



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 40 of 2006**

**JOHN KAHIGA GATERI.....PLAINTIFF**

**VERSUS**

**RUMBA KINUTHIA & CO. ADV.....DEFENDANT**

**JUDGMENT**

This is an Originating Summons brought under **Order 36 Rule 4** of the **Civil Procedure Rules** in which the plaintiff seeks orders that the defendant do give a cash account of the decretal sum paid on his behalf to the defendant in Nairobi HCCC No.1713 of 1990 and pay to the plaintiff the sum found due to him with the costs of this suit.

The OS is supported by the affidavit of the plaintiff in which he deposed that following injuries he suffered in a road accident in 1995, he instructed the defendant to sue the owner of the accident vehicle and recover damages for him. The defendant filed Nairobi HCCC No.1713 of 1996 in which the plaintiff in this case with two others were plaintiffs. Judgment was in that case entered for the plaintiffs in the sum of Kshs.355,991/- together with costs and interest. He exhibited a copy of a letter from the defendant's office showing that as of 19<sup>th</sup> May 2004 the defendant had been paid a total of Kshs.425,299/-. The plaintiff further deposed that in spite of more than 10 visits to the defendant's office he has not been paid his share of the decretal sum in that case hence this suit.

In response the defendant filed grounds of opposition and alleged that this suit is not only premature and misconceived but also incompetent for fouling mandatory legal provisions. He also filed a replying affidavit in which he admitted that he indeed filed on behalf of the plaintiff and 2 others Nairobi HCCC No.1713 of 1996 and recovered some money from the insurers of the defendant in that case. He paid to the other plaintiffs their shares but because the plaintiff in this case has refused to go to his office he has been unable to pay him his share. In the circumstances he prays that this OS be dismissed with costs.

On the same ground of the Plaintiff's failure to go to his office the defendant filed a Chamber Summons under **Order 6 Rules 13 and 16** of the **Civil Procedure Rules** as well as **Sections 3A and 15** of the **Civil Procedure Act** and sought the striking out of this OS as disclosing no or no reasonable cause of action, is scandalous, frivolous and/or vexatious thus amounting to an abuse of the process of the court.

Both the plaintiff's OS and the defendant's said Chamber Summons were fixed for hearing on 19<sup>th</sup> November 2009. On that day Mr. Wata applied for adjournment on the ground the defendant was not available. I found no good reason to adjourn and I refused to grant an adjournment. Thereupon counsel for the plaintiff urged me to enter judgment for the plaintiff as prayed in the OS on the basis of the affidavit evidence on record and dismiss the Defendant's application with costs. Mr. Wata said his instruction were limited to applying for adjournment and said nothing about the plaintiff's OS or the defendant's Chamber Summons.

I have carefully perused the pleadings in this matter. As is clear from the above narration, it is not in dispute that the defendant filed on behalf of the plaintiff and 2 others Nairobi HCCC No. 1713 of 1996 and recovered a total of Kshs.425,299/-. He claims to have been unable to pay to the plaintiff his share of the decretal sum because the plaintiff, unlike the other two plaintiffs in that case, has refused to go to his office. The plaintiff's side of the story as I have pointed out is that he has gone to the defendant's office more than ten times but the defendant has always referred him to his clerks.

Having considered these averments, I am inclined to believe the plaintiff's version of the story. The defendant has not exhibited even one letter calling the plaintiff to his office for payment. When the plaintiff's current advocate demanded payment from the defendant or when the defendant was served with this OS, if indeed it is the plaintiff who had refused to go to his office, I cannot see why he could not send the plaintiff's advocate a cheque for the plaintiff's share with a statement of account. In the circumstances I dismiss the defendant's said Chamber Summons with costs and order that the plaintiff shall within 30 days give a cash account of the amount received on behalf of the plaintiff together with a cheque payable to the plaintiff's current advocates of the amount due to the plaintiff. The plaintiff shall have the costs of this OS.

**DATED and delivered this 17<sup>th</sup> day of December, 2009.**

**D. K. MARAGA**

**JUDGE.**