts which are capricious and will not embrace ordinary matters which are in common use".

I now turn to the application of those general principles of the law of passing off actions to the grant of interlocutory injunctive relief in the case at hand. The conditions for the grant of an interlocutory injunction are well known. The Applicant has to show a *prima facie* case with a probability of success, and if the court is in doubt it should decide the application of the balance of convenience. And an interlocutory injunction will not normally be granted unless the Applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated in damages. Cases of *EA Industries Ltd v Trufoods Ltd* [1972] EA 420, *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and more recently *Cut Tobacco Kenya Ltd v British American Tobacco (K) Ltd* [2001] 1 EA 24 (CAK) make that abundantly clear. So the first question I must ask myself is whether the Plaintiff has established a *prima facie* case with probability of success that:

(i) It has acquired a reputation or goodwill with its Spontex Sponge Cloth among the public and such cloth is known to the public by the packaging (or get-up) exhibited as "RSS 3",

(ii) that consumers wishing to buy its sponge cloth are likely to be misled into buying the Defendant's sponge cloth packaged as per exhibit "RSS 6" whether in the mode of one pack or six pack, and

(iii) whether he is likely to suffer damage thereby.

The evidence on the goodwill or reputation of the Plaintiff's product is offered in the affidavit of Ramesh Chandra Shah, its managing director and Ndirangu Maina, the Plaintiff's Marketing Consultant. Mr Shah in paragraph 7 of his affidavit depones that the Plaintiff enjoys an enormous goodwill with, and trust and confidence of, the housewives and consumers who have come to trust the products that the Plaintiff markets which are of the highest quality. In paragraph 9 he depones that in the process of extensive marketing of its "Spontex" sponge cloth in the print and electronic media, on bus stops, shelters, on billboards and by messages on its sales fleet, the packaging and labelling has achieved a strong identity in the market place and amongst the consumers. And in paragraph 10 he further depones that the Plaintiff's sponge cloth is widely known and trusted

in the market. Then Ndirangu weighs in with the deposition in paragraph 9 of his affidavit that the Defendant is trying to cash in on the goodwill and the trust and confidence that the Plaintiff enjoys in the market. And what is the Defendant's response? Ketan Shah, a director of the Defendant, swears in paragraph 10 of his replying affidavit that he differs with the averment that the Plaintiff enjoys the goodwill, trust and confidence stated by its managing director. So I have a situation where one party and its consultant loudly proclaim it has substantial goodwill in its product and the adversary denies the same. Both the proclamation and the denial are on oath. And there is absolutely no affidavit evidence from any consumer or purchaser of the product in question.

I am of the opinion that like in the case of personal reputation, evidence of goodwill must, whether at interlocutory stage or final hearing of a suit, be offered by members of the public and not the subject of the reputation himself or the trader and his consultant as the case may be. And remembering that the onus of *prima facie* proof is on the Applicant, I am impelled to find that the Plaintiff has not established a *prima facie* case with a probability of success on the issue of goodwill. Without that it is unnecessary to consider whether there is *prima facie* evidence of consumers being actually misled into buying the Defendant's product in the belief that it is the Plaintiff's well-known and established quality product or whether the Plaintiff is thereby likely to suffer damage. However as counsel on record spent a considerable amount of time by taking me through their client's affidavits on the issue and cited a mass of authority on the matter. I will, out of deference to their efforts and in appreciation of the fact that should the matter end up in the appellate court the said court might be interested in the views of this Court, express short views on those concerns.

As regards the issue of consumers being likely, or being actually misled the affidavit evidence is interesting. Paragraph 15 and 18 of Rameshchandra Shah's supporting affidavit are pertinent, I will read them in full. They read:

> "15 It has been reported to me by my Marketing Manager, Gurminder Kaur Marwa to go around shops and supermarkets and I believe that she has gone to various shops and find the Plaintiff's 'Spontex' mixed with the Defendant's sponge cloth, as the staff in the shops seem to be treating them as one and the same item. She has also told me and I verily believe, that she has seen housewives picking up the Defendant's sponge cloth. When she asked them why they picked up the Defendant's pack, they looked surprised and told her that this was the same product they have been buying for many years (that is the Plaintiff's). I have also been told by Kennedy Anthony Lunalo and I verily, believe, that the shop attendants are indiscriminately mixing up the Plaintiff's sponge cloth with that of the Defendant.
>
> 18 The established customers of Spontex are likely to buy the Defendant's products assuming it to be that of the Plaintiff's Spontex and very likely after use find it not as satisfactory as before and are very likely to think that the quality of Spontex has deteriorated".

The Plaintiff's consultant, Mr Maina Ndirangu once again helpfully weighs in with his expert opinion. He depones in paragraph 5 of his supporting affidavit

> "In my opinion as a marketing expert and consultant the Defendant's recently adopted packaging and labelling of the sponge cloth is a deliberate copy with minor difference of packaging and labelling used by the Plaintiff for its Spontex brand sponge cloth. The consumer who is used to Spontex is very likely to pick up the Defendant's products mistaking it for Spontex. The two packings look very alike and in my experience housewives who are usually in a hurry never make microscopic or careful examination of what they are buying".

Then as I said before counsel for the Plaintiff asked me to look at exhibits "RSS 3" and "RSS 6" for the general impression of customers.

The Defendant has not expressly denied what the Plaintiff's managing director has deponed as to the misleading of customers and others but it has disagreed on oath with the Plaintiff's consultant's view that the packaging and labelling of the Defendant's product is a deliberate copy, of the Plaintiff's product and that the Defendant's packaging and labelling could lead to the misleading or confusion of consumers as to the origin of the two products. Detailed reasons for this stand are particularised in paragraph 6 of Mr Ketan Shah's replying affidavit. And like the Plaintiff's counsel, Defendant's counsel also invited me to consider exhibits "RSS 3" and "RSS 6" for general effect.

Now the authorities are all clear that the test of whether there is deception or likelihood of deception in respect of a product is not the conclusion which one would arrive at after a detailed juxtaposed examination of the features of the two products but the overall impression created. Bearing that in mind, if I were to substitute myself for a shopper I would not be deceived to buy the Defendant's "RSS 6" in the belief that it is the Plaintiff's "RSS 3". But I think a judge should not substitute his opinion for that of consumers. In my opinion, what matters is the opinion of the public and in particular of shoppers. In this regard, the deposition in paragraph 15 of Mr Rameshchandra Shah's affidavit is important. There is hearsay evidence that both shoppers and shop attendants have been confused.

What am I to make of this deposition? In *Kentainers Ltd v VM Assani and others* [HCCC No 1625 of 1996] *(*ur*)* I analysed at length the admissibility and value of hearsay evidence in interlocutory proceedings. I am still of the view I expressed therein and will reproduce it herein *in extenso*. I said:

> "The Evidence Act, according to its long title, is an Act of Parliament to declare the Law of Evidence. As a declaratory Act it contains the whole of the law of Evidence saving only such other provisions of any other written law as relate to matters of evidence. (See *Life Insurance, Corporation of India v Panesar* [1967] EA 614 per Clement De Lestang VP at 617). Section 2(2) of that Act states that subject to the provisions of any other Act or of any Rules of Court, the Act shall apply to affidavits presented to be court. Obviously Order XVIII, rule 3(1) is one such Rule of Court. The entire thrust of the Evidence Act is to preclude proof of facts by statements of persons who are themselves not testifying in court except on a few specified instances. Those instances are admissions and confessions (section 17 to 32), statements by persons who cannot be called as witnesses (sections 33 and 34), statements on documents produced in Civil Proceedings (sections 35 and 36) and statements made under special circumstances (sections 37 and 41). Accordingly, facts are to be proved only by the direct testimony of the witness's own perception, or by his testimony of the admissible hearsay statements comprehended by the above mentioned provisions of law, or by real evidence. Order XVIII permits a court to allow proof of facts by affidavit subject to the stricture that the deponent may be called for cross-examination. Such an affidavit should contain only such facts as the deponent is able of his own knowledge to prove except in interlocutory matters where it is permissible to adduce evidence of information received and relief entertained provided the sources of the information and the grounds of the belief are stated. Does it mean then that in interlocutory proceedings the court will accept proof of facts by information received? If that information constitutes an admissible hearsay statement, the answer is yes. No offence is caused to the Evidence Act in that case. If the information constitutes an admissible hearsay statement, the answer must be in the negative. Inadmissible hearsay is just that. It is not admissible to prove the fact asserted. The most it could do is provide

> a basis for the witness's belief or opinion in which case the statement is accepted by the court as original evidence. Rule 3(1) of Order XVIII cannot be interpreted so as to provide for a mode of proof in interlocutory proceedings which is not countenanced by the Evidence Act itself. I say so because to hold otherwise would be wholly subversive of the Evidence Act. I cannot see that Rules of Court could ever be interpreted so as to nullify substantive enactments. In short, I am of the opinion that whether the proceedings be final or interlocutory, facts in issue or relevant thereto can only be proved by the same means, that is to say a witness's testimony of his own perception by his five senses, or by testimony of admissible hearsay statements, or by real evidence. In my judgment, when rule 3(1) of Order XVIII allows that an affidavit can consist of statements of information, all it does do is permit the deposition of such statements not in proof of the facts asserted thereby but as original evidence to enable the court to assess whether there is some foundation for the deponent's expressed beliefs. To that extent the only admissible evidence in an affidavit is what the deponent has himself perceived, any matter admitted as an exception to the hearsay rule under the sections of the Evidence Act I have referred to, and the deponent's beliefs. In such cases only the first two items are probative. Expression of belief is not really probative of any fact except the existence of such belief in the mind of the deponent".

Being of that persuasion, I consider that the situation at hand is one where the Plaintiff strongly believes that the public is likely or is being deceived into buying the Defendant's product as its own and the Defendant believes with equal force that that cannot be so. I am afraid that without any evidence from any member of the public on the issue, I am unable to say that there is any *prima facie* proof of this point by the Plaintiff either. As regards the issue of the Plaintiff suffering damages if it has a goodwill in its product and further if there is deception (actual or likely) of customers as regards its product *vis-à-vis* the Defendant's product, the Plaintiff swears on oath that it will suffer irreparable damage. The Defendant has not controverted that. So on that point, the scales would weigh in favour of the Plaintiff. However as I have found that the Plaintiff has not shown a *prima facie* case with a probability of success on the issue of existence of goodwill and deception of the shopping public with regard to its product, my conclusion is that it has failed to meet the very first condition for the grant of an interlocutory injunction. Of that I am not in doubt. It is therefore unnecessary to consider the balance of convenience. However, if I may do so, *ex abundanti cautela*, I think the following matters are pertinent. Defendant's counsel boldly submits that the balance of convenience tilts in favour of the Defendant. He refers me to the case of *EA Industries Ltd v Trufoods* (*supra*). The case was for an interlocutory injunction to restrain the passing off of the Respondent's products as those of the Appellant. As there was doubt about the existence or otherwise of a *prima facie* case with probability of success, the case fell to be decided on a balance of convenience. The trial Judge, Madan J, had taken the view that the effect of granting the injunction would be to compel the Respondent to take its products off the market for the time it would take for the suit to come to judgment. In the Court of Appeal it was argued on behalf of the Appellant that the Judge had misdirected himself when he spoke of the effect of an injunction being that the Respondent company's products "would be taken off the market". It was submitted that there would be nothing to prevent the Respondent company continuing to sell its product provided it did so under different get-up. Spry VP whose judgment received the concurrence of the other two members of the court thought that was so. He nevertheless proceeded to hold that on the whole, the harm that the

Respondent company would suffer as a result of an injunction, if it succeeded in the suit, is likely to be greater and graver than that the Appellant company would suffer from the refusal of an injunction should it be successful. The Learned Vice President did not feel bound to explain or elaborate his thinking. In the absence of much more direct authority I cannot regard this case as laying down a principle or rule of law that in a passing off action, the balance of convenience is deemed to favour the Respondent to an application for interlocutory relief. In my, view, the balance of convenience is a matter of fact to be determined after weighing the hardships which the respective parties may suffer as a result of the grant or refusal of interlocutory injunctive relief. In the instant case, the Defendant has not shown what hardship it would suffer if the injunction were granted now but it was successful at the trial. Mr *Manek* submits that the Defendant would suffer no great inconvenience since it started the change in its get-up only in the month of February (which is the same month this suit was instituted) and it has not even deponed that it would be inconvenient to change the get-up. The Plaintiff for its part contends that if the injunction is not granted now and it was to succeed at the trial, it would have suffered the hardship of part of its business being taken away by the Defendant. I think considering the undisputed fact that the Defendant is the later entrant to the market in its present packaging or get-up it could not have built as old a reputation in the product so packaged as the Plaintiff has done in its own product, the Defendant would be caused less harm than the Plaintiff if an interlocutory injunction were granted at this stage but the Defendant were ultimately successful at the trial. So the balance of convenience would in my opinion weigh in favour of the Plaintiff.

Finally, but again this is not necessary for my decision having taken the view I have of the Plaintiff's want of a *prima facie* case with a probability of success, the Plaintiff has not demonstrated that it would suffer any loss that could not adequately be compensated in damages if it comes to pass that it is successful at the trial.

In the result, I dismiss the Plaintiff's application with costs to the Defendant.

For the Plaintiff:

Mr Manek

For the Defendant:

Mr Nyiha

Telkom (K) Ltd v Kamconsult Ltd

[2001] 2 EA 574 (CCK)

Division:	Milimani Commercial Courts of Kenya at Nairobi
Date of Ruling:	17 September 2001
Case Number:	262 and 267/01
Before:	Ringera J
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Arbitration – Jurisdiction – Commission letters by Applicant incorporating terms and conditions of separate document – Separate document provided for arbitration – Whether contract including

arbitration clause – Allegation of fraud in pleadings – Allegation not

proved – Whether allegation of fraud ousts arbitrator's jurisdiction – Section 17 – Arbitration Act 4 of 1995.

[2] Limitation of actions – Debt – Section 109 – Kenya Posts and Telecommunication Act (Chapter 411) – Limitation period of one year – Debt acknowledged and part payment made after expiry of one year – Whether acknowledgment of statute barred claim can revive it.

[3] Statute – Kenya Posts and Telecommunication Act (repealed) – Power conferred on Minister to approve certain contracts – Interpretation of sections 11 and 12 of the Act – Section 17 – Arbitration Act 4 of 1995 – Whether Minister's approval mandatory for contracts of a certain pecuniary value.

Editor's Summary

T brought a reference from an arbitrator's decision pursuant to section 17 of the Arbitration Act 4 of 1995 seeking an order that the arbitrator had no jurisdiction to hear a claim brought by K for breach of contract. From 1988 to 1992 T had written letters of commission to various parties, including K, awarding contracts for various aspects of a building project. The letters incorporated a document titled "Conditions of Engagement", which provided for arbitration in certain circumstances. T stopped work on the projects in 1994. In 1996, more than one year later, K made its claims and subsequently engaged T in correspondence. T subsequently acknowledged the claims and made part payment.

Subsequently, K initiated arbitration proceedings to settle its claims. T objected to the jurisdiction of the arbitrator on the grounds that the arbitration clause had not been incorporated into the agreement between the parties, that the claim was statute barred and that it was tainted by fraud and therefore outside the jurisdiction of the arbitrator. K replied that the acknowledgment of the debt and part payment of the same had revived it. On reference from the arbitrator's decision affirming jurisdiction, the supplementary question of whether the agreement in question was contrary to statute for exceeding the statutory powers of the managing director of Kenya Posts and Telecommunication ("KPTC") arose.

Held – There was a valid agreement between the Applicant and the Respondent. The agreement was contained in several documents which all incorporated terms into the contract, including the arbitration clause. The arbitration was therefore properly before the arbitrator.

An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear evidence and determine whether fraud had been established. It would be against public policy to enforce a contract, including an arbitration clause, where fraud was established. However it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction.

The cause of action in this matter had arisen when KPTC had stopped the projects in 1994. The cause of action did not start running when a demand letter was subsequently issued. Under the Kenya Posts and Telecommunication Act (Chapter 411) ("the KPTC Act"), the period of limitation for breach of contract was one year. Hence the claim against KPTC had lapsed in 1995. The

fact that there had been correspondence subsequent thereto, including an acknowledgment of the claims and part payment, could not revive an already statute barred cause of action.

Sections 10, 11 and 12 of the KPTC Act required the managing director of KPTC to seek the approval of the Minister for contracts of certain pecuniary value. The use of the word "may" in these sections implied a discretion, which meant that failure to seek such approval would not necessarily render the transaction void. In any case, no evidence had been led before the arbitrator to show that the Minister's consent had not been sought nor obtained.

Reference allowed in part. Arbitrator having no jurisdiction in the matter.

No cases referred to in ruling

Ruling

RINGERA J: Telkom Kenya Limited and Postal Corporation of Kenya (hereinafter called the Applicants) are aggrieved by the rulings made by an arbitrator, Justice (Retired) E Torgbor, on 25 January 2001 that he had jurisdiction to hear and determine a dispute between themselves and Kamconsult Limited (hereinafter called the Respondent) on professional fees for services rendered in respect of an alleged contract for consultancy services between the parties. They have accordingly brought the present references under section 17 of the Arbitration Act 4 of 1995 for a decision by the High Court as to whether the Arbitrator had the jurisdiction he found himself to have. The references have been consolidated as they largely involve common questions of law and fact.

Both before the arbitrator and before this Court, the Applicants held forth that the arbitrator lacked jurisdiction to hear and determine the dispute in question for the reasons that there was no arbitration agreement between the parties; the Respondent's claims were statute barred and that the claims were in any case fraudulent and it was contrary to law and public policy to enforce them. In addition, the Applicants did in this Court, though apparently not before the arbitrator, take the point that the contracts, if any, between the parties were unenforceable by way of action or arbitral process for the reason that they were contrary to statute. I intend to consider those arguments and the response thereto by the Respondent seriatim.

It was contended that there was no arbitration agreement between the parties on two grounds. The first ground was that there was no contract containing an arbitration clause which was concluded between the parties. The second ground was that the parties' agreement on the quantum and mode of payment of professional charges did not also have an arbitration clause. The first ground was argued as follows. The letters of commission written to the Respondent were not really letters of offer. They envisaged that further action (namely, the signature of articles of agreement) would be taken by the Applicants and the Respondent. Such action was not taken and accordingly there was no legal contract entered between the parties. It therefore followed that the arbitration clause in the document comprising articles of agreement and conditions of appointment and schedules of duties and professional charges for Architects, Quantity Surveyors and Consulting Engineers for their professional services (1974 ed) (hereinafter referred to as the 1974 conditions) could not be invoked.

The letter of commission affecting Postal Corporation of Kenya was in the following terms:

"Kenya Posts and Telecommunications Corporation

Telegraphic Address:	Office of the Managing Director.
	'Dirposts' Nairobi
Postal Department	P O Box 34567
Telephone	Nairobi 27401 Ext.2290 Nairobi

Your Ref …

P O Ref DF: 720/K.70

28 October 1992

M/s Kam Consult

P O Box 51630

Nairobi

Dear Sirs,

Kisumu Post Office and Offices

I am writing to inform you that you have been commissioned as Mechanical/Electrical Engineers for the above project.

The Consultants for this job areas follows:

(1)	Architect	Emkay Designers
	P O Box 21163	
	Nairobi.	
(2)	Civil and Structural	SapamoEngineers
	Nairobi.	
(3)	Quantity Surveyor	Nyambene and Magare Assoc.
	P O Box 62891	
	Nairobi.	

You will therefore be required to work in constant consultation with them. The terms of this commissioning shall comply with the current edition of the conditions of engagement and scales of fees for professional services for Building and Civil Engineering works issued in 1974.

You will be required to observe the General Principles laid down by our Tender Board appertaining to Mechanical and Electrical Services Engineers in private practice when acting as Mechanical and Electrical Engineers on Building Works for the corporation. This commissioning is subject to cancellation if the corporation will not be satisfied with your performance.

Finally, I should be glad if you would confirm your acceptance of this commissioning in accordance with the terms of this letter.

Yours faithfully,

P G Ndarua

For: Managing Director".

