

STANLAS YERI KOMBE *Suing as administrator of the Estate of*
GUDE BIMALINDI YERI.....PLAINTIFF

AND

1. FIRUZAH ANTHONY CRITCHLEY

2. CLIVE ANTHONY CRITCHLEY.....DEFENDANTS

RULING

The Chamber Summons application dated 29/6/09 is made under Order XXXVI Rule 8A, 9 and 12 of the Civil Procedure Rules and seeks that directions do issue for this case to proceed for hearing by taking viva voce evidence. It is based on grounds that;-

- (1) Both parties have now filed their affidavits.
- (2) Both parties have raised conflicting issues of fact in their affidavits.
- (3) The matters of fact in respect of which relief is claimed cannot adequately be determined in a summary manner by use of affidavits only.
- (4) There is need for evidence to be given viva voce by the parties and witnesses.

The application is supported by the affidavit sworn by Stanlas Yeri Kombe who states that a reading of the two affidavits by the respective parties manifests a disagreement on the correctness and sufficiency of the facts in issue and the only way to adequately determine the matters in controversy is to allow parties and their witnesses to adduce evidence viva voce – Mr Shujaa appearing for the applicant stated as much in his submission.

The application is opposed, and Mr Mwadilo submitted on behalf of the Respondent that the originating summons in which directions are sought is defective and the applicant should never have moved to court by way of originating summons and so no directions can be taken. As to whether viva voce evidence should be allowed, Mr Mwadilo argues that the application is premature as under Rule 9, such directions can only be given at the hearing of the Originating Summons.

I have perused this file and seen no replying affidavit or grounds of opposition filed by the Respondent – which would then mean that Respondent’s counsel ought to restrict himself to points of law. What does Rule 9 provide in relation to taking of viva voce evidence. The Rule states as follows;-

“On the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon and may make any amendments necessary to make the summons accord with existing facts and to raise the matters in issue between the parties.”

That provision is so clear I do not need to belabor the point. The submission by Mr Mwadilo are spot on, the application is prematurely before this court and I decline to give the directions sought. Consequently the application is dismissed with costs.

Delivered and dated this 29th day of October 2009 at Malindi

H A OMONDI

JUDGE

Mr Shujaa for applicant

No appearance for Respondent

c/c Sango Maewa/Douglas Randu