



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 14 of 2007**

**THE CHAMBERS OF JUSTICE..... 1<sup>ST</sup> APPLICANT**

**GOSPEL BIBLE BAPTIST MISSION (GBBM) ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**ALFRED ROBERT LACKEY..... 1<sup>ST</sup> RESPONDENT**

**KIDS ALIVE INTERNATIONAL..... 2<sup>ND</sup> RESPONDENT**

**KIDS ALIVE KENYA REGISTERED TRUSTEES.....3<sup>RD</sup> RESPONDENT**

**RULING**

By an Originating Summons dated 8<sup>th</sup> and filed on 9<sup>th</sup> October, 2007, the applicants moved the court for several orders set out therein.

The Summons taken out under what is set out as part II of the Children Act, Cap 586 Laws of Kenya Order XXXVI Rule 5 and 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act relates to functions and activities of the Respondents herein whose central core is the Rights and Welfare of Children.

Upon service of the Originating Summons upon the Respondents, a Notice of Preliminary Objection was lodged for and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein by their learned counsel.

In the said notice, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sought to strike out the summons in limine on the grounds that:-

- 1. The applicants have no legal personality and are incapable of suing and being sued in their own names.**
- 2. The Originating Summons dated 8<sup>th</sup> October, 2007 is fatally defective on the face of it and is thus incompetent;**
- 3. The suit is commenced in a manner unknown in law and is incompetent *ab initio*;**

**4. The Affidavit of Ababu Namwamba and John Bovard sworn on 8<sup>th</sup> October, 2007 and the annexures thereto are fatally defective and;**

**5. The suit is filed ultra vires the Trust Deed of the Applicant.**

There are subsisting interim orders granted by Kubo J. limiting the activities of the Respondents herein. The Learned Judge also heard the arguments of both learned counsel on the Notice of Preliminary Objection which are on record. Subsequent thereto, the learned Judge retired before he delivered the ruling. Both learned counsel agreed that, based on the submissions as recorded by Kubo J. this court should proceed to write the ruling.

I have perused the record before me. Order 17 of the Civil Procedure Rules and in particular Rule 10 confers upon this court the jurisdiction to deal with the matter from the stage at which Kubo J. left it.

It is trite law that 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. See **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd [1969] E.A 696.**

The institution of the Originating Summons and the form adopted by the applicants shows a significant departure from the set form in the Civil Procedure Rules. Order XXXVI Rule 7 of the Civil Procedure Rules sets out the form to be used which appears in Appendix B. It is a mandatory that any party wishing to move the court must comply therewith. The applicants herein, with respect, did not apply the procedure set out therein.

The applicants also sought interlocutory orders in the Originating Summons so filed contrary to the Civil Procedure Rules. Order XXXVI Rule 12 provides:-

**“12. Every application in a suit which has been commenced by Originating Summons shall be made by summons in chambers”**

In the absence of any such application any orders that were made on the basis of the originating summons were misplaced.

It has been submitted that non-compliance with the form set for any procedure should not be used to defeat a party's quest for justice, but some procedure and forms go to the jurisdiction of the court and departure therefrom or non-compliance therewith, is likely to cause prejudice to the other party.

The applicants have also invoked Order XXXVI Rules 5 and 6 of the Civil Procedure Rule 5 reads as follows:

**“5. Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the right of the person interested”.**

And Rule 6 reads as follows:-

**“6. The judge shall not be bound to determine any such question of construction if, in his opinion, it ought not be determined on Originating Summons”.**

The marginal not to Rule 5 aforesaid reads “*summons by persons interested in deeds or wills*” That to rule 6 reads, “Direction upon summons for construction of documents”

I have related the said Provisions to the pleadings and see no connection between the two. More significant however is that, the applicants have cited The Children Act Cap 586 Laws of Kenya which statute is non-existent. There is the Children Act, 2001 which the applicants could have used or the Provisions of the Kenya Constitution. In the absence of any foundation in law the purported Originating Summons before the court, to say the least, is incompetent.

I appreciate the fact that the issues alluded to by the applicants relate to the rights of Children, however, in the absence of proper legal basis, this court cannot address the matters canvassed by the applicants.

Having considered all the material before me including the submissions by counsel on record, I find that there is not a proper suit that should be sustained.

Accordingly, I uphold the Preliminary Objection and strike out the said Originating Summons. It follows that any interim orders in place are also vacated.

The Respondents shall have the costs occasioned by these proceedings.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of February, 2010.*

**A. MBOGHOLI MSAGHA**

**JUDGE**

Mr. Mandala for the Plaintiffs

Miss Gacheru holding brief for Mr. Lutta for the Defendants