The Respondent replied thereto as follows:

"KC/E101/001

29 October 1992

The Managing Director

Kenya Posts and Telecommunications Corporation

P O Box 34567
Nairobi.

Dear Sir,

Re: Kisumu Post Office and Offices

We acknowledge with thanks your letter reference DF: 720/K.70 dated 28 October 1992 commissioning us as Mechanical and Electrical Engineers for the above project.

By this letter we confirm our acceptance of this commission together with the terms and conditions in the commissioning letter.

Once again we thank you for the commissioning and promise to work diligently with the rest of the Consultants for the success of the project.

Yours faithfully

P K Ikigu

For: Kamconsult".

The letters of commission affecting Telkom Kenya Limited were in respect of Gilgil Junior Staff Quarters and Ngong Road Sport Complex and Staff Quarters. The first one read:

"Kenya Posts and Telecommunications Corporation

Telegraphic Address:	Office of the Managing Director
'Dirpost', Nairobi	P O Box 30301
Tel. Nbi. 27401 Ext.290	Nairobi Kenya

Your Ref……

28 November 1986

P O Ref DF: 7011/CA

M/s Kam Consult

P O Box 51630

Nairobi

Dear Sirs

Gilgil Junior Staff Quarters

I writing to inform you that you have been commissioned as Electrical and Mechanical Engineers for the above project.

The Consultants/Architects for this job are as follows:

a)	Architects	M/s A.J. Odera and Associates
b)	Quantity Surveyors	M/s Michie Consultants
		P.O. Box 14169
		Nairobi
c)	Structural/Civil Engineers	M/s Abdul Mullick Associates
		P O Box 47530
		Nairobi

You will therefore be required to work in constant consultation with them.

The terms of this commissioning shall comply with the current edition of the conditions of engagement and scales of fees for professional services for building works issued by the Ministry of Works, Housing and Physical Planning in 1974.

You will be required to observe the general principles laid down by our Tender Board appertaining to Electrical/Mechanical Engineers in private practice when acting as Electrical/Mechanical Engineers on building works for the corporation. This commissioning is subject to cancellation if the corporation will not be satisfied with your performance.

Finally, I should be glad if you would confirm your acceptance of this commissioning in accordance with the terms of this letter.

Yours faithfully

P G Ndarua

Chief Architect

For: Managing Director”.

The second one read:

"Kenya Posts and Telecommunications Corporations

Telegraphic Address:	Office of the Managing Director
'Dirposts', Nairobi	P O Box 30301
Telephone:	Nairobi
Nairobi 27401 Ext.2290	Kenya

Your Ref. …

15 July 1988

P O Ref DF: 7011/CA

Messrs Kam Consult

P O Box 51630

Nairobi

Dear Sirs

Ngong Road Complex and Staff Quarters

I am writing to inform you that you have been commissioned as Electrical and Mechanical Engineers for the above project.

The Consultants/Architects for this job are as follows:

(a)	Consulting Engineers P.O. Box 50828 Nairobi	Messrs Kigoni and Partners
(b)	Quantity Surveyors P.O. Box 44142 Nairobi	Messrs Muambi Associates
(c)	Architect P.O. Box 21163 Nairobi	Messrs Emkay Designers

You will therefore be required to work in constant consultation with them.

The terms of this commissioning shall comply with the current edition of the conditions of engagement and scales of fees for professional services for building works issued by the Ministry of Works, Housing and Physical Planning in 1974.

You will be required to observe the general principles laid down by our Tender Board appertaining to Electrical/Mechanical Engineers in private practice when acting as Electrical/Mechanical Engineers on building works for the corporation. This commissioning is subject to cancellation if the corporation will not be satisfied with your performance.

Finally, I should be glad if you would confirm your acceptance of this commissioning in accordance with the terms of this letter.

Yours faithfully

P G Ndarua

Chief Architect

For: Managing Director".

The Respondent replied to the first letter as follows:

"DF: 7011/CA

Kc/E3 1/001

4/12/86

The Chief Architect

Kenya Posts and Telecommunications Corporation

P O Box 30301

Nairobi

Dear Sir

Re: Gilgil Junior Staff Quarters

We acknowledge with thanks your letter Ref DF: 7011/CA dated 28 November 1986 commissioning us as Electrical and Mechanical Engineers/Consultants for the above project.

By this letter, we wish to confirm our acceptance of the commission and the terms and conditions as per your letter.

We are grateful for this commission and promise to work diligently and to co-operate with the rest of the design team for satisfactory results.

Yours faithfully

P K Ikigu

For: Kamconsult".

To the second letter, he replied as follows:

"DF 7011 /CA

Kc/. E059/001

19 December 1988

The Managing Director

Kenya Posts and Telecommunications Corporation

P O Box 30301

Nairobi

Attention: The Chief Architect

Dear Sirs

Re: Ngong Road Sports Complex and Staff Quarters

We acknowledge with thanks your letter Ref DF: 7011/CA dated, 15 July 1988, commissioning us as the Electrical/Mechanical Consultants for the above project.

With this letter, we wish to confirm our acceptance of this commission, and the terms and conditions as per your letter.

We are grateful and once again thank you for this commission and we promise to work diligently in co-operation with the other Consultants for the success of the project.

Yours faithfully

P K Ikigu

For: Kamconsult".

The Applicants argued that the letters of commission did not constitute offers because the expression "offer" was not employed therein; they did not identify the subject matter of the contract; the consideration was not stated and the duration of the works was not also stated. In short, their arguments were that there was no definite promise on certain terms. A plethora of authority was cited in support of the proposition that without a definite offer on certain terms made with the intention to create a legal relationship there could be no contract created even if there had been acceptance of what the offeree thought had been an offer. It was however conceded that if the articles of agreement in the 1974 conditions had been signed, all the necessary certainties of the contract would have been provided.

The Respondent on his part argued that the letters of commission were offers which incorporated the 1974 conditions and by accepting the said commissions, valid legal contracts had been created between the parties. It was further argued that indeed such contracts had been recognized by Kenya Posts and Telecommunications Corporation (KPTC) the predecessor of the Applicants.

It was also argued that the contracts had not been disputed at any time and indeed there had been performance of the said contracts by the Respondent and KPTC had made part payment therefor.

As I stated at the beginning of this ruling, the arguments canvassed before me had been canvassed before the Arbitrator. The learned Arbitrator dealt with the matter in part 4 of his ruling. He delivered himself as follows:

> "4 Jurisdiction and the Arbitration Agreement. Because the arbitral jurisdiction flows from the arbitration agreement the objection to jurisdiction is in effect an objection to the existence or validity of the arbitration agreement. Section 17 of the Arbitration Act of 1995 confers power on the qrbitral tribunal to rule on its own jurisdiction and any objections to the existence or validity of the arbitration agreement. So, was there an arbitration agreement between KPTC and Kamconsult?"

An arbitration agreement may be a clause in a contract or a separate agreement (section 4(1) 1995 Act) and must be in writing and it is in writing if contained in:

(a) a document signed by the parties (section 4(3)(*a*))

(b) an exchange of letters which provide a record of the agreement (section 4(3)(*b*)) or

(c) undenied pleadings (section 4(3)(*c*)) (my paraphrasing of the statute).

It is clear from their submissions that Respondent counsels are looking for a single document signed by KPTC and Kamconsult they can point at as the contract between the parties containing the arbitration clause or agreement. Indeed an arbitration agreement can be contained in a single document signed by the parties in terms of section 4(3)(*a*) of the statute. But this is not the only way to constitute an arbitration agreement which can also be formed by an exchange of letters, telex, telegram etc which provide a record of the parties' agreement in terms of section 4(3)(*b*) of the statute. The Claimant in this dispute relies on an exchange of letters etc as creating the parties' agreement containing the arbitration clause upon which, they submit, the arbitral jurisdiction is founded.

The principal documents relied on as constituting a record of the parties' agreement containing the arbitration clause are:

A) The Letters of Offer or Commission from KPTC dated 28 November 1986, 17 June 1988, 15 July 1988, 28 October 1992, 21 and 22 August 1990 all signed by the Chief Architect for the managing director of the KPTC.

B) The Conditions of Engagement and Scales of Fees For Professional Services For Building and Civil Engineering Works 1974 Edition incorporated by reference in the offers of the same dates and under the same signature.

C) The Letters of Acceptance by the Claimant dated 4 December 1986, 19 December 1988, 29 October 1990, 24 August 1988, 4 July 1988 duly signed by the Claimant.

It is at once apparent that the contract in dispute is not constituted by only one document or The Conditions of Engagement alone (marked B above) but by the sets of documents (marked A, B and C) which together form the parties' agreement embodying the arbitration clause. On this consideration I find that the submission by Respondent counsels that there is no contract because the requirement in the letter of commission that the "terms of commission shall

comply with the current edition of the Conditions of Engagement" was not fulfilled for lack of signature on the Conditions of Engagement is mistaken. The first reason is that the Commission Letters were offers signed by the offeror incorporating by reference the Conditions of Engagement and what was required to constitute the contract was not a signature on the incorporated document but acceptance of the offers by the offeree (Claimant) which in this case were the signed letters of acceptance marked "C" above. Secondly the compliance requirement simply means that the Claimant shall perform the contract in accordance with the incorporated terms and conditions of engagement. It did not require the Claimant to sign a separate contract. Thirdly the three documents marked A,B and C above together disclose the following particulars:

(i) The names of the contracting parties being KPTC and Kamconsult

(ii) The signatures of the parties of their respective letters of offer incorporating by reference the Conditions of Engagement 1974 Edition and the corresponding letters of acceptance.

(iii) The name and profession of the consultant engaged as Mechanical and Electrical Engineers for the project (for instance Kamconsult).

(iv) The description of the projects in the letters of offer and acceptance.

(v) The dates of the correspondence and therefore the probable dates of the contracts.

(vi) The terms of commission and obligations of the parties per the incorporated "Conditions of Engagement".

The submission that the articles of agreement and conditions of appointment must be signed before a contract can subsist between the parties might have been true and valid were the conditions of engagement the only contractual document; but the submission is false and invalid because in this instance the Conditions of Engagement were incorporated by reference in the offer and acceptance consisting the contract. Indeed section 100 of the articles of agreement, conditions of appointment headed "Articles of Agreement" is blank but the particulars missing on that page are known and ascertainable from the combined documents A, B and C above which form a record of the parties' agreement in terms of section 4(3)(*b*) of the statute.

In construction contracts the "Articles of Agreement" are known to record in general terms what the parties have agreed to do and they tie the parties' obligations to the conditions and to the other contract documents.

I find and conclude that the particulars listed above (i–vi) constitute the parties' obligations as set out in their correspondence (documents A and C) which they have tied to the Conditions of Appointment (document B) thereby creating the parties' contract containing the arbitration clause or agreement in document B in terms of section 4(1) of the 1995 Act. It should be emphasised that it was KPTC that incorporated the Articles and Conditions of Appointment (1974) into their offer which upon acceptance by Kamconsult constituted the underlying contract and that in general there is nothing to prevent the incorporation of an entire standard form contract by simply referring to it (Murdoch and Hughes; Construction Contracts page 152) as done by the signed Commission Letters that obviate any further need to sign the Articles of Agreement already incorporated by reference. Again it was KPTC that used the term "Condition of Engagement" in undeniable reference to "The Articles of Agreement, Conditions of Appointment … for Consulting Engineers 1974" for

which reasons I have in this ruling used the terms "Conditions of Engagement", "Articles of Agreement" and "Conditions of Appointment" interchangeably as appropriate.

The arbitration agreement or clause is found under section 219 of the Conditions of Appointment 1974 Edition which is one of the composite documents (document B) of the parties' contract and because it is in writing and contained in "an exchange of letters … which provide a record of the agreement"

I find that and rule that it is an arbitration agreement within section 4(3)(*b*) of the Arbitration Act 1995. Further because the Commission Letters refer to the Conditions of Engagement containing an arbitration clause that constitutes an arbitration agreement in a written contract between the parties I find and rule that the arbitration clause is part of the parties' contract in terms of section 4(4) of the 1995 Act.

Having considered the submissions made before me and the ruling of the arbitrator on the issue, I am impelled to state that I completely agree with the arbitrator that the arbitration clause in section 219 of the conditions of appointment (1974 edition) is an arbitration agreement within the contemplation of section 4(3)(*b*) of the Arbitration Act of 1995 for the reasons stated in his ruling. The only thing I would want to add is that in construing whether a particular document constitutes an offer, the court should consider the overall tenor and content of the same. It is not necessary that the word "offer" be expressly employed. In this connection the expression. "You have been commissioned", in my opinion, means and can only mean that the addressee has been offered a task or job to do. When the commission was accepted, a contractual relationship whose specifics were contained in the 1974 conditions – which document had been incorporated into the offer by KPTC itself by reference was created between KPTC and the Respondent.

As regards the alternative submission that the root of the matter before the arbitrator was the parties' subsequent agreement between the parties on the quantum and mode of payment of fees and that such agreement did not embody an arbitration agreement, I am of the opinion that this subsequent agreement cannot properly be severed from the main contract between the parties which I have already found did contain an arbitration clause. This is for the reason that the issue of fees and the mode of their payment could not conceivably have arisen if there had been no contract for services between the parties in the first instance. The Applicants' argument is accordingly rejected.

The second main issue canvassed before me was that the Respondent's claims were not arbitrable because they were statute barred. It is common ground that by the time the Respondent made its claims initially, the limitation period of one year prescribed by section 109 of the Kenya Posts and Telecommunications Corporation Act (hereinafter referred to as the Act) had expired.

The Respondent's argument was that by engaging in mutual correspondence after the expiry of the limitation period, the parties kept the claim alive and that when KPTC thereafter acknowledged the claims and made some payment the claims were revived. The Applicants' argument on the other hand were that the Respondent's claims died on expiry of the limitation period and the same could not be revived by either the subsequent correspondence in which the Applicants expressly acknowledged the claims or by subsequent part payment. The arbitrator accepted the Respondent's submissions on this issue. No case law was

cited on the issue and I am not myself aware of any. I have therefore to approach the matter on the basis of my own construction of the relevant section. The Respondent invoked section 23(3) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya. It reads:

> "Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt".

The marginal note to section 23 reads "Fresh accrual of right of action on acknowledgement or part payment". It seems to me that as a matter of grammar the right which accrues afresh is the right to recover the debt or other pecuniary claim. The acknowledgement or part payment does not create a new or fresh cause of action. What it does is extend the accrual of the right of action in respect of the cause of action from the original date, which date in the case of a contract I apprehend to be the date of the alleged breach thereof, to the date of acknowledgement or part payment. It further commends itself to my mind that if the right of action is not available due to the expiry of the relevant limitation period, there can be no fresh accrual thereof as a result of acknowledgement or part payment. In my opinion, the only acknowledgement or part payment of legal consequence is one made within and before the expiration of the prescribed period of limitation. Such acknowledgement or part payment has the effect of making time run afresh from the date thereof. In other words, a dead right of action cannot be resurrected by subsequent actions by the person who would have been sued had the claim not been statute barred.

I am fortified in this view of the matter by what the learned editors of *Halsbury's Laws of England* (4 ed) state in paragraph 1080 with regard to the English Limitation Act of 1980. They state the law as follows:

> "The Limitation Act 1980 lays down provisions for the exclusion of time limits in cases of acknowledgement or part payment in certain actions. A current period of limitation may be extended under these provisions by further acknowledgements and part payments; *but a right action, once barred by the 1980 Act, cannot be revived be any subsequent acknowledgment or payment*"(emphasis mine).

Having taken the above view of the matter, I am inevitably constrained to differ with the learned Arbitrator's conclusions on the issue. I accordingly agree with the submissions of counsels for the Applicants that the arbitrator had no jurisdiction to enter into an arbitration of the claims by the Respondent as the same had become statute barred long before they were raised and subsequently acknowledged by KPTC. The parties could not by correspondence revive or keep alive a claim which is statute barred as found by the arbitrator. Neither was it right to hold, as the Arbitrator did, that the Respondent's right of action accrued when the Applicants refused to comply with the demand for payment. In my judgment, the right of action accrued when the contract was breached, that is in 1994 when KPTC stopped work on the project's subject matter of the contracts. It is inconsequential from a purely legal perspective that the Respondent did not demand its pound of flesh until 1996. A right of action cannot in

my view, be extended in time by the fact of postponement of the demand for redress of the injury caused to the Claimant.

The third ground canvassed in support of the contention that the arbitrator had no jurisdiction was that the Respondent's claims were fraudulent and, accordingly, to enforce them would be contrary to public policy. It was common ground and the arbitrator himself acknowledged as much that fraud, if proved, could vitiate or nullify the claim and that it would be against public policy to benefit from a fraudulent claim. The Respondent's submissions both before the arbitrator and this Court were that there was no evidence of fraud and the allegations of the same were only contained in the pleadings. It was further contended that such serious allegations could not be determined without a hearing.

Having considered the submissions of the parties before me, I agree completely with the submissions of the Respondent's counsel that fraud is something which can only be found on the evidence after a hearing and that the arbitrator could not have been expected to down his tools on the basis of mere allegations in the pleadings and the submissions of counsels, however robust, that the claim before him for arbitration was fraudulent. To accept the Applicants' submissions that once fraud is raised, an arbitrator should down his tools would probably kill most arbitrations for there would be no shortage of counsel to throw allegations of fraud at the arbitrators. Such a stance would not aid but subvert the public policy of letting parties settle their disputes by the process of arbitration if they have chosen so to do. The party alleging fraud had to prove the fraud by calling evidence before the arbitrator. If the arbitrator was satisfied that the claim was fraudulent, he would then have terminated the proceedings on grounds of public policy. That was not done. In the premises I reject this ground of challenge to the arbitrator's jurisdiction as being unmeritorious.

The fourth and last ground taken by the Applicants was that the arbitrator had no jurisdiction for the reason that the contracts which were the subject matter of the arbitration were illegal in that the same were made in breach of the statute and were accordingly unenforceable by any legal process. This contention was predicated on the undisputed fact that the value of the projects in question exceeded KShs 5 million. The Applicants' argument was that by virtue of the provisions of section 10(*d*) of the KPTC Act, the managing director could on his own only approve and thus commit the corporation to capital work whose estimated costs did not exceed KShs 400 000 or such other sum as the Minister may determine. Anything over and above that up to a maximum of KShs 5 million required ministerial approval by dint of section 11(*c*). And any project whose estimated costs exceeded KShs 5 million could only be approved by the Minister in consultation with the Minister for Finance as per section 12(*d*). So, according to the Applicants, the contracts in question were in excess of the discretion of the managing director and did require the approval of the Minister in charge of KPTC in consultation with the Minister of Finance.

The Respondent's answer to this ground of challenge was threefold. In the first instance, it was argued that approval of the Minister was not mandatory as the language employed in sections 10, 11 and 12 of the Act was permissive by virtue of the use for the words "may" instead of shall. Secondly, it was submitted that the allegation that ministerial approval for the contracts was not obtained was a statement from the bar which was not contained in any pleading.

Thirdly, it was contended that the legal notices issued in 1999 by the then Minister of Finance transferring the assets and liabilities of KPTC to its successors and which specifically mentioned the deferred project's subject matter of the consultancy contracts in question were an acknowledgement of the Minister's awareness and approval of the projects. In a brief reply to these points, counsels for Telkom Kenya argued that on a proper construction of sections 10 of the Act, the discretion is to enter or not to enter into contracts within the prescribed limit and not whether or not to seek approval for contracts whose value was beyond the prescribed limits. Counsel further argued that to construe the section otherwise would render sections 11 and 12 superfluous. In his view that could not have been the intention of Parliament.

On a consideration of the above submissions, I take the following view of the matter. Sections 10, 11, and 12 of the repealed KPTC Act conferred powers on the managing director, the board and the Minister respectively to among other things approve certain contracts. Considering that the corporation was a public body generating and expending public funds, it was necessary in the interests of proper accountability and the system of checks and balances within the corporation for both the board and the Minister to approve certain expenditures. The discretion imported by the words "may" was a discretion to approve or not to approve the capital projects when the same were presented for their approval. The managing director had no discretion and could not have been expected by Parliament to have a discretion whether or not to present such contracts to the board or the Minister as the case may have been. I agree with counsel for Telkom Kenya that if a different construction of the provisions were adopted the absurd result that sections 11 and 12 of the Act were superfluous would come to pass. An interpretation of a statute which leads to an absurd result is to be avoided whenever possible.

