



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

**Civil Suit 354 of 2009**

**KLAAS HESSELS BEHEER B.V.**

.....**PLAINTIFF/APPLICANT**

**Versus**

**BONIFACE NJIRU T/A NJIRU BONIFACE**

**& COMPANY ADVOCATES.....DEFENDANT/RESPONDENT**

**RULING**

This is the Plaintiff/Applicant's Notice of Motion dated 19<sup>th</sup> august 2009 and seeking orders against the Defendant/Respondent:

- “1. THAT this Honourable Court be pleased to summarily enter judgment in favour of the Plaintiff/Applicant as against the Defendant/Respondent for the sum of US Dollars Eighteen Thousand Five Hundred (US\$ 18,500) together with costs as well as interest thereon at court rates with effect from the 25<sup>th</sup> day of March 2006 until payment in full.**
- 2. THAT in the alternative this Honourable Court be pleased to enter judgment on admission in favour of the Plaintiff/Applicant as against the Defendant/Respondent for the sum of US Dollars Eighteen Thousand Five Hundred (US \$ 18,500) together with costs as well as interest thereon at court rates with effect from the 25<sup>th</sup> day of March, 2006 until payment in full.”**

At the time of hearing, the Notice of Motion, the Applicant was represented by Mr. Onsando while M/s Ndombi held brief for Mr. Okeyo for the Respondent. That was on 22<sup>nd</sup> March 2010.

It turned out that while Mr. Onsando had come for the hearing of the Notice of Motion dated 19<sup>th</sup> August 2009 and properly fixed for hearing on 22<sup>nd</sup> March, 2010, M/s Ndombi had been instructed to come and apply for adjournment of the Defendant's Chamber Summons dated 3<sup>rd</sup> July 2009 and fixed for hearing on 14<sup>th</sup> April 2010. She told the court she had no information about the Plaintiff's Notice of Motion aforesaid and that she understood it was the Chamber summons which was to be heard on 22<sup>nd</sup> March 2010.

M/s Ndombi was wrong on that, and together with the fact that she could make no clarification concerning the alleged emergency for which Mr. Okeyo had gone home on Friday last week and as a result has failed to attend to this matter in court to-day, I dismissed M/s Ndombi's application for adjournment.

Proceeding to hearing of the Notice of Motion, it was Mr. Onsando's case that the Notice of Motion was not opposed because neither a replying affidavit nor grounds of opposition had been filed by the Defendant. He gave me the impression that the Notice of Motion

was filed in a suit instituted by a plaintiff and that the Notice of Motion was supported by an affidavit.

These are case files which came for hearing giving the judge no time to peruse them before hearing time.

Looking for the supporting affidavit is when Mr. Onsando led me to the place where there was an originating summons by which the suit was instituted dated 8<sup>th</sup> May 2009. The affidavit dated 23<sup>rd</sup> April 2009 supporting that Originating Summons is the affidavit Mr. Onsando relied upon when prosecuting the Notice of Motion dated 19<sup>th</sup> August 2009 and that is the time I realized this suit is instituted by way of an originating summons supported by an affidavit.

The Chamber Summons dated 3<sup>rd</sup> July 2009 is against the said Originating summons. Though filed earlier than the Notice of Motion, the Chamber Summons is scheduled for hearing later than the Notice of Motion which I have now heard. Is Mr. Onsando now saying the Originating Summons is now no more? If he is not saying so, should the Originating Summons not remain with its supporting affidavit? In any case, under which provisions of the Civil Procedure Act and Rules do we have TRANSFERRED AFFIDAVITS?

M/s Ndombi did not help us much on those issues, but my view is that, before me is a Notice of Motion dated 19<sup>th</sup> August 2009 which does not have a supporting affidavit.

That Notice of Motion is filed under Order XXXV Rule 1 (1) and (2) of the Civil Procedure Rules as the main provision. Others like Order XII Rule 6, Order VI Rule 9 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act have also been specifically mentioned but Order XXXV Rule 1 is the main provision.

Order XXXV Rule 1 (2) States as follows:

**“The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.”**

Emphasis supplied. As I am not aware of provisions under the Civil Procedure Act and Rules authorizing transfer of affidavits, I do hold the view that this Notice of Motion dated 19<sup>th</sup> August 2009 does not have a supporting affidavit and therefore does not comply with Order XXXV Rule 1 (2) aforesaid. It is a Notice of Motion making claims in support of which the Notice of Motion has no affidavit evidence. It is therefore an incompetent Notice of Motion.

Furthermore, the Notice of Motion is filed in a suit instituted by an Originating Summons. Such Originating Summons would be governed by Order LII rule 10 of the Civil Procedure Rules which in sub rule (2) states:

**“No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.”**

That being the position, does non filing of replying affidavit or grounds of opposition by the Defendant in the Originating summons constitute a ground for filing this Notice of Motion by the Plaintiff to obtain the orders prayed for against the Defendant? I do not think it does because this is a Defendant who is still within his lawful right to defend himself in the Originating summons without necessarily filing an affidavit in reply or replying affidavit or opposing grounds. In fact this is a matter where pleadings show that in the absence of a consent settling the suit, the sum now claimed in this Notice of Motion may only be paid after a number of issues will have been resolved during the hearing of the Originating Summons where, apparently, attempt to have directions taken is yet to be made.

The above being the position, this Notice of Motion dated 19<sup>th</sup> August 2009 is hereby dismissed with costs to the Defendant/Respondent.

Dated this 26<sup>th</sup> day of March 2010.

J.M. KHAMONI

JUDGE