



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS)**

**CIVIL CASE 651 OF 2007**

**GITAU JOHN KIMEMIA.....PLAINTIFF**

**VERSUS**

**UNILEVER TEA KENYA LIMITED.....DEFENDANT**

**RULING NO. 1**

The plaintiff moved to this court, by way of a plaint dated 6<sup>th</sup> day of August 2007, and filed the same date. The salient features of the same are as follows:

- The plaintiff was an employee of the defendant and in the course of that employment, he was allocated house number 24 2001 located in Kericho Municipality off the Kericho Nakuru Highway.
- The defendant offered to sell the said house to the plaintiff at a purchase price of Kshs 2,700,000.00 on the 2<sup>nd</sup> July 2002, which offer the plaintiff accepted and by reason of the said acceptance, it became a term of the plaintiffs employment contract that the house belonged or was to belong to the plaintiff subject to the payment of the purchase price.
- That on the 23<sup>rd</sup> February 2007 the defendant maliciously and wrongfully terminated the plaintiff's services with the sole intention of depriving the plaintiff of the benefit of purchasing the said house.
- The plaintiff moved to this court, because on 7<sup>th</sup> August 2007 the defendant issued notice to the plaintiff to vacate the said house which he had occupied with his family for seven years.
- That the balance of the purchase price could come from his terminal dues and benefits.
- That the plaintiff is willing to pay the balance of the purchase price.
- The plaintiff has already invested heavily in the said house in that he sold personal property and obtained a loan of 2,000,000.00 from Majanees cooperative in preparedness to pay for the purchase price of the said land.
- Maintain that the sole purpose of termination of his employment was to deny the purchase of the said house.

In consequence there of the plaintiff seeks the following reliefs:-

- (i) *An order of specific performance compelling the defendant to honor the agreement to sell house No 24 2001 situate in Kericho Municipality off Kericho/Nakuru Highway to the plaintiff.*

(ii) *A permanent injunction Restraining the defendant either by itself and or employees from interfering with the plaintiffs enjoyment and occupation of house no 24 2001 situate in Kericho Municipality off Kericho/Nakuru highway.*

(iii) *Costs of the suit.*

(iv) *Any other relief the honorable court may deem fit to grant.*

The court, has traced on the record an interim application brought by way of chamber summons also dated 6<sup>th</sup> day of August 2002 and filed the same date. It is brought under order 39 rules 1, 2, 3 and 9 of the CPR and section 3A of the CPA. Vide prayer 2 and 3 thereof it sought an injunctive relief to restrain the defendant/respondent by itself, its servants and or agents from evicting the plaintiff/applicant from house number 24 2001 located in Kericho Municipality off Kericho/Nakuru highway pending hearing and determination of this application interparties as per prayer 2 and pending the determination of the main suit as per prayer 3. The record reveals that interim orders were granted on the 7<sup>th</sup> day of August 2007, where upon an undertaking as to damages dated 8<sup>th</sup> day of August 2007 and filed on the 10<sup>th</sup> day August 2007 was given. It is not clear from the record, as to what happened to the inter parties hearing of that application but it is clear that the same was served and a notice of appointment of advocate dated 14<sup>th</sup> day of August 2007 and filed on 5<sup>th</sup> day of August 2007. This was followed by a replying affidavit in opposition to the plaintiffs application dated 6<sup>th</sup> August 2007 and served on the 13<sup>th</sup> day of August 2007.

Simultaneously with the filing of the replying affidavit, the defendant filed an application dated 15<sup>th</sup> day of August 2007 and filed on the 16<sup>th</sup> August 2007. Five prayers are sought namely:-

(a) *This suit be struck out with costs to the defendant on the grounds that no suit can be brought upon a contract for the disposition of an interest in land unless there is a written contract signed by the parties and attested as provided by section 3(3) of the law of contract Act satisfying the requirement of the law of contract in this matter.*

(b) *The offer to purchase the house, (herein after suit property) made by the defendants behalf was made subject to the property being saleable. No steps were taken to make the property saleable.*

(c) *Neither the alleged offer nor the alleged acceptance identify the property to be sold and there is no contract capable of specific performance.*

(d) *The plaintiffs cause of action if any, lies in a claim for damages and the claim as framed cannot be sustained.*

(e) *It is frivolous, vexatious and otherwise an abuse of the process of the court.*

