



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 64 of 2007

LOICE WANJIRU CHEGE.....PLAINTIFF

VRS

THE KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

This is a ruling on the plaintiff's Chamber Summons dated 10th June, 2008 brought under Order XXXV, rule 5 of the Civil Procedure Rules. It seeks for summary judgment against the Defendant on admission as per the prayers of claim of the Plaintiff in prayer (a). Prayer (b) seeks for costs of this application.

The application is supported by grounds contained on the face of the application and those contained in the supporting affidavit.

The Applicant, Loice Wanjiru Chege is the plaintiff herein and she appeared in person. The Defendant, Kenya Power & Lighting Co. Ltd was represented by Mr. Nyolei of Kibichiy & Co. Advocates.

The Plaintiff in her plaint dated 1st August, 2007, alleges that the Defendant has unlawfully passed over an electric power line above the Plaintiff's residential house. Later the Defendant demanded that the house has to be moved away on grounds that is obstructing the defendant's power line.

The Plaintiff's main prayers are two fold:

- a) ***An order of this Hon. Court against the Defendant to remove power line way leave by-passed direct above the buildings or houses of the plaintiff on plot title No. BUKHAYO/EBUSIBWABO/1042.***
- b) ***Damages against the Defendant to be assessed by this Hon. court with effect from the year 1995 to this date with interest at current court rates percentage.***
- c) ***Costs of his suit.***
- d) ***Any other relief that this Hon. Court may deem fit and just to grant.***

The grounds supporting her application are that the Respondent/Defendant has admitted the claim and judgment ought to be entered in her favour. The applicant has annexed a number of correspondences to her affidavit. One of them is a letter addressed to her by the Defendant Ref. ADM 59/DM/jao dated 23rd April, 2008. the subject is "***way -leave complaint***" plot no.1042 – Bukhayo/Ebusibwabo. It reads in part:

"We wish to confirm that the anomaly will be rectified at the earliest opportunity. Thank you for bring this to out attention."

Also annexed are letters written earlier by the Applicant and the Busia District Commissioner, Respondent complaining about the unlawful action and asking the Respondent to rectify the problem dated 29/10/2004 and 09/03/07 respectively.

The Applicant relies on these correspondences and more so the letter dated 23/04/2008 signed by one David Mwaniki, the Respondents Assistant Regional Manager, Western Kenya. Applicant on the basis of this letter contends that the claim has been admitted and prays for judgment against the Respondent.

The Respondent opposes the application on grounds that the application has been brought under the wrong provisions of the law. Further that there is no evidence to support the alleged admission by the Respondent. The application is brought in bad faith according to the Respondents and ought to be dismissed.

In the statement of defence dated 18/10/2007, the Respondent challenges the jurisdiction of this court that the matter originates from Busia and ought to have been filed at High Court, Busia. Part 11 also challenges the Plaintiff's suit as fatally defective and that it will raise a preliminary objection at the hearing. In the answer to the substantive issues, the defence denies the claim and raises the issue of *locus standi* that the Plaintiff is not the owner of the suit premises and therefore not the right person to file the suit. During the hearing of the application, only a few of these issues were mentioned by the Respondent.

On the first ground of objection that the application is brought under the wrong provisions of the law, I wish to analyse the relevant provisions. The plaintiff prays for "**summary judgment**" under XXXV Rule 5. As rightly pointed out by the counsel for the Respondent, summary judgment under Order XXXV can only be entered in a liquidated claim.

In the facts contained in the supporting affidavit, specifically paragraph 9 talk of admission of the claim by the Respondent. Judgment on admission is provided for by order VI Rule 9. Order XXV does not apply to admission of claim and neither does it apply to an unliquidated claim.

It is therefore true that the application is brought under the wrong provisions of the law. There is also a mix up of issues between summary judgment and judgment on admission. The application is therefore misconceived and not properly before the court.

The issue of lack of *locus standi* and lack of jurisdiction which have been raised in the defence ought to be addressed by the plaintiff at this state to save the time of the court in hearing and determining applications on those issues in the future.

I need not go into the merits of this application for the reason that it has been declared incompetent under the relevant law.

I therefore dismiss the applications with costs.

Dated, Delivered and Signed at Bungoma this 10th day of June 2009.

F. MUCHEMI

JUDGE