As regards the Respondent's submission that the Applicants' submission that ministerial approval was not obtained is a mere statement from the Bar without any foundation in the pleadings, I have come to the conclusion that the Respondent's submission is well founded. There is no deposition in any of the two affidavits sworn in support of the originating summonses by the Applicants that ministerial approval was neither sought nor obtained for the contracts in question. And as the burden of proving an illegality or contravention of a statute lies on the person so alleging such contravention, I must find that the affirmation that the contracts in issue offended the Act is not proven. Moreover, and this is equally important, as the challenge to the Arbitrator's jurisdiction comes to this Court by way of a reference from the arbitrator's ruling on his jurisdiction, I think it is imperative that all grounds of challenge to such jurisdiction should first be raised and canvassed before the arbitrator. It was therefore necessary to lead any evidence on want of ministerial approval of the projects before the arbitrator. Be that as it may, I must for the sake of completeness of this aspect of the matter consider whether the Minister could be said to have approved the contracts in question by virtue of his signing and publishing the legal notices which transferred the assets and liabilities of KPTC to its successors. In that regard, I have no hesitation in rejecting the submission of counsel for the Respondent. In my judgment, the Minister was not supposed to approve the contracts retrospectively. He was to do so at the time the projects were initiated. The intention of Parliament in requiring ministerial approval of certain projects was to ensure that public funds were spent only on well considered

projects for the public benefit. Such a requirement would have been thwarted by any countenance of the validity of retrospective approval of such projects. In the result, I am of the opinion that the attack on the arbitrator's jurisdiction on the ground that the contracts were contrary to statute must fail for the reason that the same is not well founded as a matter of fact and the attack was in any case wrongly raised for the first time before this Court before the arbitrator had been afforded an opportunity to consider the same.

The upshot of my consideration of this reference is that all grounds of challenge to the arbitrator's jurisdiction save one are rejected. The only ground which is upheld is that the Respondent's claims were statute barred by the time they were raised and accordingly the arbitrator had no jurisdiction to decide a claim which was statute barred. Such a claim is incapable of settlement by arbitration. In the result I find and hold that the arbitrator has no jurisdiction to arbitrate over the claims by Kamconsult Ltd against either Telkom Kenya Ltd or Postal Corporation of Kenya Ltd. It follows that the cost of this reference should be and are hereby awarded to the Applicants.

Finally, I must state that it is not for this Court to terminate the arbitration proceedings. That is for the arbitrator to do. It is also for him to consider and direct by whom the costs of the arbitration proceedings before him are to be borne. Those, then, are the orders of this Court.

For the Applicants:
Information not available

For the Respondent:
Information not available

Vadag Establishment v Shretta
[2001] 2 EA 587 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of judgment:	16 February 2001
Case Number:	83/00
Before:	Gicheru, Omolo and Akiwumi JJA
Sourced by:	LawAfrica
Summarised by:	W Amoko

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[1] Company law – Winding-up proceedings – Contributories petition – Application to strike out petition as an abuse of process as there was an alternative remedy – Application granted in part – Parties by consent agreeing to refer all disputes to arbitration – Whether High Court has jurisdiction to retain interim liquidators appointed ex parte *– Section 235 – Companies Act (Chapter 486).*

[2] Company law – Winding-up proceedings – Contributories petition – Application to strike out petition as an abuse of process as there was an alternative remedy – Application granted in part – Parties by consent agreeing to refer all disputes to arbitration – Whether competent for High Court to include non-parties to suit as parties to arbitration.

[3] Practice and procedure – Right of appeal – Consent order barring appeal – Jurisdiction of Court – Whether fact that High Court exceeded its jurisdiction would entitle party to appeal – Whether company barred from participating in appeal.

Editor's Summary

On 16 October 1996, YS filed a petition praying that LLL, a company in which he was a contributory, should be wound up on the ground that it was just and equitable to do so. Simultaneously, he applied for and obtained orders, *ex parte*, for the appointment of his two nominees as joint interim liquidators ("JIL") for LLL. Before this application could be heard *inter partes*, LLL took out an application to have the *ex parte* orders set aside. In the meantime, PCCL, under a debenture that was later contested by YS, appointed joint receiver-managers over LLL. Ole Keiwua J heard and dismissed LLL's application and further ordered that the JIL and the receivers were to co-exist. LLL appealed while YS cross-appealed with respect to the co-existence order. The appeal was dismissed and the cross-appeal allowed with directions that YS's application should proceed for *inter partes* hearing. Afterwards, VE, the majority shareholder in LLL, made an offer to buy out YS and negotiations ensued. Agreement was not reached on the price of the Petitioner's shares. VE then applied to have the petition struck out on the ground that it was an abuse of process as there was an alternative remedy available and the Petitioner was acting unreasonably in pursuing the winding-up proceedings. On 31 July 1998, Ole Keiwua J delivered a ruling in which he concluded that there was an alternative remedy available, stood over the application and stayed further proceedings to enable the parties to agree on terms upon which the price of YS's shares in the company could be referred to arbitration. It was ordered that the matter would be re-listed for further hearing in default of agreement. YS's appeal from this decision foundered on procedural difficulties. The parties being unable to agree came before the court (Mbaluto J) and eventually recorded a consent to arbitration whereby all differences between VE, YS, Numised (another shareholder) and LLL were to be referred to arbitration, each party was to submit terms upon which the matter would be referred to arbitration, and failing agreement, the terms would be determined by the Judge. No agreement was reached and after hearing argument, the Judge delivered a ruling which basically adopted, for the most part, YS's proposed terms. VE appealed.

Held – VE was not barred by the terms of the consent order from lodging an appeal against the Judge's orders, as on the face of it, he had exceeded its terms. Once a court exceeds the jurisdiction conferred upon it by a consent order, that excess of jurisdiction entitles a party affected to appeal.

As LLL was named in the consent order as a party to the proposed arbitration, it was entitled to actively take part in the appeal and no question of misfeasance arose.

Once it was found (as Ole Keiwua J had found) that there was an alternative remedy available to a petitioner, the parties having agreed that all the differences between them were to be referred to arbitration, and the terms upon which the matter was to go to arbitration having been settled by the court, that petitioner was not entitled to a winding-up order. The Judge *in casu* should therefore have dismissed the petition. It was no longer alive. *Re A Company* [1983] 1 WLR 927 and *Re Kenwheat Industries (Number 1)* (ur) HCW number 37 of 1984 considered.

As there was no longer any probability that LLL would be wound up, and as the petition should have been dismissed, the basis of the appointment of the JIL was non-existent and the Judge had erred in ordering their retention.

The consent order spelled out who the parties to the arbitration were and the mere fact that Patcham Holdings was a wholly-owned subsidiary of Numised did not make it a party.

Appeal allowed and terms of the arbitration revised.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Brooke Bond Liebig (T) Ltd v Mally [1975] EA 266

Flora N Wasike v Destimo Wamboko [1982–88] 1 KAR 625

Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd and another CA number 276/1997 (Ur)

United Kingdom

Re A Company [1983] 1 WLR 927 – **C**

Re Kenwheat Industries (Number 1) HCW number 37 of 1984 – **C**

Judgment

GICHERU JA: Vadag Establishment, the Appellant herein, which is a company that was incorporated in Liechtenstein on 18 August 1971 with a statutory domicile in Vaduz, holds 60% of the shares in Leisure Lodges Ltd, the Fourth Respondent in this appeal and hereinafter called the company, which was incorporated in Kenya on 18 December 1970. That shareholding by the Appellant is upon trust for Zorba Ltd, a company incorporated in Jersey, Channel Islands and whose shareholders are Kenya and overseas members of the Kantaria family which owns the Prime Bank Ltd in Kenya which is the company's banker. Numised AG, a company which was incorporated in Zug, Switzerland on 18 July 1971 holds 30% of the shares in the company of which 15% is upon trust for Patcham Holdings Ltd, a company incorporated in British Virgin Islands of the United Kingdom and allegedly owned by the family of Yashvin Shretta, the First Respondent holds the remaining 10% of the shares in the company in which 15% is upon trust for Zorba Ltd. The First Respondent holds the remaining 10% of the shares in the company so that the Kantaria family has 75% interest in the company while the family of the First Respondent has 25% interest in the company. Subsequent to the acquisition of these family interests in the company, the latter's board of directors now comprised of the First Respondent, Mr Rasiklal C Kantaria who was appointed by Zorba Ltd and the company's managing director who was to report directly to Mr Rasiklal C Kantaria on all financial matters and to the First Respondent on other matters. Thereafter, two other members of the Kantaria family became members of the company board of directors to the chagrin and subsequent disillusionment of the First Respondent in the running of the company. This was the starting point in the souring of the relationship between the First Respondent and Mr Rasiklal C Kantaria representing the majority shareholders

in the company which was characterised with accusations and counter-accusations which included allegations of fraud and misfeasance against the company. Attempts to resolve the differences between them bore no fruit including the First Respondent's offer to buy all the shares in the company that are held or are under the control of the majority shareholders or in the alternative the majority shareholders buy the 25% of the shares in the company that are held or are controlled by the minority shareholders. According to the First Respondent therefore, he lost faith in the commercial integrity in the running of the company by its board of directors whose conduct of its affairs was oppressive to him. To the First Respondent therefore, it was just and equitable that the company should be wound up. Hence the filing of his winding-up petition of the company on 15 October 1961 together with an *ex parte* notice of motion seeking the appointment of Mr Hezekiah Wang'ombe Gichohi of HW Gichohi and Co, Certified Public Accountants of PO Box 34694, Nairobi and Mr George Kimeu of Waithaka Kiarie and Mbaya Associates, Certified Public Accountants of PO Box 55107, Nairobi as interim liquidators of the company. This latter application was granted on 16 October 1996 and the two gentlemen mentioned above who together are named as the Third Respondent in this appeal were appointed interim liquidators of the company. Attempts to have their *ex parte* appointment set aside have never succeeded and the notice of motion through which they were appointed *ex parte* has never been heard *inter partes.*

By a notice of motion under section 222(2)(*b*) of the Companies Act, Chapter 486 of the Laws of Kenya, hereinafter called the Act, rules 7 and 203 of the Companies Winding-Up Rules, Order VI, rule 13(1)(*d*) and Order 50, rule 3 of the Civil Procedure Rules and all the enabling provisions of the law and filed in the superior court on 20 January 1998, the Appellant herein sought orders of the superior court that the First Respondent's winding-up petition referred to above be struck out as being an abuse of the court process and that the Appellant be at liberty to apply for further orders and/or directions as the superior court deemed fit and just to grant. That motion was grounded on the First Respondent's averment in paragraph 26 of his winding-up petition that he had made several attempts to resolve the differences between him and the Appellant herein which included an offer to the Appellant to purchase the minority shareholding which he claimed to have been 25% of the company's issued share capital. Indeed, the First Respondent had indicated through an intermediary – DEG (a lender to the company and the eighth Respondent in this appeal) – in a letter dated 5 August 1997 that he was willing to consider selling the 25% minority shareholding in the company to the majority shareholders at a price of US$ 5 million which would include the price of shares and all his other claims provided that the deal was finalised before 30 September 1997. In the circumstances, the First Respondent had an alternative remedy and was using the winding-up proceedings to exert pressure on the majority shareholders to accept a price unilaterally set by himself.

This notice of motion came up for hearing before Ole Keiwua J, as he then was, who gave his ruling in respect thereof on 31 July 1998. In that ruling the Learned Judge said that the principle of section 222(2*)* of the Act is that the alternative remedy becomes available when it has been shown that the petitioner is entitled to the relief of winding up the company but that relief would be a harsh step to redress the minority shareholders' grievance. He then said:

"In this petition all that the Applicant seeks is a better forum that should determine the value of the petitioner's shares. The petitioner had suggested that the value of all his claims should be fixed by the court".

The Learned Judge then concluded thus:

> "Like Vinelot J in *Re A Company* case, I am of the view that the petitioner will not be entitled in the circumstances of this petition to have the company wound up. The proper order to make and I accordingly make is not that dismissing, or striking out the petition as prayed in the application. I think I would stand over the petition to enable the parties to agree the terms on which the matters of price of the petitioner's shares in the company may be referred to arbitration. All further proceedings on the petition will be stayed. The petition will be mentioned if an agreement is reached for further appropriate orders to be made on the petition. In the event of disagreement on the terms on which arbitration may be heard, then the matter be listed for argument on any such question of disagreement. The aspect of costs is reserved and will be dealt with later on the happening of any matters these parties are to deal with".

On 15 September 1999 counsel for the Appellant, the First Respondent, the company and the company's interim liquidators signed a consent order of the superior court the contents of which were as follows:

> "*Order:* By consent the terms of the agreement to refer are as follows:
>
> 1 That all the differences between Vadag Establishments (Vadag) the majority Shareholder, Yashvin Shretta (The Petitioner) and/or Numised Attorney-Genral (Numised) and Leisure Lodges Ltd (the company) be and are hereby referred to arbitration; and
>
> 2 That the parties hereto namely Vadag, the petitioner and/or Numised and the company do agree upon the terms of the reference within seven days of the date hereof and in default of such agreement the parties agree that this Honourable Court do determine the basis upon which the reference is made as well as the actual terms of the reference and such determination by this Court shall be final and binding on all the said parties.
>
> Signed:
>
> 1. Kamau Kuria for Petitioner and/or Numised.
>
> 2. Mr Ochieng' Oduol for Vadag.
>
> 3. Mr IT Inamdar for S Gautama for the company.
>
> 4. Mr JS Asige for the interim Liquidators.
>
> *Further Order:* Matter to be mentioned on 22 September 1999 at 9:00am
>
> Mbaluto J".

After the mention on 22 September 1999 the parties to the consent order set out above agreed to appear before the superior court, on 7 October 1999 for submissions on points of disagreement. This they did and eventually Mbaluto J gave his ruling on 3 March 2000. In the ruling, the Learned Judge observed that the consent order was made in the course of hearing the application by the majority shareholders to strike out the winding-up petition under section 222(2) of the Act and was therefore a continuation of the exercise commenced by the ruling of Ole Keiwua J, as he then was. It was therefore to be interpreted within the context of that ruling. According to the Learned Judge, however, despite the consent order to refer all the differences between the parties to arbitration, the dispute between the parties as detailed in the petition was still alive and was yet to be resolved. Until this was accomplished, according to the Learned Judge, the parties may have to go back to the winding-up petition and have it heard as the court, continued to exercise jurisdiction over the matter as conferred upon it by law until all disputes between the parties

arising from the petition had been resolved one way or the other. To the Learned Judge, the petition was merely stood down to enable the parties to pursue the matter of the alternative remedy as encapsulated in the consent order.

As regards the removal of the interim liquidators, the Learned Judge observed that until the dispute between the parties was resolved, there was need to protect the assets of the company and that function could be successfully performed by the interim liquidators who after all were officers of the court. They were therefore, according to him, to remain for that purpose until the very end of the arbitral process. These holdings by the Learned Judge prompted the Appellant's appeal to this Court, which comprised of 60 grounds of appeal.

The thrust of the Appellant's grounds of appeal revolved around the effect of the alternative remedy to the First Respondent's winding-up petition; the role of the interim liquidators thereafter; and bringing into the arbitral process parties who had no part in the consent order set out in this judgment.

Dealing with these issues, Mr *Oraro* who appeared with Mr *Ochieng' Oduol* for the Appellant, submitted that the mode of resolving all the differences between the parties to the consent order had been agreed upon and encompassed in that order. This was by referring these differences to arbitration so that that reference alone took away the jurisdiction of the court over the said differences save as is provided by the Arbitration Act number 4 of 1995. Once the issue of the price of the First Respondent's shares was referred to arbitration for determination, the dispute between the parties to the consent order was no longer alive in court and the substratum of the First Respondent's winding-up petition collapsed. Indeed, the ruling of Ole Keiwua J as he then was, was categorical that the company would not be wound up. To Mr *Oraro* therefore, the First Respondent's winding-up petition could not survive the consent order referring all disputes between the parties to arbitration.

In regard to the removal of the interim liquidators, the submission of counsel was that if the First Respondent's winding-up petition did not survive the alternative remedy encompassed in the consent order, then, the survival of the interim liquidators was without a base. Finally, Mr *Oraro* submitted that in bringing into the arbitral process Numised Attorney-Genral and Patcham Holdings Ltd, the Learned Judge was in error as those two companies were not parties to the dispute that was the subject matter of the consent order.

Mr *Inamdar* for the company generally agreed with the submissions made by Mr *Oraro* but added that once the terms of reference were incorporated into the consent order, the reference to arbitration of the dispute between the parties to that order became complete. Nothing of the First Respondent's winding-up petition remained thereafter. It ceased to exist and once that factor was acknowledged, then, it was obvious that the existence of the company's interim liquidators was at an end. Mr *Inamdar* then concluded by submitting that in determining the basis upon which the reference to arbitration was made and the actual terms of reference, the superior court had no discretion to widen the scope of the consent order. Indeed, the terms of reference had to be within the ambit of the first paragraph of the consent order otherwise they would be in excess of the powers given to the court in that regard by the consent order.

According to Mr *Kamau Kuria* for the First Respondent, the consent order notwithstanding, the contingencies envisaged by the superior court remained in

place. For that reason, it was necessary to safeguard the First Respondent's payment for his shares considering the history of the broken promises by the Appellant. It was therefore necessary to preserve the winding-up petition and the office of the interim liquidators so as to safeguard the assets of the company. In this and in bringing Numised Attorney-Genral and Patcham Holdings Ltd into the ambit of the consent order, the Learned Judge was not in error particularly in regard to the latter two companies' interest in the company.

The submission of Mr *Asige* for the interim liquidators was simply that as officers of the Court they would abide with the decision of the Court in this appeal.

In his ruling referred to earlier in this judgment Ole Keiwua, as he then was, following the decision of Vinelot J in the case of *In re A Company* [1983] 1 WLR 927 at 936 said that he was of the view that the First Respondent would not be entitled to have the company wound up in the circumstances of his petition. The Learned Judge then proceeded to stand over the petition to enable the parties thereto to agree the terms on which the matters of the price of the First Respondent's shares in the company may be referred to arbitration. Subsequent thereto, the parties signed a consent order referring all the differences between them to arbitration and thereafter the terms of reference in respect thereof were formulated by the court. The relevant portion of the decision of Vinelot J in the case cited above in relation to the matters in difference between the parties hereto is at 936 letter H of the citation and it reads as follows:

> "I will, therefore, stand over this petition to enable the parties to agree to the terms of a submission: to arbitration or to an expert; in the meantime, all further proceedings on the petition will be stayed. The matter can be mentioned to me if an agreement can be reached and at that stage the petition will be dismissed".

In the instant appeal, when the matter relating to the First Respondent's petition came up before Mbaluto J on 15 September 1999 an agreement to refer all the differences between the parties affected by the First Respondent's petition to arbitration had been reached the result of which was the consent order set out. In this judgment. At that stage therefore, alternative remedy to the First Respondent's winding-up petition was in place and the only remaining role for the court was to make a judicatory order dismissing the said petition. Once this order is made, the office of the company's interim liquidators would be without any basis for its existence. In not dismissing the First Respondent's winding-up petition at the stage referred to above for the reason that unforeseen contingencies may frustrate the realisation of the First Respondent's alternative remedy and in not discharging the company's interim liquidators for the reason that to do so the company's assets would be unprotected during the pendency of the arbitral proceedings, the Learned Judge in his ruling given on 3 March 2000 in this regard was clearly wrong for the scheme of the Arbitration Act 4 of 1995 took care of these contingencies.