(f) *The cost of this application to be paid by the plaintiff.*

The application was objected to by a preliminary objection to the same dated 20<sup>th</sup> day of November 2008 and filed the same date. Three grounds are put forward namely:-

(1) *That the filed application is stated to be supported by the affidavit of one Antoinatte Atieno Absolms which affidavit has neither been filed nor served contrary to the applicable mandatory provisions of the Civil Procedure Rules.*

(2) *That the purported replying affidavit sworn by Antoinatte Atieno Absolms on the 15<sup>th</sup> August 2007 and attached to the chamber summons application dated 15<sup>th</sup> August 2007 makes no reference whatsoever to the application under reference herein.*

(3) *That the application as drawn is misconceived bad in law and incompetent.*

Counsel for the defendant and the plaintiff appearing in person agreed to incorporate the preliminary objection in opposition to the main application. Both filed written skeleton arguments and highlighted the same. The defendant applicant stressed the following points which, a perusal of the same reveals that it is simply a reiteration of the content of the reliefs being sought by the defendant applicant in the application subject of this ruling.

In a summary form these are:-

- There is no contract capable of being performed specifically and as such the suit cannot proceed.
- Reliance has been placed on two letters of offer but he kept quiet till he was dismissed and then asked to vacate the premises and that is when he stated he wanted to buy the house.
- That the house is not available for the plaintiffs purchase because he did not make the house saleable as required by the letters of offer as he took no steps to have the title of the house to be excised from the main title in the first instance, and in the 2<sup>nd</sup> instance no deposit was made.
- Further that damages will be an appropriate compensation.
- That they rely on the grounds in the application and the ingredients in order VI rule 13 of CPR.
- Confirmed the plaintiffs averment in the plaint that is indeed the plaintiff was their employee and by virtue of that employment he was provided with housing and later given an option to purchase the same which offer was accepted but the plaintiff did not put the house in a saleable condition because no valuation was done.
- It is their stand that by reason of what has been stated at the fore the defendant is not in a position to comply with any order that may be issued by this court, in pursuance of the reliefs sought by the plaintiffs in the plaint.
- Confirmed that indeed upon termination of the plaintiffs employment with them, they issued the plaintiff a notice to quit the said premises, and that is when he moved to this court.
- Maintain that having ceased being their employee the plaintiff has no right, interest or possessory right of the suit property and the defendant as the employer cannot be stopped from repossessing the same.
- There is no provision of any written agreement between the disputants for the sale of the said property and for this reason, the plaintiff cannot obtain an order of specific performance in the absence of exhibition of a written contract of sale.
- They also rely on case law cited.

In response, the plaintiff respondent relied on the following:-

- Grounds in support of his application dated 6/8/2007 and the supporting affidavit thereof as well as an amended plaint allegedly filed on the 14<sup>th</sup> March 2008 but not traced on the court, record.
- Confirmed the content of the plaint that he was employed by the defendant, allocated a house, given an option to purchase the same which option he accepted, raised a loan and other funds to purchase the said property.
- It is his stand that it was the defendant to initiate other steps to complete the sale and their failure to initiate measures to complete the sale should not be visited on the plaintiff.
- That the unlawful termination of his employment contract with the defendant does not disentitle him

from purchasing the said house, more so when he made inquiries on how to complete the sale to which request no respond was made only to surprise the plaintiff with a notice to vacate the said house.

- Maintains that it is not only company employees who benefited from the purchase of the said houses.
- That it is against the afore set out back ground information that he moved to this court, seeking the reliefs they are seeking.
- That the law requiring the contract of sale of land to be in writing does not apply because the contract subject of the proceeding was entered into in July 2002, where as the provision to law relied upon by the defendant came into force vide legal notice No 188 and 189 vide the statute law Misc. Amendment Act No 2 of 2002 came into operation as such the law cannot be applied retrospectively.
- By reason of the said amendment a contractor who has part, performed the contract and taken possession of the property has protection of the law as well as the contract even if it is not contained in a written agreement, the same can be discovered from an exchange of correspondents.
- That by reason of what has been stated above, this is a proper matter to be allowed to go to full trial as the plaint is not hopeless and beyond redemption.
- That specific performance is an equitable remedy and the court, has a discretion to grant it or to award damages.
- That the remedy of estoppe also operates to protect his claims but cannot be used to create a cause of action for the defendant where non exists. On the basis of the foregoing the plaintiff asked the court, to dismiss the defendants application to pave the way for the setting down of the suit hearing and disposal.

