



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 103 of 2009

TABITHA MUGURE HENRY APPELLANT

VERSUS

WILLIAM THURANIRA MBOGORIRESPONDENT

RULING

The respondent in this appeal moved the Tigania Magistrate court by Miscellaneous Civil Application No. 4 of 2009, where he filed an *ex parte* chamber summons dated 10th September 2009 which initiated that action. He sought by that *ex parte* chamber summons for an order of the court that the O.C.S. Nchiru Police Station to provide security to enable demarcation officer to implement a decision arrived by the adjudication officer. Although the appellant was named as the respondent in that application, it does seem that she was not served and the application proceeded *ex parte*. She was aggrieved by that order and has filed this appeal wherein she filed in this court a chamber summons dated 22nd September 2009. She seeks by that chamber summons the stay of execution of the order issued by Tigania SRM in Miscellaneous Application No. 4 of 2009. She seeks the stay pending the hearing and the determination of this appeal. The main ground upon which she seeks stay is that the respondent to this appeal ought not to have instituted a suit by way of an application. She further stated that consent had not been granted by the adjudication officer to file such action. The respondent in his replying affidavit stated that he had obtained consent to file the miscellaneous application. He further stated that his miscellaneous application was not done under the Civil Procedure Rules but rather under adjudication part which does not require the filing of a plaint. The argument offered by the respondent is not entirely clear to me. He moved in the civil court seeking orders for security to be provided. Having moved under the civil court he was obligated to move in a manner that is recognized by the Civil Procedure Act and Rules. He ought to have filed pleading. The Civil Procedure Act defines pleadings as follows:-

“Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

I have in the past had the occasion to consider whether civil action can be brought by way of an application. In short this is what I had to say in the case of Eutichus Muthui Vrs. Apolo Nteere M’Ambutu & 2 others HC. Misc. Application No. 82 of 2007:-

“Order IV Rule 1 prescribes the manner of commencing suits as follows:-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

Chamber summons is not a manner prescribed for instituting suits and cannot be described as pleading within the meaning of term used in Civil Procedure Act.” The Court of Appeal also in the case of Board of Governors, Nairobi School V. Getah Civil Appeal No. [1999] KLR held:-

2. *Pleading is defined in Section 2 of the Civil Procedure Act to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with order IV Rule 1, which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.*

The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made thereunder.

An application under O. VI Rule 13(1) of the Civil Procedure Rules must only be confined to plaints or defences, or such modes which are prescribed for instituting suits and the statements in defence or reply thereto.”

Without wishing to preempt this appeal I too find that the appellant’s appeal has high chances of success because the lower court’s action was not instituted as provided under the Civil Procedure Rules. Accordingly, I find that the stay sought is merited. I grant the following orders

1. *That a stay be and is hereby granted of execution of the order of Tigania SRM Misc. Application No. 4 of 2009 issued on 15th September 2009 pending the hearing and determination of this appeal.*
2. *The appellant is awarded the costs of the chamber summons dated 22nd September 2009.*

Dated and delivered at Meru this 29th day of October 2009.

MARY KASANGO

JUDGE