



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 458 OF 1992

THE REGISTERED TRUSTEES OF
MOMBASA PARISH ANJUMAN.....PLAINTIFF
VERSUS
SUSHIN ABDULKARIM ALI DEFENDANT

RULING

Before court is a Preliminary Objection raised by Mr. Gathuku learned counsel for the Defendant/Applicant. Counsel argues that the plaint filed in this suit is not compliant with R.7(1)(2) of the Civil Procedure Rules which provides that:-

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint”.

The Chamber Summons instituting this suit dated 26th June 1992 was filed in court on 26th June 1992. Thus this plaint was filed well before the amendment to the Civil Procedure Rules made in the year 2000 and which required that a plaint be accompanied by a verifying affidavit. Mr. Gathuku for the Applicant argues that following the striking out of the summons to enter appearance served on the Applicant on 3rd December 2008, the Respondent having been directed by the court to lodge a fresh summons to enter appearance ought to have put in a verifying affidavit to comply with O. VII r(1)(2). I have perused the court record and I do note that on 3rd December 2008 the proceedings indicate that my learned senior brother Hon. Justice Sergon did strike out the Respondent summons to enter appearance as defective. He further ordered that a fresh summons to enter appearance be filed. Mr. Gathuku submits before me that this summons to enter appearance marked the commencement of the case. With respect I totally disagree. The law is very clear on this point. O. IV r(1) of the Civil Procedure Rules provides that:-

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

A suit is commenced by the filing of a plaint and **not** by service of a summons to enter appearance. The orders made by Hon. Justice Sergon touched **only** on the summons to enter appearance which he ruled to have been defective. The learned Judge made no pronouncement on the plaint filed on 26/06/1992 and

more to the point he did not rule that that plaint was defective in any manner whatsoever. All that the Respondent were directed to do was to serve a fresh summons. They were not ordered to file a fresh plaint.

Counsel for the Applicant relies on O. VII r(1) (2) of the Civil Procedure Rules as the basis for his preliminary objection. O. VII is an amendment to the original Rules made in 1992. The plaint in this suit was filed in 1992. At the time when the plaint was filed there was no legal requirement that it be accompanied by a verifying affidavit. Therefore at the time that plaint was filed it was done procedurally and in conformity with the law as it existed in 1992. It is trite law that new laws or Rules do not take effect retrospectively. Therefore an amendment to the Rules made in the year 2000 will not apply to plaint filed before that amendment came into force. In any event the plaint is a document totally distinct from the summons to enter appearance. A ruling that the summons was defective can have no bearing on the plaint. I find therefore that the plaint filed in 1992 was properly filed in accordance with the law in existence at that time. I find that the plaint filed in this matter is valid and accordingly I do dismiss the preliminary objection. Costs to be met by the Applicant.

Dated and Delivered at Mombasa this 15th day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Gathuku for Defendant

Mr. Maundu holding brief for Mr. Hamsa for Plaintiff

M. ODERO

JUDGE

15/10/2009