



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 505 OF 2011**

**SOUD HAFIDH (Suing as the appointed Attorney of RUKIYA  
SOUD).....PLAINTIFF**

**VERSUS**

**SAFARICOM (K)**

**LIMITED.....DEFENDANT**

**RULING**

(1) The plaintiff who claims to represent the administratrix of the Wakf of Soud Bin Ali Bashir (deceased) the registered owner of Plot No. 270 Section VI Mainland North, on which the defendant has allegedly erected a communication mast with a perimeter fence, has by Notice of Motion dated 12.10.11 sought the following substantive orders: -

1. That Judgment on admission be entered for the plaintiff against the defendant for an express denial of ownership of the offending mast and perimeter wall on Plot No. 270 Section VI Mainland North as per paragraphs 5, 6, and 7 of the Defence dated 30.9.2011.
2. That the unknown tortfeasor be notified vide the local daily newspapers to confess within fourteen (14) days and avert demolition of the offending mast and perimeter wall.
3. That an order for demolition of the offending mast and perimeter wall to issue to the unknown tortfeasor in default of confession.”

(2) The background to the Notice of Motion is the defendant’s denial by its defence of 30/9/11 wherein the defendant denied that it constructed the transmission mast and perimeter wall as alleged by the plaintiff. In her reply to defence the plaintiff stated that the **“denial therein constitutes an admission that the offending mast does not belong to [the defendant] and [the plaintiff] shall at the opportune time move the court for orders of judgment on admission”**.

(3) Mr. Ojode for the plaintiff appeared to seek an order of the court that the defendant was not the owner of the mast and the perimeter wall based on its denial to the plaintiff’s allegation. He then sought prayers 2 and 3 as consequential orders. Mr. Simiyu for the defendant contented that there can be no judgment based on an express denial of the facts pleaded in the plaint. He also objected to the grant of the orders in prayers No. 2 and 3 of the Notice of Motion and submitted that the court cannot be asked to give orders against 3<sup>rd</sup> parties without hearing them and that the owner of the mast should have been identified before the filing of the suit.

(4) The plaintiff's Notice of Motion is obviously misconceived because

(a) Judgement on admission under Order 13 rule 2 of the Civil Procedure Rules is only available **“where admission of facts have been made, either on the pleading or otherwise”**. The defendant has, far from admitting the allegations in the plaint, specifically denied that it constructed the transmission mast and the perimeter wall. In the circumstances there can be no judgment against the defendant, which can only be judgment as sought in the plaint for **“(a) a mandatory order to issue compelling the defendant to forthwith remove the mast and perimeter wall on Plot No. 270 Section VI Mainland North; (b) Damages under the principle of trespass productive of benefit to the defendant and (c) costs of the suit”**. On the pleadings there can be no judgment against the defendant as sought in the plaint.

(b) The rules of pleadings do not permit an action against **“unknown tortfeasors to be notified vide local daily newspaper to confess ...”** A plaintiff must identify his defendants and only service upon them may be done through the daily newspapers and other substituted means of service of summons. The plaintiff cannot take a short cut to establish the tortfeasor by seeking an order for the unknown tortfeasor to confess and in default for demolition of the offending mast and perimeter wall. A court of law and justice cannot order demolition of buildings without hearing the owner of the buildings to establish any interest that he may have on the land upon which the construction stands. Accordingly, the plaintiff's Notice of Motion dated 12/10/2011 is dismissed with costs to the defendant.

(5) However, pursuant to the overriding objective of the civil process under sections 1A and 1B of the Civil Procedure Act to attain the just determination of the proceedings, I direct the Deputy Registrar of the Court, in accordance with Order 40 rule 10 of the Civil Procedure Rules to inspect the site in dispute and to establish from the Communications Commission of Kenya (CCK) the ownership and or operation of the transmission mast in issue and report to the court within 30 days of this ruling for further directions as to the hearing and determination of the suit.

**Dated and delivered this 13<sup>th</sup> day of February, 2012.**

**EDWARD M. MURIITHI**  
**JUDGE**

**In the presence of**

.....for the Plaintiff  
.....for the Defendant  
.....Court Clerk.

**EDWARD M. MURIITHI**  
**JUDGE**