In formulating the terms of reference as mandated by paragraph 2 of the consent order, the superior court was naturally required to do so within the confines and spirit of the entire consent order. Outside these confines and spirit, such terms of reference were a nullity and of no effect as between the parties to the consent order. The Learned superior court Judge was therefore in error in his ruling referred to above when he formulated terms of reference number 2 that required Numised AG to file a resolution agreeing to divest itself of the

shares it holds in the company in trust for Patcham Holdings Ltd; number 4 that Patcham Holdings Ltd holds (through Numised) 15% of the shares in the company in interim liquidation; Number 7(*b*) which stipulated that the interest of Patcham Holdings Ltd in the company may be purchased by the majority shareholders; Number 9 that required the arbitration tribunal to commence its deliberations within thirty (30) days of receipt of a resolution by Numised AG to divest itself of the 15% of the shares it holds in the company; and Number 10 that required Vadag Establishment to pay within thirty (30) days the price of the 15% shares Numised AG holds in the company in such manner as the court shall direct as they concerned matters outside the confines of the consent order.

From what I have attempted to outline in this judgment, I would allow the Appellant's appeal, set aside the orders of the superior court given an 3 March 2000 and order that the First Respondent's winding-up petition in the superior court be dismissed with costs to the Appellant and that the company's interim liquidator appointed on 16 October 1996 be and are hereby discharged forthwith but are to file in the superior court within hundred and twenty days from the date hereof, audited financial statements including profit and loss account and balance sheet for the period of their tenure commencing 18 October 1996 up to and including the date of this judgment. I would also order that the terms of reference number 2 be deleted, number 4 be deleted, number 7(*a*) be amended by adding the words "in the company may be purchased by the majority shareholder". Number 7(*b*) be deleted, number 9 be amended by deleting the words "within Thirty (30) days of receipt of a resolution by Numised AG to divest itself of 15% of the shares it holds in the company" and be substituted by the word "forthwith" and number 10 the words "Vadag Establishment shall also pay within the same time the price of 15% shares Numised AG holds in the company in such manner as the courts shall direct" be deleted. Finally, I would award the costs of this appeal and those incurred in the superior court as relates to the proceedings from which this appeal arises which costs shall be due and payable to the Appellant by the First Respondent. As Omolo and Akiwumi JJA agree, it is so ordered

OMOLO JA: As must be obvious from the voluminous nature of the record of appeal, the dispute before us is of a respectable and, to a very large extent, acrimonious ancestry. It started with a winding-up petition dated and lodged in the superior court on 15 October 1996, and by that petition, Yashvin A Shretta humbly prayed and asked the superior court to wind up a company called Leisure Lodges Limited on the ground that it was just and equitable to do so by section 219(*f*) of the Companies Act, hereinafter called the Act. Yashvin A Shretta was and still is a contributory in Leisure Lodges Ltd. I shall hereinafter refer to Shretta as the First Respondent and to Leisure Lodges Ltd as "the company". The First Respondent's winding-up petition contained a further prayer that a person other than the Official Receiver be appointed under section 231 of the Act, "or such other or further order may be made in the premises as the court shall deem just". Simultaneously, with the petition, the First Respondent filed a notice in motion under sections 231, 237, 239 and 241 of the Act and that motion had three principal prayers, namely:

> "1 That service of this application upon the Respondent be dispensed with in the first place due to the urgency and circumstances of this matter.
>
> 2 That Hezekiah Wang'ombe Gichohi of H.W Gichohi and Co, Certified Public Accountants, P O Box 34694, Nairobi and Mr George Kimeu of Waithaka

Kiarie and Mbaya Associates, Certified Public Accountants, P O Box 55107 Nairobi, be appointed the interim liquidators of the above mentioned company, Leisure Lodges Ltd.

3 That the powers of the said Mr Hezekiah Wang'ombe Gichohi and Mr George Kimeu Ltd be restricted to the powers set out in section 241 of the Companies Act Chapter 486 except section 241 (2)".

This motion, which was brought under a certificate of urgency, was heard *ex parte* by Mr Justice Ole Keiwua on the same day it was filed, namely 16 October 1996 and the Learned Judge gave the orders prayed for therein. The Judge further ordered that the motion be heard *inter partes* on the 30 October 1996.

The next step in the battle was that on the 18 October 1996, two days after the order of 16 October 1996, a chamber summons under a certificate of urgency was filed by the company itself seeking an order: "that the *ex parte* order, herein made on the 16 October 1996 be set aside or pending the *inter partes* hearing of the petitioner's application on 30 October 1996 and the costs of this application be provided for".

The chamber summons was also stated to be *ex parte*. Once again the summons was placed before the same Learned Judge on the very day it was filed and he made two orders on it, namely:

"1 That the company's application dated 18 October 1996 be heard at 11.00 am on 24 October 1996.

2 That pending the hearing, the interim liquidators shall not advertise in the Kenya Gazette or, newspapers or otherwise the fact of their Appointment".

It would appear from the record of appeal that though there were various side-shows going on at the same time, the parties thereafter concentrated their energies on the company's chamber summons of 18 October 1996. The summons was heard before the Learned Judge on various days and on the 27 November 1997, he delivered a considered ruling dismissing the company's summons but made a further order that:

"[P]ending the hearing and determination of the Petitioner's and Prime Capital Limited's respective applications the notice of appointment of the Interim Liquidators be not advertised and the Interim Liquidators do co-exist with the Receivers and Managers appointed by the said Prime Capital and Credit Limited".

Prime Capital and Credit Limited had alleged they had lent money to the company and held a debenture over the company's assets. On the very 18 October 1996, when the company filed its chamber summons seeking the setting aside or suspension of the orders made on 16 October 1996, Prime Capital and Credit Ltd had, pursuant to its debenture, appointed one Arun Shah, Certified Public Accountant of PO Box 43825, Nairobi, to be a receiver and manager of the company. It was this situation which the further order of Ole Keiwua J as he then was, was meant to take care of.

The company appealed to this Court against the orders made on the 27 October 1997 and the First Respondent also cross-appealed against that part of the order which allowed Arun Shah to co-exist with the court appointed receivers. The company's appeal was dismissed while the cross-appeal was allowed. The parties were ordered to go back to the superior court and set down the First Respondent's notice of motion of 16 October 1996, seeking the appointment of interim liquidators for hearing *inter partes*. To date that motion has never been heard *inter partes*.

In the meantime, the combatants appeared to have been somewhat fatigued. Vadag Establishment, the Appellant, is the majority shareholder in the company. It appears that the Appellant made an offer to purchase the First Respondent's shares in the company and the parties engaged in negotiations, though it is obvious from the record that the negotiations were of a very bad-tempered nature. The next shot fired in the proceedings and which is of concern to this appeal is that on the 19 January 1998, Mr James *Ochieng' Oduol*, counsel for the Appellant, filed under a certificate of urgency a notice on motion under section 222 of the Act, rules 7 and 203 of the Companies' Winding-up Rules and Orders VI, rule 13(1)(*d*) and 50, rule 3 of the Civil Procedure Rules and the orders sought in that motion were:

> "1. That service of this application be dispensed with in the first instance and an urgent date be granted for the hearing of this application *inter partes*;
>
> 2. That the Petition filed herein by Yashvin Shretta dated the 16 October 1996, be struck out as being an abuse of the court process;
>
> 3. That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant;
>
> 4. That the costs of and incidental to this application be provided for".

The grounds on which this motion was made were:

> "(a) That the Petitioner at paragraph 26 of his Petition avers that he had made several attempts to resolve the differences between him and the Applicant which included, *inter alia*, the Applicant to purchase the minority shareholding which he claims was of 25% of the issued share capital.
>
> (b) That by a letter dated 5 August 1997, the Petitioner, through DEG offered to sell the minority shareholding in the company provided the same was concluded by 30 September 1997.
>
> (c) That the majority contributory Vadag Establishment has offered to purchase the petitioner's minority shareholding and has made a reasonable offer to purchase the same at a fair market value.
>
> (d) That the petitioner has refused the offer and is acting unreasonably in seeking to have the company wound up, instead of pursuing that alternative remedy.
>
> (e) That in the premises the Petitioner has an alternative remedy and is using the proceedings to exert pressure on the majority to accept a price unilaterally set by himself".

The motion was supported by a very detailed affidavit of one Virendra Ponda, an advocate of the High Court of Uganda and who swore he was the duly appointed representative of Vadag Establishment, the Appellant, and annexed to the affidavit were numerous documents evidencing negotiations between the Appellant and the First Respondent. It goes without saying that the motion was vigorously opposed by the First Respondent and the grounds of opposition filed in the superior court on the 27 July 1998, were that:

> "The Applicant is guilty of non-disclosure of material facts–
>
> There is no jurisdiction to make the application before the hearing of the petition–
>
> The application is barred by the *res judicata* rule–
>
> The application is an abuse of the process of the court–
>
> The object of the Applicant is to delay the hearing of the applications and of the petition herein".

There was also a replying affidavit sworn by the First Respondent which ran into some 38 paragraphs. The First Respondent did not, however, deny that there had been negotiations between the parties through an intermediary

named as Deutsche Investitions und Entwicklungsgeschaft mbH (DEG) and the purpose of the negotiations was obviously to settle the matter without necessarily winding up the company. The bottom line of the First Respondent's assertions in his replying affidavit was that the negotiations had in fact failed.

The motion to strike out the petition was once again fought out before Ole Keiwua J and in a well considered ruling covering some seventeen typed pages, the Learned Judge basically found that there was in fact an alternative remedy available to the First Respondent and the Learned Judge concluded his ruling as follows:

> "Like Vinelot J in *Re A Company* case I am of the view that the petitioner will not be entitled in the circumstances of this petition to have the company wound up. The proper order to make and I accordingly make is not that dismissing or striking out this petition as prayed for in the Application. I think I would stand over the petition to enable the parties to agree the terms on which the matters of the price of the petitioner's shares in the company may be referred to arbitration. All further proceedings on the petition will be stayed. The petition will be mentioned if an agreement is reached for further appropriate orders to be once in the petition. In the event of disagreement on the terms on which arbitration may be then the matter be listed for argument on any such question of disagreement. The aspect of costs is reserved and will be dealt with later on, on the happening of any matters these parties are to deal with".

This ruling was delivered on 31 July 1998. On 5 August the First Respondent filed a notice of appeal against the ruling and he did in fact lodge an appeal. The appeal so lodged was for one reason or the other struck out as being incompetent and the First Respondent's subsequent attempts to appeal were unsuccessful. The effect of that was that the orders made by Ole Keiwua J on the 31 July 1998, are still binding on the parties and as I have said, the Learned Judge specifically found that the First Respondent had an alternative remedy, namely, to go to arbitration on the issue of the price at which the Appellant is to buy his shares in the company. Because the First Respondent had this alternative remedy, the Learned Judge concluded that the First Respondent would not, in the circumstances, be entitled to a winding-up order as prayed for in his petition of 16 October 1996. However, relying on the decision of Vinelot J in the case of In *Re A Company* [1983] 1 WLR 927, the Learned Judge declined to either dismiss or strike out the petition at that stage but gave the parties the chance to work out the terms on which the dispute was to go to arbitration. The matter was to be mentioned before him to find out if the parties had reached an agreement; if they had not, the Judge himself would determine the terms on which arbitration was to be had. That was what Cockar J, as he then was, had done in 1984 in the case of In *Re Kenwheat Industries (No 1)* High Court civil case number 37/1984 (Ur).

Had Mr Justice Ole Keiwua continued to deal with the matter, I personally have no doubt that this appeal might not have come before us, or if it did, it would have been on a totally different form. But before he could deal with the matter again, the Learned Judge was made a member of this Court. In the meantime, the First Respondent, having failed in his attempts to appeal against the orders of 31 July 1998, had to comply with those orders and the parties started to work out the terms on which the price to be paid by the Appellant for the shares of the First Respondent was to be referred to arbitration. So on 15 September 1999, the following consent order was recorded before Mr Justice Mbaluto who had taken over the case:

"Order: By consent the terms of the agreement to refer are as follows:

1. That all the differences between Vadag Establishment ('Vadag'), the majority shareholder, Yashvin Shretta ('the Petitioner'), and/or Numised AG (Numised) and Leisure Lodges Ltd ('the company') be and are hereby referred to arbitration;

2. That the parties hereto namely, Vadag, the Petitioner, Numised and the company do agree the terms of the reference within seven (7) days of the date hereof and in default of such agreement the parties agree that this Honourable Court determine the basis upon which the reference is made as well as the terms of the reference is made as well as the actual determination by this Court shall be final and binding on all the said parties.

Signed:

1 Dr Kuria for Petitioner and/or Numised.

2 Mr *Ochieng Oduol* for Vadag.

3 Mr *IT Inamdar* for Satish Gautama for the company.

4 Mr *IS Asighe* for the Interim Liquidators.

Further Order: Matter to be mentioned on 22 September 1999 at 9:00am".

Predictably, the parties did not reach an agreement within seven days upon the terms on which the matter was to be referred to arbitration. So in terms of Clause 2 of the consent order, the court was called upon to determine those terms. I need only to add that there were spirited attempts by the First Respondent to have the consent order reviewed but when the matter came before Mbaluto J on 7 October 1999, he ruled that the issue of review could be dealt with in the submissions before him regarding the terms on which reference to arbitration was to be made. Mbaluto J obviously reserved his decision on the issue of whether or not he ought to allow a variation of the consent order to the time when he would give a decision on the terms upon which the whole dispute was to be referred to arbitration for in his ruling rejecting Mr *Kamau Kuria*'s application for adjournment the Learned Judge said:

> "We are here today for submissions on the terms under which the issue of the value of the petitioner's shares can be referred to arbitration. Any matter that is relevant to that issue can be addressed during submission. I do not therefore think that there is any merit in the application for adjournment if the only reason for it is to file an application for variation of the consent order made on 15 September 1999 to enable the petitioner to bring before court an injunction matter pertaining to the terms of reference to arbitration. That surely can be done in the course of the submissions as aforesaid. In my view, therefore, the application lacks merit and must be dismissed with costs. It is so ordered".

After this order, the parties commenced their submissions before the Learned Judge and those submissions were obviously to help the Judge determine the terms on which the matter was to go to arbitration, pursuant to the consent order of 15 September 1999.

I go back to 1998. Following upon the orders made by Ole Keiwua J on 31 July 1998, the Appellant, on the 14 September 1998, filed another notice of motion and the main prayer in that motion was: "*That* Mr Hezekiah Wangombe Gichohi and Mr George Kimeu be removed from their office as Joint Interim Liquidiators of Leisure Lodges Ltd ('the company')".

The first ground given in the motion for the removal of the two Interim Liquidators was: "*That* the court found that there is an alternative remedy available to the Petitioner and consequently stayed further proceedings in this

winding-up petition the office of the Joint Interim Liquidators is rendered otiose".

It is clear to me from the record that issue of the continued existence of the office of the Joint Interim Liquidators was one of the matters discussed before Mbaluto J when the submissions opened before him on the 7 October 1999. Mr *Oraro* was then leading Mr *Ochieng Oduol* for he Appellant. Mr *Oraro* opened his submissions in the following manner, and I quote him:

> "What we agreed to do is to determine the terms under which the matter could be referred to arbitration. We did submit the terms which we thought were reasonable. These are contained in a letter a copy of which we gave to our learned friend. The letter is dated 19 September 1999. They are as follows: (counsel reads letter). The intention is to remove the decision as to the umpire from the two nominees to avoid having to a deadlock (*sic*).
>
> The next issue is that the process commences as soon as possible; the third issue is that the interim liquidators do vacate office forthwith. We are asking that by virtue of the legal provision. Interim Liquidators are appointed consequential upon a petition to wind up. That is found in rule 37.
>
> Upon termination of the winding-up proceedings all the interim liquidator is entitled to is his fees …".

In answer to these submissions by Mr *Oraro*, Mr *Kamau Kuria* for the First Respondent retorted as follows:

> "An interim liquidator when there is an effective petition pending. The need for the court to protect and fashion alternative remedy and not a remedy on paper. The court should therefore reject the submission by that following the decision to refer the matter to arbitration, the offices of the interim liquidators become otiose".

What is clear from these submissions is that though Mbaluto J was asked, pursuant to the consent order of 15 September 1999, to settle the terms on which the matter was to go to arbitration, he was equally asked to determine the issue of whether or not, after he settled the terms, the Interim Liquidators should continue in their office.

The Learned Judge gave his ruling on 3 March 2000, and among the orders he made were:

> "(4) That Patcham Holdings Ltd holds (through Numised) 15% of the shares in the company in Interim Liquidation.
>
> (5) That the parties to the arbitration shall be Vadag Establishment, Numised Petitioner, and the company in liquidation.
>
> (7) That the duties of the Arbitrators will be to determine the fair market value at which
>
> (a) the price of the Petitioner's shareholding; and
>
> (b) Patcham Holdings Ltd interest in the company may be purchased by the majority Shareholder.
>
> (9) That the tribunal shall commence it deliberations within thirty (30) days of receipt of a resolution by Numised AG to divest itself of the 15% of the shares it holds in the company and shall file its award within ninety (90) days of the date hereof.
>
> (10) That upon determination of such value, Vadag Establishment shall pay the price of the Petitioner's shares to the Petitioner within 15 days of filing of the award. Vadag Establishment shall also pay within the same time price of the shares Numised AG holds in the company in such manner as the court shall direct upon such payments the Petitioner shall forthwith cease to have any interest in the company and the appointment of the Interim Liquidators shall forthwith be terminated.

(11) That the fees of the arbitration shall in the first instance be shared by the Petitioner and the majority shareholder and thereafter shall be chewed to be costs of the cause.

(12) That the costs of the petition shall be determined by the Arbitrator on completion of the arbitral process".

It is clear from these orders that the Learned Judge:

"(a) refused to strike out the petition as he had been asked but instead kept the petition or record until after the conclusion of the arbitral process:

(b) added other parties, e.g. Patcham Holdings Ltd who were not included in the consent order of the 15 September 1999. The parties named in that order were the First Respondent (Petitioner), the Appellant (majority Shareholder) and/or Numised AG and the company itself.

(c) the Appellant was also ordered to pay the price of 15% of the shares held in the company by Numised AG who had in fact not even been a party to the winding-up petition".

Understandably, the Appellant appeals to this Court against these orders and in all there were, sixty grounds of appeal listed in the memorandum of appeal and lodged in court on the 28 April 2000. It is practically impossible to deal with each and every one of those grounds and the best one can do is to deal with them on various subheads as Mr *Oraro* did before us. Again, as I said at the beginning of my judgment, though the record of appeal is intimidatingly voluminous, I nevertheless agree with Mr *Oraro* that only three issues arise for our determination in this appeal and those issues are:

1 Was Mr Justice Mbaluto right in refusing to strike out the petition after he had settled the terms on which the dispute was to go to arbitration?

2 Was the Learned Judge right in retaining the services of the joint interim liquidators until the end of the arbitral process? and

3 Was the Learned Judge right in bringing into this litigation Patcham Holdings which was not included as a party in the consent agreement of the 15 September 2000?

Before I go into a consideration of these issues, let me first deal with two somewhat preliminary matters, which were raised by Dr *Kuria* on behalf of the First Respondent. The first issue raised by him was that this appeal does not lie. The appeal does not lie because the order made on the 15 September 1999, was made by consent and that order itself specifically provided that:

> "[P]arties hereto namely Vadag, the petitioner, Numised and the company do agree upon the terms of the reference within seven (7) days of the date hereof and in default this Honourable Court do determine. the basis upon which the reference is to be made, as well as the actual terms of the reference and such determination by this Court shall be final and binding on all the said parties".

Mr *Kuria* if I understood him correctly, submitted the Appellant, being a party to this consent order cannot appeal to this Court. Such an appeal, submitted Mr *Kuria*, is precluded by section 67(2) of the Civil Procedure Act, which provides that: "No appeal shall lie from a decree passed by the court with the consent of the parties".

Mr *Kuria* also relied on the decisions of the courts, such as *Brooke Bond Liebig (T) Ltd v Mally* [1975] EA 266 where it was held that: "a consent judgment may only be set aside for fraud, collusion or any other reason which would enable the court to set aside an agreement".

