



KAHINDI KATANA CHENGO

SAMWEL KENGA NDENGE & 18 OTHERS.....PLAINTIFFS

AND

HAFSA OMAR MZEE HAJI

FATUMA AHMED OMAR MZEE HAJI & 2 OTHER.DEFENDANTS

RULING

A Notice of Preliminary Objection dated 8-7-09 was filed in this matter by Mr. Kagundu on behalf of the respondent when the matter came up for hearing of the application dated 13-5-09.

The Preliminary Objection is to the effect that the Originating Summons dated 13-5-09 is defective and therefore the application which is based on it, is incompetent and the entire suit sought to be struck out with costs. He submitted that Order XXXVI Rule 3(d) requires that summons be supported by an affidavit to which a certificate extract of title is annexed. Mr. Kagundu stated that this is a mandatory requirement and the explanation about applying for delay is not a reason not to meet the requirement. He argues that if a party has difficulties in obtaining such a certificate, then he should come to court and seek leave to file without a certificate instead of filing then coming up with an explanation – he cited the case **HCCC 1088 of 2004 Githii Mwangi and others v Joseph Mwai Kaburu.**

The Preliminary Objection is opposed and Mr. Kenga for the applicant argues that the Preliminary Objection is defective as it does not cite concisely the provisions of law being offended by plaintiff/applicant and refers to **HCCC Appeal No. 34 of 2005 (Msa) Guinness Construction and Housing Co. v Abdul Masor** where the court was of the view that failing to cite the provisions of the law, makes a preliminary objection fatally defective and that this was repeated in **HCCC 76 of 2009 Salim Said v Khatimy Group Ltd.**

He contends that although this **High Court (Mld) in Claus Anton Elcke v Holga Palke HCCC 3 of 2008** held that failure to annexe a certified copy is fatal. It also observed that there ought to be an explanation by the defendant as to why the certificate has not been annexed. He then goes on to explain that there was an application for a certified extract of Title together with a postal search, having been made on 20-3-09 by the plaintiffs/applicants but by the time of filing suit in May, the same had not been obtained. He further points out that the originating summons explains the difficulties in obtaining the certificate of Title (which he states were steps taken before the originating summons was filed.)

In response Mr. Kagundu submits that the preliminary objection is not defective and in any event Order L Rule 12 is clear that no objection shall be raised on grounds of failure to cite any order or rule.

Does the preliminary objection fail to clearly cite what provision of the law it is raising?

It is true that the preliminary objection does not cite any provision of the law but I think it is rather late in the day for Mr. Kenga to cry wolf because he already argued the preliminary objection – meaning he understood what it was all about. Indeed the ratio decidendi in Maraga J’s ruling in the **Guinness Cosntruciton case** was that the particular provision of law should be stated so that the preliminary objection taken is understood and the other side is not taken by surprise. Mr. Kenga did not complain about that at the start of the hearing of the preliminary objection all he said was that he had just been served with the preliminary objection and needed time to file a replying affidavit – I distinguish the present case from the **Guinness case**.

Has the originating summons, upon which the application is begged met the legal procedural requirements?

Order XXXVI Rule 3D(1) reads:

“An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) the summons shall be supported by an affidavit to which a certified extract of the title of land in question has been annexed.”

That has not been done and the provision is couched in mandatory terms. The observation made by this court in the **Klaus Anton Case** did not in any way negate that requirement and indeed as noted by Mr. Kagundu it was an obiter and the court in fact dismissed the originating summons for want of complying with Order XXXVI Rule 3(D) (2).

The preliminary objection has merit and is sustained consequently both the suit and application are dismissed.

The plaintiffs shall bear costs of the suit and costs of the application.

Delivered and dated this 26th day of **October 2009** at Malindi.

H. A. Omondi

JUDGE