



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

**Commercial Civil Case 47 of 2006  
WELLINGTONE WAKWABUBI..... APPLICANT**

**~VRS~**

**ELIUD NJATA MUREFU ..... RESPONDENT**

**RULING**

This is a ruling on a preliminary objection dated 11/11/2006 raised by Mr. Situma on behalf of the Respondent. It is based on the ground that the originating summons (O.S) is not supported by a supporting affidavit and a certified copy of register. The originating summon is not in compliance with Order XXXVI Rule 3 (3) (d) and also Order L Rule 16 (3). Mr. Omukunda for the Applicant conceded to the preliminary objection but pleaded with the court not to strike out the original summons for such a minor defect.

Order XXXVI rule 3 (3) (d) provides:

*“The summons shall be supported by an affidavit to which a certified copy of title to the land in question is annexed.”*

Mr. Situma referred the court to Hccc No.83 of 2001 (O.S) where my brother Justice Serگون struck out the originating summons for failure to comply with Order XXXVI Rule (3) (d) (2). The Applicants omitted to annex certified copies of title to the summons rendering it fatally defective.

What the Applicant has annexed herein is a copy of title deed issued quite some while ago from its appearance. The law requires that a certified copy of register be annexed to the supporting affidavit. Failure to annex the certified copy of register and a verifying affidavit is not a minor defect as submitted by the counsel for the Applicant. It is a major defect which is fatal to the summons.

On 9/7/2009, the Applicant was granted leave to amend the originating summons. An amended originating summons dated 22/01/09 was filed on the same date. The summon has no supporting affidavit or a certified copy of register annexed to it. The summon is not in compliance with Order XXXVI rule 3 (3D).

I find that the preliminary objection is merited and I uphold it accordingly. The originating summons dated 22/07/2006 is hereby struck out with costs to the Respondent for being fatally defective.

**F. N. MUCHEMI  
JUDGE**

Ruling dated and delivered on the 13<sup>th</sup> day of October, 2010 in the presence of Mr. Situma for the Resopendent.

**F. N. MUCHEMI**

**JUDGE**