Mally's case was followed by this Court in *Flora N Wasike v Destimo Wamboko* [1982–88] 1 KAR 625 where the Court once again held that: "It is settled law that a consent judgment can only be set aside on the same ground as would justify the setting aside of a contract, for example fraud mistake or misrepresentation".

This Court once again applied these principles on 10 March 1998, in the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd and another* CA number 276/1997 (Ur) where having cited the cases of *Mally* and *Wamboko*, the court stated: "Those in essence, are the principles which the Learned Judge should have applied to determine the application before him. Applying those principles to this case we can find no circumstances that could have entitled the Judge to vary or rescind the consent order".

That being the state of law, was the Appellant entitled to appeal to the Court? To answer that question, I note first that the appeal is not brought directly against the consent order of the 15 September 1999. That order gave the Learned Judge authority to determine the terms of reference to arbitration, and though it stated specifically that no appeal would lie from such a determination it specifically spelt out the names of the parties to the arbitration. The First Respondent himself actually asked the Judge to vary the terms of the consent order and it is clear to me that Patcham Holdings Ltd was brought into the Judge's final order because of the request of the First Respondent for a variation thereof. On the face of it, once the Learned Judge brought in Patcham Holdings Ltd, he was exceeding the powers conferred on him by the consent order and surely it cannot realistically be argued that the Judge was entitled to go outside the limits of his jurisdiction given to him by the consent order. I would myself hold that once the court exceeds the jurisdiction conferred upon it by a consent order, that excess of jurisdiction would entitle a party affected thereby to appeal. In the circumstances of this case, it was the First Respondent who asked the Learned Judge to bring Patcham Holdings Ltd into the dispute and having done so, he cannot in the same breath be heard. to complain that the Appellant is barred from appealing by the terms of the consent order. I would accordingly reject Mr *Kuria*'s contention that this appeal does not lie.

The second objection taken by Mr *Kuria* was on the question of the appearance of Mr *Inamdar* for the company and in support of the appeal filed by the Appellant. Mr *Kuria* argued that this dispute was essentially between and amongst the shareholders of the company and that being so it should not be the business of the company itself as to which shareholder is right or wrong. In other words, Mr *Kuria* contends that the company ought to be neutral in the dispute and what they are doing amounts to a misfeasance by company and is not in the best interest of its shareholders.

This argument, however, ignores the fact that even the consent order made by the parties on 15 September 1999, recognised the company as a party to the arbitration, and having been recognised as a legitimate party, I cannot see how the company is to be prevented from taking an active part in the dispute. Having been made a party to the dispute by the very protagonists themselves, it must be expected to have its say and in supporting the stand taken by the majority shareholder (the Appellant) which stand is the one supporting its continued existence as opposed to that taken by the First Respondent which supports its very extinction, I do not myself see that the company is committing

any misfeasance and I would once again reject Mr *Kuria*'s contention to that effect.

Having dealt with these preliminary matters, I can now pass on to a consideration of the three issues I posed earlier as falling for determination in the appeal.

The first issue I framed was: "Was the Learned Judge right in refusing to strike out the first petition to wind up the company even after the Judge himself had settled the terms on which the whole dispute was to go to arbitration?"

In dealing with this point one must not lose sight of the fact that the centre or core of the dispute was the First Respondent's petition to wind up the company and the petition fell squarely within the ambit of section 219(*f*) of the Act, namely that: "the court is of opinion that it is just and equitable that the company should be wound up".

The petition was by a contributory, the First Respondent, and his petition had contained numerous allegations and from those allegations he asked the court to conclude that:

> "In the face of the foregoing, the affairs of the company are being conducted in a manner oppressive to your petitioner. Your petitioner has lost all faith in the commercial integrity of Mr Rasikhal C Kantaria and the members of the board currently running the company – see paragraph 27 of the petition".

Paragraph 28 of the petition then went on to plead that "In the circumstances it is just and equitable that the company should be wound up". It is not the duty of this Court in this appeal to examine the correctness or otherwise of the allegations contained in the petition. As we have seen Mr Justice Ole Keiwua had examined the matter and come to the conclusion, as I understand it, that even if the allegations contained in the First Respondent's petition were in the end to be found to be true, they would not entitle the First Respondent to a winding-up order because there is an alternative remedy, other than a winding-up order, which would effectively address the complaints raised in the petition. The alternative remedy found by the Learned Judge was that the majority shareholder, who is now the Appellant was to buy out the shares held by the First Respondent in the company whose winding-up he sought. If his shares in the company were to be bought out at their market price, then the First Respondent would no longer be a member of the company and the oppression upon him by the majority shareholder or any other person in the company would cease. There would, accordingly, be no need to wind up the company so as to get rid of the oppression upon the Appellant. Upon that conclusion by the Learned Judge, the only issue left outstanding was the price at which the shares of the First Respondent were to be bought and to determine that issue, the Learned Judge had given the parties themselves the chance to set up a machinery for the determination of the value to be placed on the shares. If the parties failed to agree on the appropriate machinery he himself would set up one. There has not been a successful appeal against the orders of Mr Justice Ole Keiwua. The effect of the orders made by the Learned Judge was and must be that the First Respondent is no longer entitled to a winding-up order as prayed for in his petition. Naturally, the Learned Judge could not at the stage of his ruling dismiss or strike out the petition because the parties had yet to agree on the modalities for the valuation of the First Respondent's shares. Had the Judge

dismissed or struck out the petition at that stage and the parties subsequently failed to agree on the terms on which the machinery so agreed was to operate indeed they did disagree on this latter point then it would mean that the parties would *either* ask the Court to revive the dismissed or struck-out petition *or* file a completely new one so that the court itself can determine the machinery for arbitration and the terms on which it was to be carried out. That, in my understanding, is the explanation for the position taken by Vinelot J in *Re a Company*, *ante*, and Cockar J in *Re Kenwheat Industries Ltd.* In the Kenyan case, on 9 July 1986, Cockar J held that (and I quote him):

> "The offer made in the letter of 25 February 1986 and the further modified offers made on behalf of the Respondents during the hearing are not in my view reasonable offers so as to persuade one to find that the petitioner thought over the matter, on balance I am satisfied that it would not be in the best interests of the company and all the shareholders at this stage to dismiss this application. Perhaps the Respondents may want to make another offer modified in light of what this Court has found would constitute a reasonable offer which it would be unreasonable for the petitioner to refuse".

The application Cockar J was dealing with was one to dismiss the petition on the ground that the petitioner there had an alternative remedy in that a reasonable offer had been made to him, and that in refusing the offer the petitioner was acting unreasonably. It is to be noted from the passage I have quoted that though Cockar J thought that the offer made was not a reasonable one, nevertheless he did not straight away dismiss the application for the dismissal of the petition. He stood over the application to 29 September 1996, to enable the Respondent make a reasonable offer to the petitioner. The matter was eventually dealt with again on 9 December 1996 and on that day, the Judge held:

> "In my view the offer now made by the majority shareholders is a reasonable one and that the petitioner is now acting in an unreasonable manner. A suitable remedy in the circumstances of this petition other than proceeding with the winding up of the company, is available. In my view, the petitioner in not accepting this remedy is acting in an unreasonable manner. The Respondent is seeking a dismissal of the petition. In view of my findings I have no alternative but to accede to what is prayed for in the application. The petition is dismissed …".

The proposition to be derived from case law is and must be that once there is an effective alternative remedy, that is, a remedy alternative to a winding-up, then even if the allegations contained in a petition are to be found to be true, the petitioner is nevertheless not entitled to a winding-up order as the court cannot conclude, under section 219(*f*) of the Act**,** that "it is just and equitable that the company should be wound up".

It cannot be just and equitable to wind up the company over complaints which can be effectually resolved in an alternative manner.

How does that proposition apply in the present case?

The parties themselves have agreed to go to arbitration for the purpose of determining the price at which the Appellant is to buy the shares held by the First Respondent in the company. The parties were unable to agree on the terms of reference and the ruling of Mbaluto J the subject of this appeal dealt exhaustively with those terms. In these circumstances, I have not the slightest doubt that Mbaluto J was, with respect, wholly wrong in refusing to dismiss the petition. His stated reason(s) for refusing to dismiss the petition was that:

> "The dispute between the parties as detailed in the petition is still alive and has yet to be resolved. All what has happened is that the petition has been stood over in order to give the parties time to pursue the issue of the alternative remedy as ordered by Ole Keiwua J. If as boldly stated by Mr *Ochieng Oduol* in page 4 of his written submission that this Court has become *functus officio* in the matter or by Mr *Satish Gautama* in page 2 of his submissions, what would happen if say due to lack of co-operation by the majority shareholder the arbitral process did not take off? Would the court not be justified in concluding that the alternative was not after all available and would the matter in that event not fall back to the position that attained prior to the application to strike out the petition which would mean, as suggested by Dr *Kamau Kuria*, that the petition would proceed to hearing?".

I do not, for my part, think that these arguments can take away or derogate from the fact that once there is an alternative remedy available to a petitioner, that petitioner is not entitled to a winding-up order. I have held that even if the allegations in his petition were to be proved to be true, that would not entitle him to a winding-up order as of right particularly if there were an alternative remedy available. The availability of a remedy alternative to a winding-up order takes away his entitlement if any, to such an order and the dispute over the winding up is no longer a live issue. The Learned Judge, in thinking that the issues raised in the petition were still alive was, with respect, in error. Having settled the terms on which the parties are to go to arbitration he ought to have dismissed the petition at that stage. If any party to the arbitral process refuses to co-operate, the hands of the court will not be tied in the matter; the provisions of the Arbitration Act are still available to the parties. I would, in the event, answer the first issue by holding that the Learned Judge erred in refusing to strike out the petition after he had settled the terms on which the parties were to go to arbitration.

The second issue, which deals with the retention of the joint Interim Liquidators, is fairly easy and can be answered shortly. The Interim Liquidators were appointed on the basis that there was a probability of the company being wound up by the court. Once that probability is gone, there cannot be any justification for retaining the Interim Liquidators in their office. I am certain that had Mbaluto J correctly appreciated the first issue I have dealt with, he would not have retained the joint Interim Liquidators in their place. Once the petition to wind up the company is dismissed or struck out, the interim liquidators must go with the petition.

Finally, there is the issue of the Learned Judge bringing in Patcham Holdings Ltd into the arbitral process. The parties themselves had given to the Judge a consent order showing who were parties to the dispute. Patcham Holdings Ltd was not a party included in the consent order. Even if Patcham Holdings Ltd is a wholly-owned subsidiary company of Numised AG or any other company included in the consent order, that, by itself cannot make it a party to the dispute any more than it would be made a party by the fact that the First Respondent and his family are shareholders in Patcham Holdings Ltd. It is to be noted that Patcham Holdings Ltd did not at any stage join the First Respondent in contending that the company, that is, Leisure Lodges Ltd, should be wound up. The Learned Judge had no jurisdiction to make orders the effect of which was to bring in Patcham Holdings Ltd as a party to the arbitral process.

I have said enough, I think, to show that I am for allowing this appeal. I would, accordingly, allow the appeal in the following terms:

1 The petition to wind up Leisure Lodges Ltd filed by the First Respondent Yashvin Shretta, be and is hereby dismissed with costs thereof to Leisure Lodges Ltd and Vadag Establishment the Appellant.

2 The order made on the 16 October 1996 appointing Mr Hezekiah M Gichohi and Mr Kimeu as joint interim liquidators be and is hereby discharged forthwith. The said joint Interim Liquidators shall, within hundred and twenty days from the date hereof render to Leisure Lodges Ltd full audited accounts of their stewardship from the 18 October 1996 to the date of this judgment, such accounts to include profit and loss accounts and balance sheets for each year. On this aspect I would give the parties leave to apply to the High Court, if necessary.

3 With regard to the terms of reference determined by the Judge, I would amend the orders made by him as follows:

(a) Paragraph 2: delete the requirement of a resolution by Numised AG agreeing to divest itself of the shares it holds in the company in trust for Potcham Holdings Ltd.

(b) Paragraph 4: the whole of' this paragraph is deleted.

(c) Paragraph 7(b): the whole of subparagraph (b) of this paragraph is deleted.

(d) Paragraph 9: Amended to read: The tribunal shall commence its deliberation within 30 (thirty) days from the date of this judgment

(e) Paragraph 10 Amended to read: Upon determination of such value Vadag Establishment shall pay the price of the Petitioner's shares to the petitioner within 15 (fifteen) days of filing of the award.

(f) Paragraph 12: the whole of this paragraph is deleted.

4 I would award the costs of the appeal to the Appellant.

These then, are the orders I would myself make in the appeal.

AKIWUMI JA: I have had the advantage of reading the judgment of my Lord Omolo which fully sets out the facts and law involved in this appeal with which I agree, and will therefore confine myself to only a few comments in this appeal.

After Yashvin Shretta had instituted his petition for the winding up of Leisure lodges Ltd, which I shall hereinafter refer to as "the company", and attempts initiated by him by way of an alternative remedy, to settle the matter through the purchase of his 10% shareholding in the company by the majority shareholders of the company, had failed, the court's assistance was sought in determining the value of the shares of the company.

When the matter came before him, Keiwua J as he then was, and as he could properly do under section 222(2) of the Companies Act, after considering the pleadings filed in the petition and the submissions made thereon, on 31 July 1998, "stayed" the petition which he had then refused, and which in the circumstances had become jettisoned, to enable the parties "to agree the terms on which the matters of the price of the petitioner's share in the company may be referred to arbitration".

He further ordered that the petition be mentioned for appropriate orders which could not possibly be for the determination of the petition which had been rejected, to be made, when the terms of the arbitration were agreed by the parties and if not, for their determination by the court. As things stood, the matter was to be determined by arbitration and nothing else, and once the terms of the arbitration were settled either by the parties or the court, this

alternative remedy would be the only process available to the parties. Indeed, this was what the parties reiterated in the consent order made by Mbaluto J on 15 September 1999, but more of that later.

It should also be remembered that in the petition filed by Yashvin Shretta, reference is made, *inter alia*, to the possibility of him being bought out by the majority shareholders. It is then finally urged in the petition that in the circumstances, it was just and equitable that the company should be wound up. Furthermore, section 222(2) of the Companies Act provides that where a petition is presented as in this case, on the ground that it is just and equitable that a company should be wound up, the court, if of the opinion that the petitioner as in this case, is entitled to relief by some other means, other than the winding up of the company "shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".

In other words, where the court having considered the petition and is of the opinion that some other remedy is available and that the petitioners are acting unreasonably in seeking to have the company wound up, it shall not make a winding-up order, which means that the petition as a process, is rejected, but shall make an order in respect of the alternative remedy. When this is done, as in my view was what Keiwua J did, then the petition is rejected and cannot be revived.

To my mind, and based on the evidence before him, Keiwua J was right, firstly, in refusing in the exercise of his discretion under section 222(2) of the Companies Act, the petition for winding up (see In *Re A Company* [1983] 1 WLR 927) and in ordering the alternative remedy of determining by way of arbitration, the ascertainment of the value of the shares of Yashvin Shretta so that they can be bought by the majority shareholders and by doing so, completely rejected the petition; and secondly, the terms of this alternative remedy be settled by the parties failing which they would be settled by the court.

Apart from Yashvin Shretta, those that could be parties and were indeed, parties to the petition, were the company and its other contributories, namely the other registered shareholders of the company, Vadag Establishment which had been allotted 60% of the shares and Numised AG which held 30% of the shares. Vadag Establishment, it was alleged by Yashvin Shretta, held its shares in trust for Zorba Ltd, whilst Numised AG held half of its shares in trust for Zorba Ltd and the other half is trust for Patcham Holding Ltd. The point to be made here is that the fact that Vadag Establishment and Numised AG held shares in trust for Zorba Ltd and Patcham Holding Ltd, who were not contributories to the company, did not make them shareholders of the company so as to qualify them to be parties not only to the petition but also to the alternative remedy that were adopted in place of petition and whereby the petition as such, was rejected. Indeed, article 15 of the of Association of the company provides that:

> "Except as ordered by a Court of competent Jurisdiction or as by law required, no person shall be recognized by the company as holding any share upon any trust and the company shall not be bound by or be compelled, in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these articles or by law otherwise provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder".

Similarly, section 119 of the Companies Act reiterates the lack of legal standing of the beneficiaries of trusts for the purpose of the Companies Act, under which the petition was instituted and the order for the alternative remedy, made, as follows: "No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the register".

On 15 September 1999, the parties, that is Yashvin Shretta and Numised AG, Vadag Establishment, the company, and the Interim Liquidators by consent agreed before Mbaluto J as follows:

> "That all the differences between Vadag Establishments (Vadag) the majority shareholder, Yashvin Shretta (The Petitioner) and/or Numised AG (Numised) and Leisure Lodges Ltd (the company) be and are hereby referred to arbitration; and
>
> That the parties hereto namely Vadag, the petitioner and/or Numised and the company do agree upon the terms of the reference within 7 days of the date hereof and in default of such agreement the parties agree that this Honourable Court do determine the basis upon which the reference is made as well as the actual terms of the reference and such determination by this Court shall be final and binding on all the said parties".

The parties being unable to agree upon the terms of reference within the seven days, appeared before Mbaluto J who upon considering the submissions made thereon delivered his ruling on 3 March 2000, which is the subject of the appeal before this Court.

In this ruling, Mbaluto J held that the ruling of Keiwua J did not in any way affect the life of the petition and that the "dispute between the parties as detailed in the petition is still alive and has yet to be resolved. All what has happened is that the petition has been stood over in order to give the parties time to persue the issue of alternative remedy as ordered by Ole Keiwua J".

I do not think that this is right. As I have already stated, Keiwua J had to make a discretionary choice under section 222(2) of the Companies Act, on the basis of the facts and submissions made, before him which cannot be reviewed by Mbaluto J, and having made the choice that the alternative remedy be the one that should be pursued by the parties to the petition, that was the end of the petition. His staying of the petition did not amount to putting the substance of the petition on hold so that it can be resorted to where the parties in this case failed to settle the terms of the arbitration. The further appropriate orders that he said he would make would relate only to incidental matters such as costs, but certainly not to the determination of a dead petition. Once the parties were to settle their difference by arbitration, that was the only process open to them.

In support of his ruling that the interim liquidators that had been appointed by virtue of the petition but before Keiwua J's ruling, should be maintained until the alternative remedy had been completed, Mbaluto J decided that not only did the existing bad blood between the "principal players in the matter" require it, but also that the interim liquidators who are "officers of this Court", must remain until "the very end of the process", by which Mbaluto J must have meant the end of either the alternative remedy or the petition. In my view, the adoption by Keiwua J of the alternative remedy brought the substance of the petition to an end and with that, all orders made therein such as the appointment of the interim liquidators, which cannot be extended merely under the aegis of a discarded petition. And another thing, Mbaluto J appears to be reviewing which he cannot do, the facts that were considered by Keiwua J

when he exercised his discretion and ruled as he did. What is more, it would seem that the interim liquidators cannot under section 234 of the Companies Act continue to act as such where an alternative remedy is being pursued. This section provides only that: "For the purpose of conducting the proceedings in winding up of a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators".

The interim liquidators, with the death of the petition as it were, go. And the alternative remedy by way of arbitration does not amount to "conducting the proceedings in winding up of a company" or the performance of "such duties in reference thereto". Mbaluto J, therefore, had no jurisdiction to extend the *ex parte* order appointing the interim liquidators as he did.

In his ruling, and having determined that the parties to the arbitration shall be Yashvin Shretta, Numised AG, Vadag Establishment and the company, Mbaluto J went on to order, and which is really outside the ambit of what the alternative remedy between the parties was all about, and also contrary to the spirit of section 119 of the Companies Act and under which Act, the alternative remedy was being pursued, that Numised AG should divest itself of the shares it held in trust for Patchan Holding Ltd only (no mention being made in respect of those shares held by Numised AG in trust for Zorba Ltd) which is not a shareholder of the company, and that the fair market value of these shares should be ascertained. He also went on to order, and which is contrary to what Keiwua J had already ordered, namely, that the costs of the petition be determined by the court, and which order he therefore had no jurisdiction to make, that the "costs of the petition shall be determined by the arbitrator (*sic*) upon the completion of the arbitral process".

