



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Case 886 of 2005

GENERAL TOOLS & ELECTRICAL EQUIPMENT

LIMITED.....APPLICANT

VERSUS

ORIENTAL COMMERCIAL BANK LTD.....RESPONDENT

TIMIMI KARAMA YISLAM.....INTERESTED PARTY

RULING

By its Originating Summons filed on 26th October 2005, the applicant (hereinafter “the plaintiff”) seeks five orders from the court expressed as follows:

- 1) That there is a binding agreement reached between the plaintiff and the defendant on the terms of discharge of charge over the suit premises.
- 2) That the plaintiff has fully met the terms of the discharge of charge agreed between the parties.
- 3) That the court directs that the defendant discharges the charge on plot No. 1264 Section 1 Mainland North (CR. 12002/1 Sub-division No. 1264) Original No. 67 Rev/551.
- 4) That the court do order stay of any further dealings and/or transactions relating to the said plot save for the purpose of the discharge.
- 5) General damages for breach of agreement and costs.

Simultaneously with the Originating Summons, the plaintiff filed a Chamber Summons in which it sought one primary prayer of injunction restraining the defendant from carrying out any further dealings and/or transactions or interfering with the said plot pending the hearing and determination of the suit.

When the defendant was served, it entered appearance and filed a Notice of Preliminary Objection on 15th November 2005 on three grounds namely: that the court has no jurisdiction to entertain the plaintiff’s Originating Summons; that the said Originating Summons is resjudicata and that the summons is an abuse of the process of the court.

The matter came up before me for hearing on 12th November 2008 when counsel agreed to file written submissions. Before then however, Timimi Karama Yislam had joined the fray as an Interested Party and it also through its counsel agreed to file written submissions. In his Written Submissions, counsel for the defendant elaborated the said grounds of objection and cited several authorities he believed supported the preliminary objection.

On his part, counsel for the plaintiff submitted that there is jurisdiction to entertain the plaintiff's Originating Summons and that any defects therein, are not fatal. With regard to the objection, on the basis that the plaintiff's claim is resjudicata, counsel submitted that that is not the case as the issues in the Originating Summons are different and there is now an Interested Party who was not a party in the former suit.

The Interested Party's counsel submitted that the court has jurisdiction to entertain the Originating Summons and that the question of resjudicata does not arise since he was not a party to the former suit and further that the issues for determination in the Originating Summons are different.

I have carefully considered the Originating Summons, the Grounds of the Preliminary Objection, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. In challenging the jurisdiction of the court to entertain the Originating Summons, counsel for the defendant argues that, the Originating Summons seeks general damages which cannot be claimed in an Originating Summons and for that reason it is incompetent and an abuse of the process of the court. Counsel relied upon the Court of Appeal decision in **Kenya Commercial Bank Limited – v – James Osebe (1982-88) 1 KAR 48**. The ratio decidendi of that case in my view is that neither Rule 3A nor Order 36 of the Civil Procedure Rules confers power to award damages on an Originating Summons. There can be doubt that that is an unassailable proposition of the Law. It must be remembered, however, that the Court of Appeal in the said case was faced with a decision of the High Court where damages had been awarded on an Originating Summons. The Court of Appeal in my view did not set up a principle that an Originating Summons otherwise validly founded is invalid if damages are claimed. There is no dispute that the plaintiff's other claims can validly be adjudicated upon under Order 36 of the Civil Procedure Rules. In any event, as was appreciated in the **KCB – v – Osebe** case (supra), the court has a discretion under Rule 10 (1) of Order 36 of the Civil Procedure Rules to order that proceedings commenced by Originating summons be continued as if they had commenced by way of plaint.

The case of **Floriculture International Limited – v – Central Kenya Limited and Others (CA No. 121 of 1995) (UR)** was also cited by counsel for the defendant as supporting his proposition that the present Originating summons is incompetent. I have perused the entire case and I am not persuaded that the facts in that case are similar to the facts in our case. In the case before the Court of Appeal, it was held that none of the claims made in the Amended Originating summons could be entertained under Order 36 or Section 3A. The Originating summons sought, *inter alia*, to have two charges declared invalid, cancellation of the same and general damages. The court observed at page 3 of its Judgment as follows:-

“The very provisions of Order 36 Rule 3A are predicated upon there being a valid mortgage and the reliefs specified in that rule are also predicated upon there being a valid mortgage. In the instant appeal, the plaintiff's main claim was that there was no valid mortgage.”

It is plain that the court did not establish an inexorable rule that where damages are claimed as one of the claims, the Originating Summons would be incompetent as counsel for the defendant seemed to argue.

Counsel further cited, to the defendant's aid, the case of **Lali Swaleh Lali and Others – v – Stephen Mathenge Wachira & Others (C.A. No. 132 of 1993)**. In that case the court specifically held that the Originating Summons contained prayers for rectification of the register under Section 143 of the Registered Land Act which rectification was a prerequisite to the claim for adverse possession which would have been entertained in an Originating Summons. The court's decision was heavily influenced by the fact that the claim of adverse possession was unsustainable without the rectification of the register which could not be entertained in an Originating Summons. Nothing could have been achieved by

continuing the proceedings as if began by plaint.

It can be seen right away, that that is not the position in our case. I need not say anything more on that case.

Finally, counsel cited a decision of Justice Ibrahim in **Eurocraft Agencies Limited – v – Tradewinds Express Limited ([2003] LLR 2591 (CCK))** for the proposition that an applicant cannot obtain interim relief by way of an injunction in a suit commenced by Originating Summons. With all due respect to counsel for the defendant, my Learned Brother Ibrahim J did not put up that proposition. In my view the Learned Judge was of the contrary view. In his own words:-

“There must be a suit first duly commenced. It is the Summons in Chambers that may be used to apply for the temporary injunction and not the suit itself.”

In the premises I have come to the conclusion that the preliminary objection based on want of jurisdiction has not been well taken and is overruled.

With regard to the objection that the Originating Summons and the Chamber Summons filed by the plaintiff are resjudicata, the short answer is that a final adjudication over the objection would entail a perusal of evidence which cannot be availed in a preliminary objection. I have, however, perused the affidavit filed by the plaintiff upon which counsel for the defendant based his objection. I am of the prima facie view that the issues for determination in the Originating Summons are not the same issues directly and substantially in issue in the former suit: HCCC No. 389 of 2002. Besides, there is now an Interested Party who was not and could not have been a party in the former suit.

The upshot of my consideration of the defendant’s preliminary objection is that the same has no merit and is overruled. The plaintiff and the Interested Party shall have the costs of the Preliminary Objection.

Order accordingly.

DATED AND SIGNED AT MOMBASA THIS 3rd DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

DELIVERED AT MOMBASA THIS DAY OF APRIL 2009.

JUDGE

Read in the presence of:-