



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
**CIVIL SUIT (ELC) NO.98 OF 2011**

**PATRICK THOITHI KANYUIRA.....PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT**

**R U L I N G**

1. Patrick Thoithi Kanyuira is the plaintiff in this case. He brought the suit against Kenya Airports Authority seeking *inter alia* a declaration that he is the registered proprietor of property known as LR No.209/11444 Nairobi and that the defendant should not order him to demolish the development made on the suit property or in any way prevent the plaintiff from using or developing the suit property, unless the defendant complies with the provision of the Kenya Airports Authority Act Cap 395 providing for compensation.
2. The plaintiff also seeks an order of injunction restraining the defendant from demolishing his property and a mandatory injunction compelling the defendant to comply with the provisions of Kenya Airports Authority Act and render compensation to the plaintiff for the loss and damage suffered by the plaintiff as a result of a notice dated 30<sup>th</sup> September, 2008, issued to the plaintiff by the defendant.
3. Filed simultaneously with the plaintiff's suit is a notice of motion dated 8<sup>th</sup> March, 2011 in which the plaintiff seeks orders of interlocutory injunction pending the hearing and determination of his suit.
4. On 24<sup>th</sup> March, 2011, the Iseme Kamau and Maema Advocates filed a notice of appointment indicating that the defendant had appointed that firm to act for it. The firm of Iseme Kamau and Maema also filed a notice of preliminary objection to the plaintiff's notice of motion, raising two grounds: that the plaintiff's suit is misconceived, unsustainable and bad in faith; that the plaintiff's suit is premature and does not lie as it offends the provisions of Section 33 of the Kenya Airports Authorities Act Cap 395.
5. When the matter came before me for hearing, the plaintiff's counsel took issue with the appearance of the defendant. He submitted that summons to enter appearance and plaint having been served on the defendant on 18<sup>th</sup> March, 2011, it was mandatory for the defendant to file a memorandum of appearance within 14 days. The defendant did not however file the memorandum of appearance. Counsel maintained that the notice of appointment filed by the defendant's counsel, could not be a substitute for the memorandum of appearance. He therefore maintained that the defendant was not properly before the court and therefore the plaintiff should be allowed to proceed *ex parte*.

6. For the defendant, it was submitted that the purpose of the memorandum of appearance is to notify the other party, the physical address of the defendant and also the advocate acting for the defendant. It was maintained that that purpose had been achieved through the notice of appointment that was filed by the defendant's counsel. Relying on **Article 60** and **Article 149 of the Constitution**, the court was urged that the defendant has a constitutional right for representation by an advocate, and that justice should be administered without undue regard to technicalities. It was further submitted that the objective of the Civil Procedure Act and Rules as provided in Sections 1A and 1B of the Civil Procedure Act, would be defeated if the objection raised by the plaintiff's advocate was upheld.

7. I have given due consideration to the objection which has been raised by the plaintiff's counsel. It is not disputed that the defendant has not filed any appearance but has instead filed a notice of appointment of advocates. Under Order 6 Rule 2(1) of the Civil Procedure Rules 2010, it is envisaged that upon service of summons to enter appearance, a defendant will actually enter appearance. The purpose of the appearance as is evidenced in the format provided in form No.12, is to give the full name of the defendant, the defendant's advocate or recognized agent, the defendant's address for service and the defendant's physical address. In this case, this information has been provided through the notice of appointment which was filed by the defendant's counsel.

8. The question is, should the court strike out the notice of appointment because no appearance has been filed? I think not. This is because to do so, would be paying too much regard to procedural technicalities. The important thing is that the defendant has indicated his intention to challenge the plaintiff's suit through the notice of appointment, and the notice clearly indicates his advocates for that purpose and his address for service. It is further noteworthy that the notice of appointment was filed just about 5 days from the date the defendant was served with summons to enter appearance. It would neither be fair nor just to shut out the defendant from the seat of justice. Indeed, I am obliged by Article 159(1) (d) of the Constitution to administer justice without undue regard to procedural technicalities.

9. The Civil Procedure Act and Rules are simply intended to facilitate the just expeditious proportionate and affordable resolution of disputes. That objective can only be achieved if the court administers substantive justice. For the above reasons, I overrule the objection which was raised by the plaintiff's counsel. The notice of motion dated 8<sup>th</sup> March, 2011 shall be fixed for hearing and determined on merit.

**Dated and delivered this 24<sup>th</sup> day of May, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -  
Advocate for the plaintiff absent  
Ms Nyaiitho for the defendant  
B. Kosgei - Court clerk