It must be obvious that I support the judgment of my Lord Omolo, that the appeal for the reasons hereinbefore stated, be allowed in the terms proposed by him with costs for the Appellant.

For the Appellant:
Mr Oraro and *Mr J Ochieng' Odual*

For the First Respondent:
Mr K Kuria

Wavamuno v Uganda
[2001] 2 EA 608 (SCU)

Division:	Supreme Court of Uganda at Mengo
Date of judgment:	10 January 2002
Case Number:	16/00
Before:	Odoki CJ, Oder, Tsekooko, Mulenga and Kanyeihamba JJSC
Sourced by:	B Tusasirwe
Summarised by:	HK Mutai

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[1] Appeal – First appellate court – Duty of – Review and appraisal of evidence adduced at trial – Whether Court of Appeal had conducted an adequate review of trial court proceedings.

[2] Criminal law – Trial – Procedure – Committal proceedings – Absence of indictment and summary of case at committal proceedings – Whether proceedings were nullity – Sections 1 and 163A – Trial on Indictments Decree 1971.

[3] Evidence – Doctrine of recent possession – Appellant found in possession of stolen dollars four days after robbery – Whether trial court was correct in relying on doctrine of recent possession to convict

Editor's Summary

On 29 February 1996 a vehicle carrying a consignment of US dollars from Entebbe airport to Kampala was stopped at Kitoro and robbed of part of its cargo by two armed men. In the course of the robbery, one of the two policemen escorting the cargo was shot and killed. Two men were arrested in Kenya on 5 March 1996 and subsequently extradited to Uganda where they were charged with murder and robbery. In May 1997 the Appellant was also arrested in Kenya and returned to Uganda where, on 12 October 1998, he too was indicted on the charges of murder and robbery before the High Court. The prosecution case against the Appellant was that he had masterminded the robbery and had been found in possession of some of the stolen dollars four days after the robbery. Testimony was given to the effect that on the day of the robbery the Appellant was in Uganda and had borrowed the vehicle of an employee who had been out of his office at around the time the robbery took place.

At the trial the Appellant relied on the defence of alibi and claimed that he was out of Uganda between 26 February 1996 and 2 March 1996. The trial Judge found the Appellant's alibi false and rejected it. She also found that he had been found in possession of recently stolen dollars and held him guilty on the basis of the doctrine of recent possession. The cases against the Appellant's co-accused were based solely on their alleged confessions. They too were found guilty and all three were sentenced to death. On appeal to the Court of Appeal, the appeals of the other two accused were allowed but that of the Appellant was dismissed. He now appealed to the Supreme Court on the grounds, *inter alia*, that he had not been properly committed for trial to the High Court, that the Court of Appeal had erred in failing to conduct a fresh re-appraisal of the evidence adduced before the High Court, and that it had erred in relying on the doctrine of recent possession to support his conviction. He also contended that the court had erred in its consideration of his alibi and in holding that he had been given sufficient opportunity to call his defence witness.

Held – Objections against the manner in which committal proceedings were conducted should be raised at the earliest opportunity. The Supreme Court would not ordinarily consider points of law that had not been raised in lower courts but as the point in issue here was of some importance the court would address it. It was clear that certain requirements of section 163A(3)(*a*) and (*b*) of the Trial on Indictments Decree had not been complied with and this fact should have (but had not been) raised at the time of trial, nor was it made a ground of appeal in the Court of Appeal. Though the committal proceedings were irregular in that an indictment and the summary of the case were missing, they were not a nullity as the magistrate had jurisdiction and had actually made a committal order. In the circumstances, the Appellant was not prejudiced in any way at his trial and the error did not occasion a miscarriage of justice. *Asenua and another v Uganda* criminal appeal number 1 of 1998 and *R v Singh* [1934] 1 EACA 110 applied; *R v Gee Bibby Dunscombe* [1936] 2 KB 442, *R v Philips* [1939] 1 KB 62, *Singh v R* [1956] 23 EACA 459 distinguished; *Kamunya*

v R [1954] 21 EACA 327, *Uganda v Lule* Cr Sc number 456/68 [1969] HCB, *Uganda v lsabirye* Digest of Cases on Criminal Procedure 1972, *Uganda v Matovu* criminal case number 541 of 1967 considered.

The trial Judge had exercised her discretion in refusing the Appellant further adjournments to call his witness. Such a discretion would only be interfered with if there had been a failure to exercise it judicially and it was not sufficient that other members of the court would have exercised their discretion differently. The Court of Appeal had adequately reviewed the record of the trial court before coming to their conclusion. The Appellant had been given sufficient time to call his witness and the failure to grant him an adjournment did not occasion a failure of justice.

The apparent contradictions in the prosecution evidence regarding the debt allegedly owed by the Appellant were minor and the evidence was corroborated in other respects. The Court of Appeal had adequately reviewed the evidence before accepting the finding of the trial Judge that the Appellant had indeed owed a debt, part of which he had repaid in stolen dollars, and there were no grounds for interfering with this finding.

A court could presume that a man in possession of stolen goods soon after the theft was either the thief or had received the goods knowing them to be stolen, unless he could account for his possession. According to the circumstances, it was open to the court to hold that an unexplained possession of recently stolen articles was incompatible with innocence; *Mudasi v Uganda* criminal appeal number 3 of 1998 (SC) and *Moses v Uganda* criminal appeal number 1 of 1997 followed. The mere failure to give an explanation did not imply that an accused was a thief as it was possible that he was a receiver. In order to rule out the possibility of the accused being a receiver it was necessary to take into account the nature of the property, that is, whether it could change hands quickly, and other surrounding circumstances. In this instance there were sufficient surrounding circumstances to justify the concurrent findings of the two lower courts that the Appellant was not a mere receiver but one of the robbers who had stolen the dollars.

The Court of Appeal had subjected the evidence supporting the Appellant's alibi defence to a fresh appraisal and had failed to resolve any doubts in favour of the Appellant. Its conclusion that the trial Judge was right in accepting and relying on the eyewitness testimony that the Appellant was present in Kampala on the day of the robbery could not be faulted. Though it was the duty of the prosecution to check the alibi of an accused at the earliest opportunity after it had been disclosed, in this instance the failure to call further evidence regarding the movements at the border post cast no reasonable doubts in favour of the accused. The appeal would therefore be dismissed.

Cases referred to in judgment

("**A**" means adopted; "**AL**" means allowed; "**AP**" means applied; "**APP**" means approved; "**C**" means considered; "**D**" means distinguished; "**DA**" means disapproved; "**DT**" means doubted; "**E**" means explained; "**F**" means followed; "**O**" means overruled)

East Africa

Asenua and another v Uganda criminal appeal number 1 of 1998

Kamunya v R [1954] 21 EACA 327

Kimera v Uganda criminal appeal number 151 of 1974 [1975] HCB 126

Moses v Uganda criminal appeal number 1 of 1997

Mudasi v Uganda criminal appeal number 3 of 1998 (SC)

Obonyo v R [1962] EA 542

R v Singh [1934] 1 EACA 110

R v Thakar Singh [1934] 1 EACA 110

Singh v R [1956] 23 EACA 459

Uganda v lsabirye Digest of Cases on Criminal Procedure 1972

Uganda v Lule Cr Sc No 456/68 [1969] HCB

Uganda v Matovu criminal case number 541 of 1967

United Kingdom

R v Flack 53 Cr App R 166

R v Gee Bibby Dunscombe [1936] 2 KB 442

R v McCann and others 92 Cr App R 239

R v Philips [1939] 1 KB 62

R v Quinn [1996] Cr LR 516

Judgment

ODOKI CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA JJSC: The Appellant and two others were convicted by the High Court at Kampala (Byamugisha J) of murder contrary to section 183 of the Penal Code and robbery contrary to sections 272 and 273(2) of the same code. They were sentenced to death. They appealed to the Court of Appeal which allowed the appeals of the other two Appellants but dismissed the appeal against the conviction and sentence of the Appellant. The Appellant now appeals to this Court against the decision of the Court of Appeal.

The facts as found by the courts below were as follows. On 29 February 1996 at 10:30am, three officials of Barclays Bank, namely Ngobi Patrick (PW1); Abu Mayanja and Joseph Semakula left Kampala for Entebbe Airport in a Land Rover Registration No UPN 327. The purpose of the journey was to collect a consignment of US Dollars coming from the United Kingdom by a British Airways plane. The bank officials were accompanied by two policemen, namely PC Wodulo and Corporal Kahwa.

When the plane arrived, the bank officials collected four sealed parcels and loaded them into the Land Rover. On their way back to Kampala at a place known as Kitoro, two men in military uniform and armed with guns stopped the vehicle which had apparently slowed down because of humps at that part of the road. The armed men started asking questions and in the process shot at PC Wodulo and disarmed Corporal Kahwa. The others in the vehicle ran in disarray and took cover. After the armed men had gone, the bank officials returned to the scene and found that two of the four parcels had been stolen. The matter was reported to the police at Entebbe. Efforts to chase the robbers yielded no

results. None of the armed men had been recognized during the robbery.

On the same day, the Land Rover was found by the Mpigi police with some of the parcels in it. One of the parcels was sealed whilst the others were open. The parcels were brought to the Central Police Station, Kampala. The police at Kampala handed to a bank official PW1 cash of US$ 130 000 and a sealed parcel, which was found to contain US$ 130 000. On or about 5 March 1996, the second and third accused were arrested and extradited from Kenya in May 1998 and charged with murder and robbery.

The prosecution case against the Appellant was that he masterminded the plan to rob the Barclays Bank of some amount in US dollars, which the bank was expecting from the United Kingdom. He enlisted the services of the other two accused persons and others still at large. The plan was carried out on 29 February 1996. They succeeded in robbing US$ 240 000. During the robbery a policeman was shot and killed. About four days later, some of the stolen dollars were found in his possession. The cases against the second and third accused rested solely on their alleged confessions.

At the trial the Appellant relied on the defence of alibi. In his unsworn statement, he stated that he left Uganda on 26 February 1996 and went to Kenya through Malaba border post. He returned to Uganda on 2 March 1996. After staying for five days in Uganda he travelled to Germany on 6 March 1996 to attend an exhibition in Berlin. He arrived in Berlin on 7 March 1996. After the exhibition, which lasted two and a half weeks, he went and stayed with Dr Ahamad for three weeks. He stated that he was a diabetic patient. Dr Ahamad referred him to Guy's Hospital in London where he was admitted for three months whilst undergoing treatment for diabetes. When he stabilised, he rented a house in London and started exporting fridges with an English partner called Anchor. On 24 March 1997 he returned to Kenya and was again hospitalised on account of diabetes. He was arrested in the middle of May 1997 and brought to Kampala. He denied the charges.

The Learned trial Judge accepted the prosecution's evidence. She found the alibi of the Appellant false and rejected it. She also found that the Appellant was found in possession of recently stolen dollars and found him guilty on the basis of the doctrine of recent possession.

The Appellant appealed to the Court of Appeal complaining of the trial Judge's failure to accept the Appellant's alibi, of holding that the Appellant was found in possession of US$ 10 000, of relying on the extra-judicial statement of his co-accused and of failure to grant an adjournment to enable him to call his witness. The Court of Appeal dismissed the appeal.

In his appeal to this Court, two memoranda of appeal were filed on behalf of the Appellant. The first memorandum of appeal dated 27 February 2001 was filed by M/s Kawanga and Kasule, Advocates. The second memorandum dated 13 March 2001 was filed by M/s Ayigihugu and Company, Advocates. The Appellant was represented by Mr *Ayigihugu* and Mr *Kasule* as well as Mr *Kabega* in this appeal. The two memoranda were consolidated. Mr *Ayigihugu* applied for leave to substitute grounds one and two of his memorandum for ground 4 of Mr *Kasule*'s memorandum. We allowed the application.

The grounds of appeal are as follows:

1. The Court of Appeal erred in law when it held that though the Appellant had not been properly committed for trial to the High Court, the Appellant's trial by the High Court was proper and in accordance with the law and no miscarriage of justice had been caused.

2. The Court of Appeal erred in law when it failed to make a fresh reappraisal of the evidence adduced before the High Court and by reason of such a failure reached wrong conclusions leading to the dismissal of the Appellant's appeal.

3. The Court of Appeal erred in law when it maintained the Appellant's conviction on the basis of the doctrine of recent possession.

4(a) The Court of Appeal erred in law in failing to subject the evidence of PW4 to fresh scrutiny and merely confirmed the holding of the trial Judge that the Appellant owed a debt to PW4 and that he paid it with stolen dollars.

(b) The Court of Appeal erred in law in failing to evaluate the evidence of PW4 and confirmed the finding of the trial Judge that the Appellant paid US$ 10 000 to PW4.

5. The Court of Appeal erred in law and fact when it failed to resolve in favour of the Appellant any doubts regarding the entries made in the Appellant's passport.

6. The Court of Appeal erred in law when it failed to consider and subject the same to fresh appraisal evidence supporting the Appellant's alibi.

7. The Court of Appeal erred in law when it held that the Appellant had been given sufficient opportunity to call his defence witness and that no failure of justice had been occasioned to him.

On the first ground of appeal, Mr *Kasule* one of the learned counsel for the Appellant, submitted that the Appellant was not properly committed to the High Court as required under section 163A of the Trial On Indictments Decree which provisions are mandatory. Counsel pointed out that in this case there was no indictment, no summary of the case and no police file. He argued that it was the duty of the magistrate to satisfy himself that the summary of the case gives the accused reasonable particulars of the offence, and to give a copy of the summary of the case to the accused. The magistrate must satisfy himself that the Director of Public Prosecutions (DPP) has complied with the provisions of the law before committing the accused to the High Court for trial. Once the above provisions are not complied with, counsel submitted, the magistrate must not commit the accused for trial, and if he does so, the committal is a nullity.

Mr *Kasule* referred to section 1 of the Trial on Indictments Decree which provides that no person can be tried by the High Court unless the provisions of the Magistrates Courts Act have been complied with. learned counsel emphasized the word "cognisance" which is defined in *Osborne*'s *Dictionary* as meaning jurisdiction. He relied on a number of authorities, namely, R *v Gee Bibby Dunscombe* (1936) 2 KB 442, *R v Philips* (1939) 1 KB 62, *Asenua and another v Uganda* criminal appeal number 1 of 1998, Indian Criminal Procedure Code, section 537, *Halsbury's Laws of England*, Volume 9 at 350, *Kamunya v R* [1954] 21 EACA 327, R *v Singh* [1934] 1 EACA 110, *Uganda v Lule* Cr Sc number 456/68 [1969] HCB, *Uganda v lsabirye* reported in *Digest of Cases on Criminal Procedure, 1972*.

Mr Kasule submitted that the Court of Appeal did not consider the above authorities. He argued that the Court of Appeal erred in law in acknowledging that the provisions of section 163A were not complied with but failing to hold that the committal was a nullity. He contended further that it was immaterial that there was no objection raised since failure to object does not turn a nullity into a legal action. He also submitted that pleading to the indictment in the

High Court could not cure an illegality. He prayed that the ground be allowed and a retrial be ordered if the State wished to retry the Appellant.

Mr Byabakama, Senior Principal State Attorney, for the Respondent, supported the conviction. He conceded that certain requirements were not complied with particularly paragraphs (a), (b) and (c) of section 163A(3). He pointed out that on 8 June 1998, the Appellant was informed of the charge; on 21 August he was committed to the High Court and on 12 October 1998 he was indicted in the High Court. While conceding that the above procedure was irregular and contrary to the requirements of section 163A, he submitted that the failure to comply with those provisions did not render the act of committing the Appellant illegal.

Section 1 of the Trial on Indictments Decree 1971 provides,

> "The High Court shall have jurisdiction to try any offence under any written law and pass any sentence authorized by law:
>
> Provided that no criminal case shall be brought under the cognizance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the provisions of the Magistrates' Courts Act 1970".

The relevant provisions of the Magistrates' Courts Act are contained in section 163A which states,

> "(1) When a person is charged in a Magistrates' Court with an offence to be tried by the High Court, the Director of Public Prosecutions shall file in the Magistrates' Court an indictment and a summary of the case signed by him or an officer authorized by him in that behalf acting in accordance with his general or special instructions.
>
> (2) The summary of the case referred to in subsection (1) shall contain such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he is charged.
>
> (3) When a person charged with an offence to be tried by the High Court appears before a Magistrate and the Director of Public Prosecutions has complied with the provisions of Subsection (1) the Magistrate shall–
>
> (*a*) give to the accused person a copy of the indictment together with the summary of the case;
>
> (*b*) read out the indictment and the summary of the case and explain to him the nature of the accusation against him in a language he understands, and inform him that he is not required to plead to the indictment.
>
> (*c*) Commit him for trial by the High Court and transmit to the registrar of the High Court copies of the indictment and of the summary of the case".

It was conceded by learned counsel for the State that the requirements in paragraphs (*a*) and (*b*) of section 163A(3) of the Trial on Indictments Decree, were not complied with.

At the time of trial in the High Court no objection was raised against the committal proceedings held in the Magistrates' Court. Nor did the error form any ground of appeal in the Court of Appeal. This is a very unsatisfactory state of affairs for the defence. Objections should be raised as early as possible so that errors can be dealt with and if possible redressed. The Court of Appeal was deprived of an opportunity to consider the matter. This Court will not ordinarily consider points of law not raised in the lower courts. But since we allowed counsel to argue the point, which is of some importance, we have found it necessary to deal with it in some detail.

The record of committal proceedings in the Magistrates' Court reads as follows:

> "8 June 1998
>
> A6 in Court
>
> Represented by *Kabyesiza and Ojakoni Asst* ASP (*sic*)
>
> *Court:* c/s read and explained to the accused. Accused told not to plead as he was to be tried by the High Court.
>
> *Prosecution:* Other accused were committed to the High Court. I pray accused be remanded pending his committal to High Court.
>
> *Counsel:* Accused was charged with other accused in absentia. I pray he be committed too.
>
> *Court:* Adjourned to 22 June 1998. Prosecution to ensure that accused is committed promptly. Accused further remanded.
>
> *Sgn*
>
> 21 August 1998
>
> Accused present
>
> *Wagona* for the state
>
> *Mwangusha* for the accused.
>
> The original file is in Court III.
>
> Neither the court clerk nor the Magistrate is there. The other accused persons were already committed for trial. I wish to have this accused person (Kamya Johnson Wavamuno also committed).
>
> *Court*
>
> A6 (Kamya Johnson) is committed for trial to the next convenient session of the High Court. He shall remain on remand until then.
>
> Sgn".

It is apparent from the above proceedings that neither the indictment nor the summary of the case were read to the accused before he was committed to the High Court for trial. The name of the Appellant was not included on the indictment and summary of the case upon which the other accused were committed.

At the time of trial, however, an amended indictment and amended summary of the case were filed which included the name of the Appellant together with the names of the other accused. The Appellant was named accused number one (A1). When the case was first called for hearing on 5 October 1998, the Appellant was not present but the State Attorney applied for a hearing date on 12 October 1998 so that the State could summon witnesses and amend the indictment. On 12 October 1998, the Appellant was present in court with his counsel, the late Kabyesiza. Then the indictment was read and explained to the Appellant and the other accused, who all pleaded not guilty. The hearing started the same day.

The issue is whether the committal proceedings in respect of the Appellant were a nullity so as to vitiate proceedings in the High Court. In *R v Gee Bibby and another* (*supra*) the Court of Criminal Appeal held that the committal proceedings where the committing justices did not record down depositions from witnesses, but merely allowed the chief constable to examine witnesses from the typewritten statements, were so defective that the Appellants were not lawfully committed for trial in accordance with section 17 of the Indictable Offences Act of 1848 and section 2 of the Administration of Justice

(Miscellaneous Provisions) Act 1933. The court held that there was a mistrial or no trial at all. We note that the provisions of these Statutes appear to be different from the provisions of our Magistrates' Courts Act and therefore the effect of non-compliance with particular requirements may not be similar. It seems that under the English Provisions, the bill of indictment is filed after the accused has been committed for trial. In the *Gee* case (*supra*) the position was that there was objection to the committal proceedings before the Recorder which objection was rejected, unlike in the present case where there was no such objection.

