



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 141 of 2007**

**JOSEPH THUGO GICHUHI.....1<sup>ST</sup> APPLICANT**

**MICHAEL CHEGE.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**TERESIAH WANJIKU NJUGUNA.....RESPONDENT**

**RULING**

This matter was first fixed for hearing before me on 22<sup>nd</sup> January 2013. Mr. R. M. Mutiso Advocate appeared for the Plaintiff/Applicant and Mr. G. Kamonde Advocate appeared for the Defendant/Respondent. Mr. Kamonde indicated that he wished to take a preliminary point that there was before the court as the originating summons that commenced the action was not signed by the applicant and hence the suit ought to be struck out for incompetency.

The court directed that the parties do canvas the preliminary point taken by way of written submission. The parties filed their written submissions and on 27<sup>th</sup> February 2013 the court reserved its ruling on the issue to be given on 18<sup>th</sup> April 2013.

It is the Defendant's contention that the plaintiffs originating summons filed on 12<sup>th</sup> February 2007 is totally incompetent and misconceived on the ground that it was not signed as was provided in the previous order VI Rule 14 that required every pleading to be signed by an advocate or recognized agent (as defined by order III Rule 2) or by the party himself if he sues or defends in person. The equivalent Rule in the Civil Procedure Rules 2010 is to be found in Order 2 Rule 16 which provides thus:

***“Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9 Rule 2) or by the party if he sues or defends in person”.***

The defendant contends that this provision (rule) is mandatory and the originating summons having not been signed by Mr. R. M. Mutiso as the plaintiff's Advocate at the time of filing rendered the Originating Summons *void ab initio* and that the defect is incurable. The Defendant submitted that this was not a technical objection as envisaged in Order VI Rule 12 as the failure to sign the originating Summons goes to the root of the whole Originating Summons.

The Defendant further submitted that the failure to sign the originating summons is not a technical objection to the pleading on the ground that it is not based on want of form.

For his part the Plaintiff submitted that the defendant's conduct during the times that the matter has come up before the court for directions disentitles the Defendant to take this objection at this stage. With

respect I do not suppose there is anything in the conduct of the Defendant to estop him from taking the objection. the Defendant had through his replying affidavit intimated that he would take the objection.

I have looked at the Originating Summons dated 5<sup>th</sup> February 2007 and filed on 12<sup>th</sup> February 2007. The summons has been endorsed by R. M. Mutiso & Company Advocates as the firm that took out the summons on behalf of the plaintiff.

In my view the firm of R. M. Mutiso & Company Advocates by endorsing the summons have in doing so owned the same. The inscriptions ***“Deputy Registrar, High Court of Kenya at Nairobi”*** in the summons do not in my view add anything to the summons. The summons remains the product of R. M. Mutiso & Company Advocates who have endorsed the same on behalf of the plaintiff.

For his part has signed the affidavit in support of the originating summons.

It is my view that one of the reasons why a party or his advocate or his duly nominated agent is required to sign all the pleadings is that a party is precluded from denying that the pleading was theirs and further a party is bound by the pleadings that they file. If they were not required to sign the pleadings one can envision a situation where parties could easily deny pleadings on record as being not theirs.

In the instant case it is apparent the pleading in issue has been acknowledged by the plaintiff’s agent R. M. Mutiso & Company Advocates. In my vies I would also be prepared to hold that to the extent that the applicant has acknowledged the originating summons and the Defendant has responded to the same the need to administer substantive justice would militate against striking out the originating summons. Section 1A and 1B of the Civil Procedure Act 2010 enjoin the court to render substantive justice without being shackled by procedural technicalities. Article 159 (2) 9d) of the constitution of Kenya fortifies this duty bestowed upon the courts and provides:

***“Justice shall be administered without undue regard to procedural technicalities”.***

I do not consider that the Defendant would be prejudiced in anyway if the originating summons is allowed to stand the situation may have been different if the defendant could demonstrate that there would substantial injustice occasioned to him if the Originating Summon was allowed to stand. However since I have held that the Originating Summons has infact been endorsed/signed by R. M. Mutiso & Company Advocates for the Applicant the issue is spent.

I in the premises dismiss the Preliminary Objection and direct that the costs for the objection being the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Applicant

..... for the 2<sup>nd</sup> Applicant

..... for the Defendant