



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 340 of 2007**

**1. ADAM TULLER**

**2. LYNNE TULLER .....PLAINTIFFS**

**VERSUS**

**NEHEMIAH NG'ENO AND TWO OTHERS.....DEFENDANTS**

**RULING**

Chamber Summons dated 1<sup>st</sup> October 2007 is filed by the 3<sup>rd</sup> Defendant herein under the provisions of Order 1 Rules 10(2) and 22 and Order VI Rules 13(a) and 16 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of law.

It seeks the prayer that the suit against the 3<sup>rd</sup> Defendant, who is a firm of Advocates, be struck out with costs to the 3<sup>rd</sup> Defendant.

The Chamber Summons is supported on the grounds mentioned therein.

It is contended in support of the application that the Amended plaint dated 17<sup>th</sup> August, 2007 does not show any reasonable cause of action and that no substantive prayer is sought against the 3<sup>rd</sup> Defendant and thus it shall be unable to satisfy any order or decree that may be made by the court.

The application is supported by 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

In opposition, it is contended by the Plaintiffs' counsel that the first prayer in the Amended plaint seeks orders against all the Defendants and that order should be understood against the background averred in paragraphs 19, 20 and 21 of the Amended plaint. The said paragraphs aver:

**19. Prior to the letter averred to in paragraph 18 above, the 3<sup>rd</sup> Defendant had by letter dated 20<sup>th</sup> June, 2007 addressed to the Plaintiffs, asserted that they (the plaintiffs) were in "arrears of rent" in the sum of KShs.1,840,000/- for the period October 1999 to 20<sup>th</sup> June, 2007 and the Plaintiffs position is that the assertion and demand lacks foundation and is dishonest.**

**Particulars:**

***(a) the terms of The Agreement did not contain any stipulation that the consideration for the purchase***

of L.R.No.2327/187 included alleged “arrears of rent” and

(b) *presuming that the Plaintiffs had not been paying rent as and when it fell due (which is strenuously denied) a considerable portion of the amount demanded would in any event be irrecoverable by reason of the provisions of the Limitation of Actions, and*

(c) *the demand for KShs.1,840,000/- “arrears of rent” was in all probability generated to enable the defendants or either of them to perpetuate breaching The Agreement as varied and to dishonestly unlawfully retain by way of forfeiture the sum of KShs.1,000,000 held by the 3<sup>rd</sup> defendant as stakeholder/deposit.*

20. Without having served upon the plaintiffs any Distress Note or warrant, the defendants have now instructed M/s Ndarugu Merchants to undertake Distress for Rent as evidenced by the Proclamation dated 11<sup>th</sup> July, 2007 which the Plaintiff crave leave to refer to.

21. By a letter dated 21<sup>st</sup> May, 2007, the plaintiffs gave notice of their readiness to complete the sale and purchase transaction but the 3<sup>rd</sup> defendants have failed or neglected or refused to prepare a Supplementary Agreement and/or the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed, neglected and refused to sign it rendering these proceedings necessary.

It is contended further that 3<sup>rd</sup> Defendant represented the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in sale transaction of the land in question which could not be completed and the parties agreed to execute a supplementary agreement but the 3<sup>rd</sup> Defendant refused and/or neglected to act thereon (see paragraphs 10, 13 and 14 of the amended plaint).

It is also submitted that the averments made in paragraphs 13 and 14 of the Amended plaint is evasively responded in paragraph 7 of the 3<sup>rd</sup> Defendant’s Defence.

Thus there are allegations made against the 3<sup>rd</sup> Defendant and the plaintiffs have to prove their entire case as pleaded. In absence of the 3<sup>rd</sup> Defendant as a co-defendant the same cannot be relied.

Reliance was placed on the case between Kinluck Holdings Ltd. and Minet Holdings Ltd. and another C.A. (Nairobi) 264 of 1997 (unreported).

The Court of Appeal summed up the *ratio decidendi* of the case relied upon viz Stevenson Vs. Roward 6, English Reports 668 on page 10 of the judgment, i.e.

**“A law agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his disregard of them”. (emphasis mine)**

I am aware that the plaintiffs herein are not clients of the 3<sup>rd</sup> Defendant but it is alleged in the plaint that the Plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> Defendants agreed to make a supplementary agreement which was forwarded to the 3<sup>rd</sup> Defendant but he refused to send the same for execution of the other two Defendants.

Moreover, as observed earlier, there are several averments made against the 3<sup>rd</sup> Defendant in its capacity as an Advocates’ firm and that fact cannot be overlooked by me.

I shall have to cite the provisions of Order 1 Rule 3 which provides:

**“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same acts or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in alternative, where if separate suits were brought against such persons any common question of law or fact would arise”.**

In my view, from the pleadings before the court, a cause of action has been shown prima facie against the 3<sup>rd</sup> Defendant its presence in this suit as a co-defendant may assist the court to determine the issues raised herein.

I thus cannot at this stage dismiss the suit against the 3<sup>rd</sup> Defendant, and do find so.

The question whether an application be filed under both the provisions i.e. those of order 1 Rule 10(2) and Order VI Rules 13 (1) (a) and 16 of Civil Procedure Rules is also resolved by the Court of Appeal in the Kinluck's case (*supra*).

The court has this to say – viz:

**“ ..... To that extent we agree with what Windham C.J. said in the Tanganyika High Court case of Parry vs. Carson (1962) E.A/ 516. At 516(1) he said:**

***‘In the first place, I could not at this stage order that the defendant be “dismissed from the suit” without holding that the plaint discloses no cause of action against him, or that in the face of the pleadings, as a whole the plaintiff has no chance of success’***

**By that parity of reasoning the learned judge could not have dismissed the advocate from the suit as there is, as we have set out, a cause of action against him. Rules procedure, although technically expressed are based on common sense and it stands to reason that the advocate could only have been dismissed from the suit if the plaint failed to show any or any reasonable cause of action against him”.**

Thus following the observations made by the Court of Appeal, I do find that the application as filed is competent and apply the common sense both the provisions can stand in juxta position.

Having found that the amended plaint does show reasonable cause of action, I shall not dismiss the suit against the 3<sup>rd</sup> Defendant.

The upshot is that the Chamber Summons dated 1<sup>st</sup> October, 2007 is not allowed and stands dismissed. The costs thereof be in the cause.

Dated and signed at Nairobi this 27<sup>th</sup> day of February, 2008.

**K.H. RAWAL**

**JUDGE**

**27.2.08**