On the court's assessment of the facts herein, and upon perusal of the court record, the following doesn't seem to be in dispute:-

- (1) That the plaintiff presented to this court a plaint filed simultaneously with the filing of an interim application seeking an injunctive relief.
- (2) That indeed interim orders were granted in favour of the plaintiff ex parte on the basis of that interim application.
- (3) That the plaintiff complied with the condition for the granting of that interim relief by giving an undertaking as to damages
- (4) The record does not have an entry as regards the hearing inter parties of that interim application because the defendant upon being served with the same, filed a replying affidavit simultaneously with the application subject of this ruling seeking to strike out the suit.
- (5) It is common ground that summons to enter appearance have not been taken out as non has been traced on record and neither party has mentioned that this procedural step had been taken.
- (6) The plaintiff has mentioned in his written skeleton arguments that there is an amended plaint filed in 2008 but the court has traced non on the record.

Due consideration has been made by this court, as regards the above common grounds and the same considered in the light of the rival arguments herein and the court makes a finding that the argument has presented the court, with issues touching on the technical, as well as the merit aspect of the argument. The technical aspects, arises because of the issue of locus standi to the defendant to file this substantive application of attacking the plaint and seeking to unseat the plaintiff from the seat of justice, where as the merit aspect deals with the issue as to whether the defendants application has merit. In this courts view, the best approach to take is for this court, to dispose off the technical aspect first because if this is upheld,

then there will be no need for this court to interrogate the merit aspect.

Having said that the plaint was filed simultaneously with the interim application, then the court, has to determine what the defendant had locus standi to do upon that invitation. This court has judicial notice that the answer to this lies in the order 50 rule 16 procedures. This reads:-

*“Order L rule 16(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of the grounds of opposition, if any not less than three clear days before the date of hearing.*

*(2) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may with the leave of the court, file a supplementary affidavit.*

*(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard ex parte”.*

It is the finding of this court, that a proper construction of the said provision, in relation to the rival arguments herein is that, upon service of the plaint, and interim application, to the defendant, the defendant received an invitation to file a replying affidavit or grounds of opposition. This filing could either be in person or through counsel. The defendant elected to file a replying affidavit through counsel. There is no invitation to take any other step in this matter.

The above being the finding, then the court, has to determine how else the defendant was to gain locus standi to take any other procedural step herein. This court, has judicial notice supported by an abundance of case law as enunciated by the Court of Appeal and as dutifully followed by the superior court, that this invitation or gaining of locus standi is found in the order IV rule 3(1) CPR procedures which reads:-

*“O. IV rule 3(1) when a suit has been filed a summon shall issue to the defendant ordering him to appear within the time specified therein.”* It is therefore a summons to enter appearance which entitles a defendant to gain locus standi by entering appearance, and taking procedural steps towards the finalization of the suit. No such invitation having been taken by the plaintiff, it would follow that there is no procedural invitation to the defendant to file a substantive application herein in the nature of an application to strike out the suit. This step would appear to be premature.

A question may then arise as to whether there is any other way through which the defendant could otherwise gain locus standi and attack the plaint before service of the summons to enter appearance? The answer to this is in the affirmative. In that, although the order IV CPR procedures do not provide so, the practice has been developed by case law and is now an accepted procedure of the civil process. This court had an accession to deal with a similar situation in an own ruling in the case of ALIANCE MEDIA KENYA LTD VERSUS AL OUT DOOR KENYA LTD AND AL OUT DOOR KENYA LTD VERSUS ALIANCE MEDIA KENYA LTD AND MOTOR CARE LTD NAIROBI HCC NO 748 OF 2005 dated and delivered by this court on the 24<sup>th</sup> day of July 2009.

Case law on the subject is discussed at page 35 through to 41. These are the case of MOBIL KITALE SERVICE STATION VERSUS MOBIL OIL KENYA LTD AND ANOTHER (2004) 1KLR1 where it was held inter alia that *“order IV of the CPR contemplates that summons will be issued and served at the same time with the plaint.”* The case of U DAY KUMAR CHANDULAL RAJANI AND THREE OTHERS T/A LIT PETROL STATION VERSUS CHARLES THAITHI NAIROBI CA 85 OF 1996 where it was held inter alia that *“order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non compliance with the procedural aspects caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court, under section 3A of the CPA cannot cure”.*

The case of TRENTON (K) LTD VERSUS NAIROBI HOUSE LTD AND ANOTHER NAIROBI HCCC NO 1184 OF 2005 where Rawal J. in which the plaintiff had failed to take out summons to enter

appearance held that:- *“we ought to respect the rules of engagement as they are promulgated to advance justice to rival parties. Summons is a judicial document calling a party to submit to the jurisdiction of the court”*.

