REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 546 of 2006

RAJ DADHLEY *t/a*
BARON ENTERPRISES ……..…….. PLAINTIFF

VERSUS
G.M. HOLDINGS LIMITED ……..…… DEFENDANT
R U L I N G

This application is brought by a Chamber Summons dated 22nd March, 2010, and expressed to be taken out under **Order VI Rules (3)** and **(9); Order VIII Rule 1 (2); Order IX Rule 2 (2)** of the **Civil Procedure Rules; Sections 3, 3A** and **63 (e)** of the **Civil Procedure Act;** and all enabling provisions of the law. The Plaintiff/Applicant thereby applies for orders that –

1. ***The Defendant's statement of defence filed herein be struck out.***
2. ***Summary judgment be entered for the Plaintiff against the Defendant for the sum of Kshs.5,200,000.00 as prayed in the plaint herein, plus interest from the date of filing suit until payment in full.***
3. ***Costs of the suit be borne by the Defendant.***

The application is supported by the affidavit of Raj Dadhley, the Plaintiff, and is based on the grounds that –

(a) The Defendant has admitted the existence of the contract, the subject matter of this suit.
(b) The defence filed herein is a mere sham full of mere denials without any triable issues.
(c) The filing of the defence violates the provisions of the Civil Procedure "Code" particularly Order VIII Rule 1 (2) and therefore amounts to an abuse of the Court process and should be struck out.

When the application came for hearing on 3rd May, 2010, Mr. Mbegi appeared for the Plaintiff/Applicant, but the Defendant neither appeared nor was it represented. Mr. Mbegi told the Court that the Respondent's Advocates, M/S Singh Gitau, were served on 14th April, 2010 seeing that this was more than 14 days before the hearing date, the Court found that they were served in sufficient time to attend Court and allowed the application proceed *ex parte.*

While conceding that the defence herein was filed on 2nd April, 2010, Mr. Mbegi for the Plaintiff submitted that this was contrary to **Order VIII Rule 1 (2)** which requires, in mandatory terms, that a defence be filed within 15 days. He further submitted that whereas the rules provided for extension of time, the Defendant did not seek any such extension, and therefore the filing of the defence after 30 days amounted to abuse of Court process. He also submitted that even if the defence was filed regularly, it did not and could not raise any issues in the face of the contract which gave rise to this suit.

Finally, Mr. Mbegi submitted that even though the application was served, it was not opposed. He therefore prayed for orders as prayed with costs in the suit and in the application.

Regarding service of this application, I note that Wislaus Murenga, the Court Process Server, states in his affidavit of service that on the 14th day of April, 2010, he received from M/S S.G. Mbaabu & Co., Advocates, an application which was coming up for hearing on 3rd May, 2010, to serve it upon M/S Singh Gitau & Co., the Advocates on record for the Defendant. On the same date he proceeded to Unity House where the said firm was located and "served them with the said application." He also deposed that the said Advocates accepted service thereof by signing and stamping on the deponent's copy which he thereby returned duly served.

I have taken the liberty to go into these details because the service of the application in this matter raises several eyebrows. The first one is that the Process Server is categorical that he served the application on the Respondents' Advocates on 14th April, 2010. However, the Court record shows that the hearing date of 3rd May, 2010 was given by the Registry on 20th April, 2010. How did the Process Server serve

the application on 14th April, 2010 by which time the application had not been given a hearing date? Secondly, in paragraph 3 of his affidavit of service, the process server merely says that he went to Unity House where **"… the said firm is located and served them"** with the said application. It was imperative for him to identify the particular person who was served, the time of service, and state that he knew that person. But he did give not given such details. That part of the affidavit is so generalized that is poses more questions than it answers.

As if that were not enough, the affidavit itself is neither signed by the deponent nor commissioned by the Commissioner for Oaths before whom it was sworn! Given all these shortcomings, this affidavit is no more than a typed piece of paper without any probative value. It leaves a lot to be desired.

Coming to the application itself, I note that it is said to be brought under various provisions of the law and procedure. The first of these is **Order VI Rules (3)** and **(9)**. In the first instance, **Order VI** deals with pleadings generally. The use of brackets around 3 and 9 denotes that these are subrules. But the rules to which they are subrules are not indicated. One cannot help but note that all **Rules 1, 3, 4, 6A, 8, 9,** and **10** of **Order VI** have each a subrule **(3),** and none of those subrules bears any relevance to this application. Similarly, none of these rules has a subrule **(9).** And if perchance the application was meant to refer to **Order VI Rules 3 and 9,** both of these are irrelevant to this application inasmuch as **Rule 3** deals with the contents of pleadings while **Rule 9** deals with admissions and denials.

The next **Order** under which the application is expressed to be brought is **Order VIII Rule 1 (2).** This **Rule** is relevant to a Defendant in the context of filing his defence within 15 days after entering an appearance. Reference to **Order IX Rule 2 (2)** is also relevant as it regulates the mode of appearance. But the two orders sought are not provided for in the provisions of procedure cited. The 1st order which the Plaintiff seeks is that the Defendant's statement of defence be struck out, which should have been based on **Order VI Rule 13.** The 2nd prayer is for summary judgment which is provided for in **Order XXXV** of the **Civil Procedure Rules.** Since there are these specific provisions on which the orders sought could have been based, one cannot have recourse to **Sections 3** and **3A** of the **Civil Procedure Act.**

In a nutshell, the totality of the above observations is that the application before the Court is incompetent as the provisions of the **Civil Procedure** relied on do not invoke the Court's jurisdiction to grant the orders sought. The affidavit of service leaves a lot to be desired as it is not signed either by the deponent or by the Commissioner for Oaths; it purports to have been served before the hearing date was given; and it does not identify the person who was served.

For the above reasons, I find that this application is incompetent and it is hereby struck out.

Dated and **delivered** at **Nairobi** this 10th day of June, 2010.

L. NJAGI
JUDGE