In *R v Phillips and another* (*supra*), the second accused was jointly charged with the first accused after 35 witnesses had given their evidence at committal proceedings incriminating him. Their evidence was merely read to the accused and then the second accused was allowed to cross-examine the witnesses whose evidence had been read. It was held that the procedure was irregular and contrary to law, and grave enough to invalidate the committal. As the committal of the second accused was a nullity the conviction would be quashed. Again the legal requirements in *Phillips* case (*supra*) were different from those in the present case and therefore the case is distinguishable, and the authority inapplicable.

In *Kamunya v R* [1954] 21 EACA 327, it was held that where a magistrate holds a full preliminary inquiry in lieu of summarily committing an accused to trial under the Emergency (Criminal Trials) Regulations 1952, the proceedings are irregular, and if the accused is thereby prejudiced the irregularity is incurable.

In that case the accused had not been prejudiced first because he had reserved his defence and secondly he received more information regarding the nature of the case against him than he would otherwise have had. The test in that case was whether prejudice to the accused had been occasioned.

In *Singh v R* [1956] 23 EACA 459 the Court of Appeal held that the magistrate should not have commenced and held a preliminary inquiry in view of the accused's mental condition since he was incapable of understanding the proceedings due to serious injuries. It held further that the preliminary inquiry was a nullity and so was the order of committal, and if there was no order of committal there could be no lawful trial. The court observed that it is not for the Appellant to show prejudice arising from the irregularities. It is for the State to negative it, if the curative provisions of section 363 of the Criminal Procedure Code are to be applied. After considering other irregularities and the evidence the court allowed the appeal. The facts of this case are clearly distinguishable from those in the instant case.

The question of the requirements of committal proceedings has been considered in a number of cases by the High Court. In *Uganda v Lule* MB 17/79, the High Court held that compliance with the provisions of section 4(2)(*a*) and (*b*) of the Criminal Procedure (Summary of Evidence) Act relating to the filing of the indictment and summary of evidence and a reference to any exhibits were mandatory. The court observed that there were numerous defects in the summary of evidence that might well have affected the validity of the whole proceedings. However DPP entered a *nolle prosequi* after 24 prosecution witnesses had been called and therefore, the case is no authority for holding that defective committal proceedings make the proceedings a nullity. Moreover the court had

in fact proceeded with the, hearing despite the defect. The court suggested that the committing magistrate might refuse to commit if the summary of evidence did not disclose a *prima facie* case, or, if it contained a shadow and not the substance of the evidence the prosecution intends to adduce at the trial. The law has since been changed not to require a summary of evidence but a summary of the case.

In *Uganda v Isabirye* criminal session case number 538 of 1967 the accused made an application to quash the indictment on the ground that his committal for trial should have been under the provisions of part VI of the Criminal Procedure Code (since the offence was allegedly committed before the coming into force of Act 10 of 1967) and that therefore the committal was bad. The court held first that the proper application for making such an application was before a plea was entered. Secondly, the court held that if the committal was clearly bad for fundamental incurable irregularities, there was nothing that the court could do but quash the indictment, for the prisoner would then not properly be before the court. Thirdly, the court held that the proceedings before the magistrate were not a hearing of a preliminary inquiry since the magistrate had not commenced hearing the evidence in the presence of the accused; and therefore the application to quash the indictment would be dismissed and the trial would proceed.

In *Uganda v Matovu* criminal case number 541 of 1967 after the magistrate had concluded the examination of all the witnesses called for the prosecution at a preliminary inquiry, he complied with the provisions of section 225 of the Criminal Procedure Code, and considered that there was sufficient grounds for committing the accused persons for trial. Each of the accused persons then made a short statement, apparently unsworn, denying having committed the offence. The magistrate recorded in each case the following words: “The accused is remanded in custody until he will be summoned by the High Court for trial”.

The High Court held that if the court considered the evidence sufficient to put the accused persons on their trial at this stage, the court was bound to commit them for trial in accordance with the provisions of section 228 of the Code. The form of the words used by the magistrate was clearly in the court’s opinion, not a proper committal for trial. If there had been no committal there would be no indictment and on this ground alone, the indictment would be quashed. The court exercised its revisionary powers and remitted the case to the magistrate to comply with the provisions of section 228 of the Code, and then a new indictment would be filed and served on the accused persons. In the present case, our opinion is that the magistrate used clear words to commit the Appellant. He stated: “A6 Kamya Johnson is committed for trial to the next convenient session of the High Court”.

The last authority we wish to consider is *Asenua and another v Uganda* criminal appeal number 1 of 1998 (SC). The Second Appellant complained in the first ground of appeal that he was tried without an indictment and that therefore there was a grave miscarriage of justice when the Court of Appeal confirmed his convictions and sentence.

On 16 September 1994 a Principal State Attorney withdrew the charges against the Second Appellant and proceeded to have the First Appellant committed alone to the High Court for trial. Upon realizing his mistake, the same

Principal State Attorney later on the same day had the charges against the Second Appellant (A2) reinstated. A2 was on 21 September 1994 separately committed to the High Court for trial. The typed record of proceedings at the commencement of the trial read:

> "Charge read and explained to both accused
>
> A1: I deny all charges
>
> A2: I deny all charges
>
> Court: Proceed on both accused on all three counts".

Counsel for the Appellant submitted that the withdrawal of the charges at the committal stage was fishy. She contended that the confusion created doubt, which should have been resolved in favour of A2. The Principal State Attorney submitted that this point should have been raised at the trial and that the two Appellants were properly arraigned. This Court observed:

> "With all due respect to Mrs *Owor Akorimo*, we think that this ground has no merit. There was confusion during committal proceedings. An amended indictment in which the two Appellants are mentioned was shown to us at the hearing of this appeal. We are not sure of the time when the amendment was effected. But the record of the trial shows quite clearly that three charges upon which the Appellants were tried were read and explained to the Second Appellant, Kakooza. Quite clearly, he was tried on an indictment and for the murder of Mudhola and Kidubuka. Moreover if there had been an irregularity now suggested by Mrs *Owor Akorimo*, we think that objection to such irregularity should be taken care of by the provisions of sections 137 of the Trial on Indictments Decree [1971] (TID) and section 331(1) of the Criminal Procedure Act. These provisions read as follows:
>
> '137 Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless such error, omission, irregularity or misdirection has, in fact occasioned a failure of justice:
>
> Provided that in determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings' ".

The court also referred to section 331(1) of the Criminal Procedure Code, which reads:

> "331(1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice or any other ground if the court is satisfied that there has been a miscarriage of justice and in any other case shall dismiss the appeal:
>
> Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred".

The court cited the case of *R v Singh* [1934] 1 EACA 110 which is the authority for the view that objection to an indictment should be taken during the trial and that where no failure of justice has occurred and the accused has not been embarrassed or prejudiced, the conviction should stand.

In the present case, it is clear that neither the indictment nor the summary of the case were before the court before the Appellant was committed. It seems to have been assumed that since his co-accused persons had been committed previously, his name must have been included in the indictment and summary of the case. It turned out that this was an oversight on the part of the court and counsel who appeared before it at the committal proceedings. The absence of an indictment and the summary of the case were clearly an irregularity in the committal proceedings. Both the filing of an indictment and the summary of the case are intended to inform the accused of the allegations against him and the case he is likely to face so that he can adequately prepare his defence.

The issue is whether such an irregularity or error rendered the committal proceedings or the subsequent trial a nullity or whether the Appellant was prejudiced or embarrassed in his defence. We are of the view that the committal proceedings were not a nullity but irregular because the magistrate had jurisdiction, and he actually made a committal order. We do not think that the irregularity embarrassed or prejudiced the Appellant because the Appellant was represented at committal proceedings and subsequent proceedings by a competent counsel. Secondly, the Appellant was informed of the charges against him in the Magistrate's Court before committal, and when the indictment and the summary of the case were read to him in the High Court. Thirdly, no objection was raised to the committal proceedings or to the indictment at the trial or in the grounds of appeal in the Court of Appeal. We are satisfied that in these circumstances the Appellant was not prejudiced in any way in his trial, and therefore the error did not occasion a miscarriage of justice. We therefore find no merit in the first ground of appeal which must fail.

Mr *Kasule* next argued ground 7 which complains that the Court of Appeal erred in law when it held that the Appellant had been given sufficient opportunity to call his defence witness and that no failure of justice had been occasioned to him. Counsel submitted that the Court of Appeal ought to have reviewed the facts and the law and come to their own conclusions. He contended that the refusal to grant an adjournment caused a miscarriage of justice because the evidence of the defence witness who was not called was vital to the Appellant's alibi. He cited Archbold *Criminal Pleadings, Evidence and Practice* 1997 at 878, on the exercise of discretion to grant an adjournment and *Kimera v Uganda* criminal appeal number 151 of 1974 [1975] HCB 126 on the effect of refusal to summon a defence witness. Mr *Byamukama* for the State submitted that the Court of Appeal had reviewed the evidence on record to determine whether the Appellant was denied an opportunity to call his witness and had rightly concluded that the Appellant had ample time to call his witness.

We agree with the submission of Mr *Byamukama* that the Court of Appeal reviewed the record of the trial court before it came to its conclusion that the Appellant had not been deprived of the opportunity to call his witness. The court re-examined the record of the trial on 23 November 1998 when the Appellant gave his unsworn statement, and his counsel informed the court that he had no witness to call. Then towards the end of his statement he told the court that he had a witness who had travelled from Kenya. The witness was from Titjan Ltd, Nairobi and had arrived in town. The Appellant stated that the witness was going to tell the court why the Appellant was in Kenya on the date the crime occurred.

The Court of Appeal observed that the hearing was adjourned at 12:30pm to 24 November 1998 for further hearing. On that day, counsel for the Appellant, the late *Kabyesiza,* told the court that he had one witness who was not in court and would be available in due course. After the Third Appellant had given his unsworn statement, counsel for the Appellant informed the court that he had been advised that his witness had not arrived and he had not seen him himself and was therefore seeking an adjournment. After an argument with the state counsel, the court ordered the case to stand down till 12 noon. When the court re-assembled at 12 noon, counsel for the Appellant informed the court that he sent people to check for the witness called Francis Ogutu at Rena Hotel on Namirembe Road but it was found that he had left the hotel in the morning at 7:45am, and he was neither in court nor in the hotel. Since he did not know what had happened to the witness he applied to the court to issue witness summons under section 73 of the Trial on Indictments Decree for the witness to appear before the Court the following day. He stated that he was unable to proceed then and prayed for an adjournment.

The Court of Appeal noted that the application was opposed and after arguments of counsel, the court refused to issue the witness summons as the whereabouts of the witness was unknown. The adjournment was also refused and the defence was ordered to continue. Counsel for the Appellant declined to continue as his witness was not present and invited the court to close the case. After reviewing the above record of proceedings, the Court of Appeal concluded,

> "The Judge did not close the case as she was entitled to do. The case was adjourned to 26 November 1997 for submissions. When the matter came up for submission on the 26 November 1997 that is after two days of adjournment, Mr Kabyesiza did not tell the court that his witness was present in court and was ready to testify. The prosecution completed its submission on 26 November 1997. The matter was adjourned to 30 November 1997. It was on 30 November 1997 that Mr Kabyesiza made his submissions. On that day he did not tell court that his witness was available.
>
> From the above scenario, it seems to us that the First Appellant had sufficient time to call his witness if indeed he had one. If the witness arrived in Kampala on the 23 November 1997, we found it difficult to understand why he failed to appear in Court on 24 November 1997 and 26 November 1997".

We agree with the conclusion reached by the Court of Appeal that the court could not issue a witness summons to a witness whose whereabouts were unknown and who had purportedly arrived in town and vanished into thin air. An adjournment had been granted to the defence to trace their witness but in vain. The Learned trial Judge refused further adjournment and the Court of Appeal declined to interfere with exercise of her discretion. It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion, or a failure to take into account a material consideration or taking into account an immaterial consideration, or an error in principle was made. It is not sufficient that the members of the court would have exercised their discretion differently: *R v Quinn.and another* [1996] Crim LR 516, *R v Flack* 53 Cr App R 166, *R v McCann and others* 92 Cr App R 239. Archbold *Criminal Pleadings, Evidence and Practice* (*supra*) paragraph 7–99 at 878.

We are satisfied that the Court of Appeal came to the right conclusion that the Appellant had been given sufficient time to call his witness and the failure

to grant him an adjournment did not occasion a failure of justice. Ground 7 must therefore fail.

Mr *Ayigihugu* the second learned counsel for the Appellant argued grounds 2, 3, 4(*a*) and 4(*b*). He combined grounds 2 and 4(*a*), which he argued first. The main issue raised in these grounds was whether the Appellant owed Etyang PW4 US$ 20 000. Mr *Ayigihugu* submitted that the Court of Appeal was wrong in confirming the finding of the trial court that the Appellant owed PW4 a debt and that the Appellant repaid part of the debt from the stolen dollars. Learned counsel for the Appellant contended that in the Court of Appeal, it was argued that there was no proof that the Appellant owed PW4 money and that PW4's evidence was hearsay but the court did not consider this argument and merely confirmed the trial court's finding without subjecting the evidence to fresh scrutiny.

In arguing ground 4(*b*) Mr *Ayigihugu* submitted that the Court of Appeal failed to evaluate the evidence that the Appellant paid PW4 US$ 10 000 which evidence was contradictory and unreliable. He contended that there were material contradictions relating to the amount owed which were material. Counsel argued that PW4 had stated that the Appellant owed him US$ 20 000 but repaid US$ 10 000 but he had told the police that he gave the Appellant US$ 25 000. He contended that this was a material contradiction. Mr *Ayigihugu* also attacked the credibility of PW4 when he claimed that he had been paid in phases, when he claimed that his secretary was present when he was paid, when he paid the stolen money to the bank and not to the police and that the document indicating receipt of the money by the bank was made in the bank whereas PW1 said it was made in his office. He also attacked the failure of PW4 to identify the dollars in court. Counsel prayed the court to hold that the evidence of PW4 as to the debt and repayment was unsatisfactory and unsafe to maintain a conviction for a capital offence.

Mr *Byabakama*, learned counsel for the State, submitted that the Court of Appeal did evaluate the evidence relating to the debt and repayment. He conceded that PW4 contradicted himself on the amount of the debt but submitted that this was a minor contradiction. What was clear, argued Mr *Byamukama* was that the Appellant owed PW4 some money and that is why the Appellant paid him some money. Counsel referred to the evidence of the Appellant where he denied the payment of US$ 10 000 in his police statement, but accepted borrowing money from PW4; and yet in his unsworn statement he denied borrowing money from PW4. He contended that these conflicting versions of the Appellant should lend credence to the prosecution case. It was his submission that the Court of Appeal re-evaluated the evidence of PW4 and came to the conclusion that the trial Judge was right in believing the evidence of PW4.

From the record of proceedings it is clear that the Court of Appeal reviewed the evidence that had been adduced at the trial by the prosecution and particularly that of PW4 and the defence, before accepting the findings of the Learned trial Judge.

The Court observed,

> "At the trial two persons testified on the debt and its subsequent payment in dollars, namely PW4 (Paul Etyang) for the prosecution and the First Appellant for the defence. Their evidence was in sharp contrast one with the other. Paul Etyang testified that sometime in July 1995 the First Appellant telephoned him from London that he

> wanted financial assistance urgently. After, the First Appellant had convinced him, PW4, what he needed the money for, he organized it for the First Appellant using his niece. The amount was US$ 20 000 and was paid to the First Appellant through the Standard Chartered Bank. The First Appellant acknowledged receipt and he promised to pay back within two days after arrival in Uganda, but he failed to do so. Then out of the blue and without any prior appointment, the First Appellant walked into PW4's office on the 4 March 1996 in the afternoon apologized for the delay and paid him a bundle of US$ 10 000 new notes in US$ 100 denomination plus UShs 5 million.
>
> The First Appellant denied having paid any money to Mr Paul Etyang in his statement to the Police Exhibit P19. He however, admitted that he had received some loan from Paul Etyang in 1994 through Mrs Mariam Emeru cousin of Paul Etyang. He did not indicate how much. He stated that he had been paying that loan in instalments. The last instalment of UShs 11 million was paid to Paul Etyang in January 1996 through Mrs Mariam Emeru: This Mariam Emeru is Mariam Emeru Adeke, PW2. In his unsworn statement in court, however, the First Appellant denied having borrowed any money from Mr Paul Etyang. Instead he claimed that it was PW2 who borrowed UShs 21 million from Etyang and his role was to guarantee its repayment from her commission from ticket sales. He added that when the company was experiencing financial problems he sold one of the company's vehicles with the consent of one of the directors for UShs 11 million and gave it to PW2 to pay Etyang so as to ease her from the pressure being exerted on her by Etyang".

Before reaching its own conclusion on the issue whether the Appellant owed PW4 a debt, the Court of Appeal referred to the trial Judge's consideration of the apparent discrepancies between PW4's statement to police and his evidence in court which she found to be minor and did not point to deliberate untruthfulness and her finding accepting PW4's evidence as follows: "I accept the testimony of PW4 whom I found to have been a witness of substantial truth that A1 owed him money and on 4 March 1996 he paid him US$ 10 000 which was stolen". The Court then concluded:

> "We accept the above conclusion of the Learned trial Judge. PW4 is an independent witness. Even though he had been branded as a liar, no reason has been shown why he should be. The First Appellant's admission in Exhibit P19 that he borrowed money in 1994 from PW4 through PW2 leads credence to PW4's story that he gave financial assistance to the First Appellant.
>
> We agree with the finding of the Learned trial Judge that the First Appellant owed PW4 a debt and that he paid US$ 10 000 to PW4 in settlement of that debt. This US$ 10 000 has been found to be part of the money that was stolen on the 29 February 1996".

From the above passages we are satisfied that the Court of Appeal adequately re-evaluated the evidence and came to its own conclusion before accepting the finding of the Learned trial Judge that the Appellant owed PW4 a debt and repaid part of the debt with some of the stolen dollars. The Court of Appeal reviewed the contradictions in the evidence of PW4 and agreed with the Learned trial Judge that they were minor and that PW4 was substantially a truthful witness. We agree with the conclusion reached by the Court of Appeal that the contradictions in PW4's evidence relating to the amount of debt and how much of it had been repaid were minor and did not go to the root of the issue whether the Appellant owed PW4 some money. No reason was advanced why PW4 should have falsely claimed to have lent the Appellant the money or to have received repayment from the stolen dollars. Moreover, part of the Appellant's evidence corroborated PW4's evidence regarding the debt. We do

not agree with Mr *Ayigihugu*'s argument that PW4's evidence regarding the debt was hearsay merely because his niece PW2 was not asked about it. PW2 was merely an agent of PW4 in the transmission of the money, but the transaction was concluded between the Appellant and PW4. The fact that the Appellant paid PW4 US$ 10 000 corroborates the evidence of PW4 that the Appellant owed him the money. Accordingly, we find no merit in this ground of appeal which must fail.

Mr *Ayigihugu*, learned counsel for the Appellant, then argued ground 3 where the complaint was that the Court of Appeal erred in law when it maintained the Appellant's conviction on the basis of the doctrine of recent possession. Learned counsel submitted that the Appellant did not have to give an explanation of how he came into possession of the money since he denied giving the money. He contended that failure to give an explanation did not imply that he was the thief. Mr *Ayigihugu* further argued that it was important to take into account the nature of the property. He pointed out that the money was stolen on 29 February 1996 and given to PW4 on 4 March 1996, after a period of four days. He submitted that money changes hands very rapidly and therefore one could not rule out the fact that the Appellant was merely a receiver and not the thief. It was his contention that the trial and appellate courts did not rule out the possibility that the Appellant was a receiver.

For the State, Mr *Byabakama* submitted that the evidence on record ruled out the possibility that the Appellant was a mere receiver. He argued that the Court of Appeal reviewed the evidence and came to the conclusion that the Appellant was not a mere receiver but a participant in the robbery. Mr *Byabakama* also submitted that there was evidence in exhibit P13 of subsequent conduct whereby the Appellant's passport had expired and he was travelling on a different passport from the Ugandan one.