The case of KIPTALUM RONO VERSUS AGRICULTURAL FINANCE CORPORATION HCCC NO 2348 OF 1998 where Waki J as he then was (now JA) ruled that *“order 5 in my view is tailored for those vigilant plaintiffs who obtain summons to enter appearance when they ought to under order IV-----“*

In FONVILLE VERSUS KELLY III AND OTHERS HCCC 3727 OF 1995 (LLR 2636) Githinji J as he then was, now JA ruled that *“the defendants submitted to the jurisdiction of the high court, by filing their appearance, defences conditionally and by challenging the plaintiffs application for injunction.--- The question of service of summons goes to the root of this courts jurisdiction. Unless summons to enter appearance have been issued and defendant served with summons to enter appearance and defendant has failed to enter appearance, all proceedings in the suit against him will be a nullity. The subsequent action of the defendants of filing a defence under protest, filing an application to stay or strike out the suit and the raising of a preliminary Objection before trial of the suit is a lawful means of challenging the jurisdiction of the court, and defendants cannot be said to have submitted themselves to the jurisdiction of the court and waived the irregularities complained of.”*

In view of the finding of this court, as a result of an examination of the afore set out case law, in the absence of an appearance under protest, having been filed by the defendant, the defendant had no locus standi to attack the plaint.

Issue was also taken up by the plaintiff as regards the competence of the defendants application in that the same was not supported by an affidavit. Indeed the court, has perused the record and finds that the defendants application subject of this ruling says that it is supported by the affidavit of Antoinatte Atieno Absolms. The same is not attached what is attached is the replying affidavit by the same Antoinatte Atieno Absolms. Paragraph 2 thereof states clearly that the said replying affidavit was responding to the plaintiffs interim application. By reason of the afore said application having been presented by way of chamber summons it is obligated to comply with the provisions of order L rule 7 CPR. It reads:-

*“ order 50 rule 7 CPR – every summons shall state in general terms, the grounds of the application being made and shall be heard in chambers and where any summon is based on evidence by affidavit a copy of the affidavit, shall be served.”*

Applying this to the application herein, and bearing in mind the content of the reliefs sought, this is a proper candidate required to be supported by an affidavit. In the absence of grounds in the body of the application and a supporting affidavit, the application stands faulted on this ground as well.

The one to be dealt with is mode of opposition to the content of the plaint. As demonstrated herein by the provision of order L rule 16 CPR opposition to an application is by way of a replying affidavit. This court, has judicial notice of the fact that opposition to a plaint is by way of a defence in terms of the provisions of order VIII rules 1(1) (2) duly filed after service of the summons. In the absence of that, there is no proper opposition to the plaint.

For the reason given in the assessment, the defendants application dated 15/8/2007 and filed on the 16<sup>th</sup> day of August 2007 stands faulted on two limbs and is accordingly ordered to be struck out for the following reasons, on the first limb namely:

- (1) The plaintiffs invitation to the defendant to gain locus standi and participate in these proceedings was by way of service of the plaint and the interim injunctive application.
- (2) By reason of the invitation in number 1 above, the defendant was only expected to comply with the provisions of order 50 rule 16 (1) by filing a notice of appointment if represented, followed by filing of a replying affidavit which were complied with.

(3) The invitation to gain locus standi and take any substantive action in the proceedings could only have come by way of service of summons to enter appearance under order V rule 3(1) CPR. None of which were served.

(4) In the absence of service of summons to enter appearance, the defendant could have gained locus standi to take any substantive action in the matter by entering an appearance under protest and then presenting the application which has been faulted.

(5) On the second limb, the application stand faulted because it does not comply with the provisions of order 50 rule 7 CPR because:-

(i) It does not have grounds in the body of the application.

(ii) It is not supported by a supporting affidavit.

(6) By reason of what has been stated in number 1 – 5 above, there is no need to interrogate the merits of the application filed by the defendant and the plaintiffs preliminary objection.

(7) The plaintiff will have the costs of the struck out application.

**Dated, Read and delivered at Nairobi this 18<sup>th</sup> day of September 2009.**

**R.N.NAMBUYE**

**JUDGE**