



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 158 OF 2008**

**MWAI LIMITED.....1<sup>ST</sup>**  
**PLAINTIFF**  
**JAMES MATHENGE MWAI, GRACE GACHEKE MWAI**  
**And CATHERINE WANGUI MUIGAI as Administration of the**  
**Estate of ISIAIAH MWAI MATHENGE.....2<sup>ND</sup>**  
**PLAINTIFF**  
**VERSUS**  
**MOUNT HOLDINGS LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**  
**G.K. MEENYE & M.N. KIRIMA t/a MEENYE KIRIMA ADVOCATES.....2<sup>ND</sup>**  
**DEFENDANT**  
**MUNICIPAL COUNCIL OF MOMBASA.....3<sup>RD</sup>**  
**DEFENDANT**

**R U L I N G**

This is an application dated 1<sup>st</sup> October 2009 by the 1<sup>st</sup> Defendant, under the provisions of Section 3, 3A and 63 (e) and Orders 3a Rule 4 of the Civil Procedure Rules. It seeks the following inter alia orders:-

- *That the order of stay issued on 25<sup>th</sup> June 2008 against the 1<sup>st</sup> Defendant be discharged varied and/or set aside.*
  
- *That the amended Chamber Summons dated 15<sup>th</sup> September 2009 and the entire suit is against the 1<sup>st</sup> Defendant be struck out and/or be dismissed.*

When the application dated 25<sup>th</sup> June 2008 was placed before Honourable Justice Sergon on 25<sup>th</sup> June 2008. It was under a certificate of urgency.

As is the practice the matter was placed before a Judge and was expected to proceed ex parte. Mr. Simiyu appeared for the plaintiff; however, the matter did not proceed ex parte. Mr. Omulele Advocates was present and was recorded appearing for the 1<sup>st</sup> Defendant. How Mr. Omulele knew of the application and came to the court is not disclosed.

For certain, he had not come on record by the said date formally.

Mr. Omulele told the court that he would raise questions touching on jurisdiction. The court then proceeded to grant interim orders in terms of prayer 2 of the Application for 14 days.

The Court record shows that the 1<sup>st</sup> Defendant never filed any Replying Affidavit and the application has by the First Defendant has never been heard on merit. The orders of 26<sup>th</sup> June 2008 were obtained in the presence of the counsel for the 1<sup>st</sup> Defendant. The interim order was granted in the discretion of the court and extended from time to time by consent of the parties or otherwise. The 1<sup>st</sup> Defendant was under a duty to have filed its Replying Affidavit and to set down his matter for hearing.

Since Mr. Omulele was present in court and addressed the court, it is difficult to state that the orders were given ex parte, strictly speaking. It appears that he was reserving to raise his jurisdictional issues through an Replying Affidavit and grounds of opposition. I have not seen these on record. I therefore take it that the application can not to date been opposed by the 1<sup>st</sup> Defendant.

If Replying Affidavit was filed or grounds of opposition, the position shall remain that the Application has not been heard on merit.

In fact somehow there is a consent order that the application dated 25.6.2009 would be disposed of by way of written submissions. This suggests that both parties had filed appropriate papers to the application. I have not seen the written submissions on record. If they were filed there are no proceedings to show that the application was ever heard,

In the circumstances, I hold that the 1<sup>st</sup> Defendant is not entitled to the orders to discharge, vary or set aside the orders granted by Hon. Justice Sergon in the presence of both parties.

The expectations are that the 1<sup>st</sup> Defendant was to respond to the application and oppose it on merit. The plaintiff has not stolen a match on the 1<sup>st</sup> Defendant whatsoever.

It follows that that prayer 3 cannot succeed as the order of leave to amend the Chamber Summons dated 15/09/07 was granted by this court presided over by myself, upon hearing on merit.

Application dated 1<sup>st</sup> October 2009 is dismissed with costs.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of November 2010**

**M.K. IBRAHIM**

**J U D G E**

**16.11.2010**

Coram

Mr. Omulele for the 1<sup>st</sup> Defendant/applicant

Mr. Simiyu for the plaintiff

**ORDERS**

Ruling delivered in their presence.

**ORDER BY CONSENT**

Mention on 1<sup>st</sup> December 2010 to ensure that all court papers are in place for directions.

**Ibrahim, J**