The Court of Appeal considered at some length the question whether the Appellant was a thief or a mere receiver. It took into account the dates when the money was stolen and when it was found in possession of the Appellant and held that the Appellant was found in recent possession of stolen property. The court referred to the decision of this Court in *Moses v Uganda* criminal appeal number 1 of 1997 where the court stated:

> "it ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raised a very strong presumption of participation in the stealing so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a natural event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eye witness".

In the instant case, the Court of Appeal considered the argument made on behalf of the Appellant that at best he was a mere receiver and not a thief because the currency notes involved could readily change hands and that the Learned Judge was wrong in holding that they could not change hands in such a short time. The argument for the State was that the Appellant was not a mere receiver but a thief because firstly he had failed to give an explanation as to how he came into possession of the dollars, secondly the dollars were brand new and had not gone into circulation. Thirdly, all banks and forex bureaux had been alerted and the serial number of the stolen US$ 100 bills given to them, and therefore only the robbers and their associates had them. Fourthly, the US$ 10 000 given to PW4 were notes of consecutive numbers.

In answer to the above arguments, the Court of Appeal said,

> "The evidence shows that the Barclays Bank of Uganda Ltd was expecting a consignment of US$ 500 000 from United Kingdom. The consignment was brought by British Airways. The plane arrived around lunchtime and Ngobi Patrick collected four parcels containing the dollars. Two of the parcels were stolen by the robbers at Kitoro. On the following day, that is, 1 March 1996, the bank alerted by Exhibit P.11 all banks and forex bureaux, in the country about the theft and gave the serial numbers of dollar bills involved. Therefore, it was absolutely impossible for anybody to get any of the dollars through the bank or forex bureaux save and except the thieves and their collaborators. Then four days after the incident the First Appellant paid to PW4 US$ 10 000 with serial numbers F22357201B to F22357300D Exhibit P.11 which fall within the serial numbers of the dollars that had been stolen. That raises, on the authority of *Bogere Moses* (*supra*) 'a very strong presumption of the participation in the stealing.' The First Appellant did not give any innocent explanation of the possession. Therefore the strong presumption of the participation in the stealing has not been rebutted.
>
> We are of the view that the Learned trial Judge was right in finding that the failure of the First Appellant to give an innocent explanation of his possession meant that he was one of the thieves. It was during the robbery that the policeman was murdered. In our view, the above finding justifies the conviction of the First Appellant of the offences charged".

In *Mudasi v Uganda* Cr App No 3 of 1998 (SC) this Court summarized the law relating to the doctrine of recent possession as follows:

> "It is now well established that a court may presume that a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. This is an inference of fact which may be drawn as a matter of common sense from other facts including the particulars of the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found in possession. It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against the accused person must be incompatible with innocence and capable of explanation upon any other reasonable hypothesis than that of guilt. According to the particular circumstances, it is open to a court to hold that an unexplained possession of recently stolen articles is incompatible with innocence. On finding of possession of property recently stolen in the absence of a reasonable explanation by the Appellant to account for his possession a presumption does arise that the Appellant was either the thief or a receiver. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen whether it is a kind that readily passes from hand to hand and the trade to which the accused belongs can all be taken into account. See *Obonyo v R* [1962] EA 542".

In *Obonyo v R* (*supra*) the Court of Appeal for Eastern Africa held that where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the articles depends on the presumption arising from his recent possession of stolen articles, such a finding would not be justified unless the possibility that he received the articles is excluded.

We accept Mr *Ayigihugu*'s argument that mere failure to give an explanation, does not imply that the Appellant was a thief or in this case a robber. He could be either a thief or a receiver. In order to rule out the possibility that the Appellant was a mere receiver, in the absence of his explanation, it is necessary to take into account the nature of the property, whether it could change hands quickly and other relevant surrounding circumstances.

In the present case both the trial Judge and the Court of Appeal came to the conclusion that the Appellant was a thief and not a receiver because he had failed to give a reasonable explanation of his possession of the dollars and the stolen dollars could not have changed hands so quickly. In this connection the Learned trial Judge held:

> "I am therefore satisfied that the prosecution proved beyond reasonable doubt that A1 was in possession of dollars which had been stolen in the robbery of 29 February 1996 and his failure to explain means that he was one of the thieves. In any case I do not think the dollars could have changed hands within so short a time".

The Learned trial Judge also considered other circumstantial evidence which pointed to the guilt of the Appellant. The first was the Appellant's sneaking out of the country and his failure to return and renew his passport which expired in 1997, the acquisition of a European passport which he first used in 1997 and the possession of charms to protect himself against arrest. The Learned Judge held that such was not the conduct of an innocent person who left his business and family for over two years on the pretext of being a diabetic patient.

As we have already pointed out above, the Court of Appeal accepted the above finding of the Learned trial Judge that the Appellant was not merely a receiver but a thief because the dollars could not have changed hands so quickly. We agree with the Court of Appeal that since all banks and forex bureaux in the country had been alerted about the theft and given the serial numbers of the dollar bills involved, it was absolutely impossible for anybody to get any of the dollars through the bank or forex bureaux except the thieves and their collaborators.

There was ample other evidence on record connecting the Appellant with the offence. These included his borrowing of PW2 vehicle on the date of the robbery, the failure to give an explanation of his possession of part of the stolen money, his subsequent conduct in fleeing the country for over two years on the pretext of being diabetic and his failure to renew his Ugandan passport and acquisition of a foreign one for travel to Kenya. We agree with the concurrent findings of the two lower courts that the Appellant was not a mere receiver but one of the robbers who stole the dollars. Ground 3 must fail.

The third learned counsel for the Appellant Mr *Kabega* argued together grounds 5 and 6. The complaint in ground 5 was that the Court of Appeal erred in law and fact when it failed to resolve in favour of the Appellant any doubts regarding the entries made in the Appellant's passport. In ground 6, the Appellant complained that the Court of Appeal erred in law when it failed to consider and subject to a fresh appraisal evidence supporting the Appellant's alibi.

Mr *Kabega* submitted that the Appellant raised his alibi at the earliest opportunity in his charge and caution statement on 7 June 1998 in which he stated that he had been out of the country in Kenya between 24 February 1996 and 2 March 1996 and that he had passed through Malaba border. The Appellant had also repeated this in his defence in court. Learned counsel pointed out that to disprove the alibi, the prosecution adduced the evidence of PW8, Lutalo Patrick, and PW14 Nyakana Patrick who claimed that the Immigration File Monthly Returns were available. He submitted that it was imperative for the State to adduce evidence to rebut what the Appellant claimed by producing the returns to show that the Appellant never travelled through Malaba. Mr *Kabega* also argued that the Court of Appeal did not reconcile the statement of the Appellant exhibit P19 and the evidence of PW2, in order to resolve the

contradictions. Learned counsel submitted that it was not the duty of the Appellant to explain the entries and dates in the passport and that the court scrutinized the entries on its own, which was not its duty. Mr *Kabega* further submitted that there was no evidence putting the Appellant at the scene of crime as the only attempt to do so was the evidence of PW2 who claimed that she had lent him her vehicle. He referred to the case of *Moses v Uganda* (*supra*) on the question of alibi. His final submission was that the Court of Appeal erred in rejecting the evidence of alibi on the basis of the evidence of entries only and that had the court re-evaluated the evidence, it would have come to the conclusion that the Appellant was not in the country.

Mr *Byabakama* for the State submitted that the Court of Appeal had re-evaluated the evidence and come to its own conclusion that the alibi had been disproved. He argued that the Court had considered the versions of both sides and believed the evidence of PW2 while it disbelieved the Appellant's evidence relating to his movements. It was his contention that the evidence of PW2 that the Appellant was in the country on 29 February 1996 destroyed his claim that he was not in the country on that day.

As regards the entries in the passport, learned counsel for the State submitted that the court examined the entries and found that they were "doctored" due to anomalies found. He contended that failure to call evidence of entries at Malaba border did not weaken the evidence relied upon by the court and that no adverse inference should be drawn against the prosecution on that account. Learned counsel for the State argued further that the fact that the Appellant disclosed his alibi at the first opportunity did not mean that it was correct but had to be considered together with other evidence. He submitted that there was ample evidence which the Court of Appeal relied upon in holding that the Appellant was in the country at the material date and that his alibi was false.

On the issue of the Appellant's alibi the Court of Appeal reviewed the evidence of PW2 and that of the Appellant before coming to its conclusions. As regards the evidence of PW2 the court said:

> "At the trial, evidence was given by Miria Emeru Adeke PW2. She used to work as a Manager of Spear Tour and Travel where the First Appellant was her immediate boss. She used to own a motor vehicle 774 UBM. It was a Saloon car. She said that on the 29 February 1996, she went to work in that car. She said that the First Appellant came to the office on 29 February 1996 and borrowed her car 774 UBM at about 10:00am. The First Appellant did not tell her where he was going with the vehicle. She saw the First Appellant again at about 3:00pm. The First Appellant did not tell her where he had gone with the car. The First Appellant came to the office the following day and continued to come to the office until he flew out of the country on 6 February 1996 to attend an exhibition in Berlin. In his unsworn statement the First Appellant said that at around 26 February 1996 he travelled to Kenya through Malaba. He had gone to Kenya to collect exhibition materials for a Trade fair in Berlin from a company called Titjan Ltd. He travelled to Kenya on his Ugandan passport number A.02783 Exhibit D2. He returned to Uganda through Malaba on 2 February 1996. He relied on the entries on pages 32, 34 and 36 of Exhibit D2".

In our opinion this was a review of the evidence of PW2 and that of the Appellant in relation to his alibi that he was in Kenya on 29 February 1996 when the robbery was committed. The evidence of PW2 was that the Appellant was not only in the country, but that he was in Kampala and had borrowed her vehicle at 10:00am and returned it at 3:00pm. It is common ground that the robbery took place at Entebbe around lunchtime which is within the time the Appellant was away from the office with PW2's vehicle.

The Court of Appeal also reviewed the evidence relating to the entries in the Appellant's passport as follows:

> "There is no doubt that the First Appellant travelled out of the country to Kenya on the 26 February 1996. This is clearly borne out by the entries on page 32 of Exhibit D.2. What is not clear is the date when he returned to Uganda. According to him he returned to Uganda on the 2 March 1996. He relies on the entry on page 36 to show that he left Kenya on that day and the entry on page 34 to indicate that he arrived in Uganda on the 2 March 1996. As the Learned Judge correctly pointed out, the words on the stamp, are not clear and therefore it is difficult to determine whether the stamp was a Ugandan Immigration Stamp or not. Besides, the date has been doctored. The figure in front '2' has clearly been altered. The date, which he claimed, was the corresponding entry on Kenya side is not 2 March 1996 but 21 March 1996. We say so because we have observed from the entries in Exhibit D.2 that the Immigration Authorities of both Kenya and Uganda do not use a stroke or a dash after the day when the month is in words. They only use a stroke or dash when the day and month are in figures. Then at page 36 the date of 7 March 1996 is written '26 February 1996' and not '26/Feb. 1996'
>
> Therefore the First Appellant's claim that he went to Kenya on 26 February 1996 and returned to Uganda on 2 March 1996 cannot be true. We do not attach much importance to Exhibit D.3. The invoice was issued on the 28 February 1996. It is common knowledge that travelling from Kenya to Uganda by air takes about one hour and less than a day. Therefore he could have obtained the Delivery Note in Nairobi on the 28 February 1996 and returned to Uganda on the same day".

The Court of Appeal concluded that the Learned Judge was right in holding that the alibi was false and in rejecting it. We agree with the Court of Appeal. We find that the Court of Appeal sufficiently considered and subjected to a fresh appraisal the evidence supporting the Appellant's alibi and did not fail to resolve in favour of the Appellant any doubts regarding the entries made in the Appellant's passport. The Court of Appeal was correct in accepting the trial Judge's finding that the relevant entries in the Appellant's passport were "doctored" to coincide with the period when the robbery was committed. We find that the Court of Appeal came to the right conclusion that the trial Judge was right in accepting and relying on the evidence of PW2 which was not seriously challenged by the defence. The evidence of PW2 did not place the Appellant at the scene but in the country in Kampala which is not too far from the scene at the material date. We agree with Mr *Kabega* that where an accused discloses his alibi at the earliest opportunity it is the duty of the prosecution to check it. However, we do not find that the failure by the prosecution to call evidence from the Immigration Department of the entry returns made at Malaba border during the material dates casts any reasonable doubt in favour of the accused in respect of the alibi given the uncontroverted evidence of PW2. Therefore, grounds 5 and 6 must fail.

In conclusion, we hold that there was ample evidence to justify the conviction of the Appellant. The Court of Appeal was therefore right in upholding the conviction and sentence against the Appellant by the Learned trial Judge.

We therefore find no merit in this appeal. It is accordingly dismissed.

For the Appellant:
Information not available

For the State:
Information not available

Wilderness Trails (K) Ltd v Nkubitu
[2001] 2 EA 628 (CAK)

Division:	Court of Appeal of Kenya at Nairobi
Date of Ruling:	30 March 2001
Case Number:	56/01
Before:	Kwach, Shah and Bosire JJA
Sourced by:	LawAfrica
Summarised by:	C Kanjama

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[1] Appeal – Stay of execution – Whether a mandatory injunction can be given – Rule 5(2)(b) – Court of Appeal Rules.

Editor's Summary

On loss of an appeal from a magistrate's decision, W applied for stay of execution. When the formal application came up for hearing, consent was recorded staying execution pending an appeal. N subsequently applied to the magistrate for an order that the decretal amount, deposited in a joint deposit account, be released to him. The magistrate made an order granting the prayer and inserting a penal notice to the order. In the face of these irregular proceedings, W applied to the Court of Appeal under rule 5(2)(*b*) for a mandatory injunction to compel the repayment of the said sum.

Held – N's advocate was ordered to repay the sum to W, to be deposited in an interest-earning account.

Ruling

KWACH, SHAH AND BOSIRE JJA: On 22 April 1998 the Resident Magistrate at Meru, Oundu Esq entered judgment against the present Applicant, Wilderness Trails Ltd, in the sum of KShs 193 500 plus costs. That was in Meru CMCC number 223 of 1997 wherein the present Respondent, Thomas Nkubitu was the Plaintiff and the present Applicant and one Delia Craig were the Defendants. The said Defendants appealed against the judgment and decree of the Resident Magistrate. The appeal was heard by Commissioner of Assize, Omwitsa Esq. That was civil appeal number 25 of 1998 in the High Court at Nyeri. On 21 September 2000 the learned Commissioner of Assize dismissed the appeal. On that day Mr *Mahan* for the Appellants applied for stay of execution pending an intended appeal to this Court. A temporary stay for 14 days was granted pending a formal application for stay. Such formal application was filed and came up for hearing on 11 October 2000 when the learned Commissioner made the following order: "By consent application dated 27 September 2000 is hereby allowed. There will be stay of execution pending appeal to Court of Appeal. Costs in the cause".

Mr *Mahan* had, on behalf of the present Applicant, filed a notice of appeal against the decision of the learned Commissioner, on 21 September 2000. A copy of that notice of appeal was served on M/s Ayub K Anampiu and Company, Advocates for the Respondents.

It must be mentioned, at this stage, that the learned Commissioner would not have granted an order for stay of execution unless there was a notice of appeal as provided for by Order XLI, rule 4 of the Civil Procedure Rules.

By his letter of 22 September 2000 Mr *Mahan* had sought copies of proceedings before the learned Commissioner and a copy of his judgment to enable him to lodge his client's intended appeal. That letter was copied to M/s Ayub K Anampiu and Company, Advocates, so that the proviso to rule 81(1) enured to the benefit of the intended Appellant.

Such was the scenario in the matter when Mr *Anampiu* applied, on 6 February 2001, to the Resident Magistrate, who first heard the case, for the following orders:

> "(a) That this Hon. Court be pleased to order that the money deposited to (*sic*) the joint names of R.N. Machage and Company, Advocates and Ayub K Anampiu and Company, Advocates be released to the firm of M/s Ayub K Anampiu and Company, Advocates.
>
> (b) That costs of this application be paid by the Defendants/Respondents".

The application lodged by M/s Ayub K Anampiu and Co was titled "Notice of Motion" without mention of what provision of law or procedure it was based on. The grounds upon which that application was based were:

> "(a) That there has been no appeal filed against the judgment in HCCC (*sic*) No. 25/98.
>
> (b) That no notice of appeal has been served on us.
>
> (c) No appeal from the Court of Appeal has been served on the firm of Ayub K Anampiu and Company, Advocates since the date of judgment in HCCC No 25/98".

In support of that application Mr *Anampiu* swore an affidavit in which he deponed that Mr *Mahan* had never served a notice of appeal on him or the Plaintiff (the present Respondent). That statement under oath was clearly false. Mr *Anampiu* admitted before this Court that he had been served with a copy of the notice of appeal. He could not have denied it in the face of proof of service deponed to by Mr *Mahan.*

Mr *Mahan* opposed the application for release of the moneys in question. In an affidavit sworn to oppose that application Mr *Mahan* swore to the fact that his office had served a copy of the notice of appeal on Mr *Anampiu*'s office on 21 September 2000. He also deponed to the fact that he had complied with the requirement for obtaining copies of proceedings and judgment which had not yet been supplied. The learned Magistrate's jurisdiction to make the orders sought was also challenged.

Despite all that was before him, the Learned Magistrate, Oundu Esq, on 28 February 2001, ordered as follows:

> "1. That the money deposited in Account No. 61422/652601/00 – Standard Chartered Bank Meru Branch in the joint names of Richard Marangia Machage and Ayub K Anampiu, Advocates be released to the firm of M/S Ayub K Anumpiu and Company, Advocates forthwith.
>
> *Penal Clause: Take Notice* that any party served with this order and disobeys the same shall be liable for contempt of court".

It must be noted that the aforesaid "Penal Clause" was inserted despite the fact that no such order had been prayed for. It is also noted that the sum as ordered to be released stood at KShs 243 000 when released to Mr *Anampiu,* who on 2 March 2001 promptly paid a sum of KShs 169 546 to his client Thomas Nkubitu.

What has caused us much anxiety is the manner and speed with which the sum was ordered was released when there was more than ample evidence before the Learned Magistrate that the time for lodging an appeal had not expired. The matter had been dealt with by the superior court. There was no jurisdiction in the Resident Magistrate's court to order such release. Once a matter had gone to the High Court the magistrate had no jurisdiction to entertain any further application in connection therewith. We are also concerned about the Penal Clause inserted by the magistrate. Why did he do it? Is it possible that he had personal interest in seeing to it that the money was released to Mr *Anampiu*?

The sum total of all what we have said so far is that the application before us must succeed. Mr *Anampiu* left the matter to us instead of even attempting to justify what he did. What is sought before us is a mandatory injunction, under rule 5(2)(*b*) of the Rules of this Court, seeking orders to the effect that the Respondent and his advocate do personally re-deposit the sum in question in another banking account. We are aware that a mandatory injunction is not usually granted under a rule 5(2)(*b*) application; but if circumstances so warrant we can grant it. The facts before us warrant the granting of such a far-reaching order in the interest of justice.

We order, therefore, that Mr *Anampiu* personally shall within 7 days from the date of this order pay to Ms Bali-Sharma and Bali-Sharma Advocates the sum of KShs 243 000 which sum the said advocates will deposit in an interest bearing account with Housing Finance Company of Kenya Ltd, Nyeri Branch in the joint names of Bali-Sharma and Bali-Sharma Advocates and the deputy registrar, High Court, Nyeri. We would normally order that costs of such an application be costs in the intended appeal but in this instance we order that the Respondent and Mr *Anampiu* pay in equal shares costs of this application to the Applicant and we assess these costs at KShs 15 000 which must be paid within 7 days and in default execution to issue.

For the Applicant:
Mr Mahan

For the Respondent:
Mr Anampiu

Endnotes

1 (Popup - Footnote)

1 Page 474 of East Africa Law Reports [2001] 2 – Ed.