



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 452 of 2009**

**HON. DANIEL LYULA KHAMASI ..... PLAINTIFF**

**VERSUS**

**RELIABLE SECURITIES LIMITED ..... DEFENDANT**

**JUDGEMENT**

The plaintiff took out the originating summons under order XXXVI rule 5 of the Civil Procedure Rules seeking for the determination of the question of whether the defendant ought to deposit in court Ksh.7 million or give such security that will suitably secure its performance of the award that may be made in favour of the applicant in the arbitral proceedings between the parties under the Arbitration Act. The application is supported by an affidavit which is said to have been filed with chamber summons sworn on 25<sup>th</sup> June 2005.

According to the applicant, he was persuaded by the defendant to open a discretionally portfolio agreement which he did on 11<sup>th</sup> April 2008, he deposited a sum of Ksh.5 million. The defendant was supposed to invest that money and pay the applicant Ksh.250,000/- per month being 5% return on the investment subject to review upwards. Disputes and differences arose regarding the respective rights and liabilities under the agreement thereby prompting the matter to be referred for arbitration as provided for under clause 19 of the agreement. The plaintiff contends that he has a claim for payment of about 6 million shillings he will also incur costs for arbitration. The plaintiff is also apprehensive the respondent financial situation is precarious for reasons that the respondent was not issued with a annual license by the capital market authority but the license was only extended conditionally. Moreover the respondent paid the plaintiff cheques which were returned unpaid for lack of sufficient funds in the respondent's bank account. There is also report that the principle proprietor of the respondent is facing a litany of criminal litigation and civil suit. It is for those reasons that the applicant is seeking for interim measure of protection pending the arbitration proceedings.

This application was opposed by the defendant who relied on the replying affidavit by Josephert Milimu Konzolo sworn on 10<sup>th</sup> July 2009. The suit by the plaintiff is challenged on four principle grounds according to the defendant's replying affidavit and submissions.

Firstly, the originating summons is faulted for failure to comply with the provisions of order 6 r 14 of the Civil Procedure Rules which require every pleading to be signed by an advocate or recognized agent by the party if he sues or defend in person. A suit started by an originating summons is a suit and should be signed. The courts have held that a party who files unsigned pleadings run the grave risk of having the suit struck out for failure to comply with the rules. See the case of Atulkumar Maganlal Shah vs. Investments & Mortgage Bank Ltd & 2 Others C.A. No.13 of 2001 . Further it was argued that the

originating summons is not supported by an affidavit. The affidavit relied on is in support of a chamber summons which is contrary to the provisions of order XXXVI r10(1). An affidavit is a co pleading in support of the originating summons and in the absence of the affidavit accompanying the Originating Summons is an incurable defect that renders the suit totally incompetent and liable to be struck out. The courts have similarly struck out suits which are not accompanied by an affidavit. In the case of Research International East Africa vs Julius Arisi & 213 Others. The Court of appeal held that a verifying affidavit is necessary by each of the plaintiff and failure to file a verifying affidavit renders the suit liable for striking out under rule 1(3) of Order VII of the Civil Procedure Rules.

The fourth point urged by the respondent is that the matter is *sub judice* pending arbitration before Mr. Stephen Gatembo Kairu an arbitrator who was appointed by the consent of both parties on 8<sup>th</sup> day of June 2009 pursuant to the Arbitration agreement. The determination of whether the plaintiff is entitled to the sum claimed in the suit will affect the proceedings before the arbitrator and cause prejudice and multiplicity of actions. Under section VI of the Civil Procedure Act it is provided that:-

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claim.”*

Counsel argued that an application for interim measures to protect arbitration proceedings is not brought under the provisions of order XXXVI of the Civil Procedure Rules. An application such as the one by the plaintiff is seeking for security for anticipated decree and not security for costs. Interim measure can only be given by way of security for costs but not for an anticipatory decree where no judgment has been pronounced. Counsel urged the court to strike the originating summons with costs.

This suit was instituted by way of originating summons. It is clear the summons is slovenly drawn. It is not signed by the advocates the way the pleadings should be signed. There is no supporting affidavit but the plaintiff states that he relies on an affidavit filed with the chamber summons application. Further the summons is brought under order XXXVI rule 5 which concerns the determination of any question of construction arising under a written instrument a deed or a will and to determine the rights of the person interested.

An originating summons is an independent suit on its own. It should be supported by its own affidavit as provided for under order XXXVI r 10(1).

*“Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavit”.*

The affidavit in support of the chamber summons cannot be relied on to support the originating summons which is the foundation of the chamber summons. The prayers sought would of necessity involve the determination of the rights of the plaintiff under the discretionally portfolio management agreement which is the subject of arbitration before an arbitrator. I agree with counsel for the defendant determining the rights of the parties under that agreement would prejudice the arbitral proceedings. The applicant is seeking for security of costs but the prayers are convoluted as it includes the anticipated decree as well as the costs. The plaintiff has be clear in what they want to protect. For those reasons I find the suit by way of originating summons is incurably defective and it is hereby struck out with costs to the defendants.

It is so ordered.

RULING READ AND SIGNED ON 30<sup>TH</sup> OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**