



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 58 of 2007

FRANCIS KIBUNYI GICHUHI T/A HABITECH CONSULTANTS...PLAINTIFF/APPLICANT

versus

NYERI FARMER'S SACCO SOCIETY LTD..... DEFENDANT/RESPONDENT

RULING

The Plaintiff's Chamber Summons dated 10th September 2007 came up for hearing on 5th February 2008. On that date the Defendant raised Preliminary Objection to the application. In the first instance the Defendant argued that the application ought to have been by way of Notice of Motion rather than Chamber Summons. This was because the Plaintiff had relied on **Section 3A** of the Civil Procedure Act in conjunctions with **Order VI Rule 13(1) (b) (c) and (d)**. According to **Order L Rule 1** the correct form ought to have been by way of Notice of Motion and not Chamber Summons. For this reason the Defendant sought the striking out of the application. In addition the Defendant argued that the Plaintiff's application was an omnibus application because it sought the striking out of the defence and the entry of summary judgment in favour of the Plaintiff as prayed in the plaint. The defence argued that because the application sought various prayers the same was incompetent. In that regard the plaintiff relied on the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004**. In that case it was held as follows:-

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.”

The Plaintiff in response to the Defendant's argument submitted that the application could be amended to enable the same to proceed.

In response to the arguments of the Defendant I wish to begin by stating that I am not persuaded by the authority relied upon by the Defendant. That authority does not cover the application that is before the court for indeed the application seeks two prayers. The first prayer is that the defence be struck out and the second prayer is for the entry of summary judgment for the Plaintiff. In my view those two prayers are complementary for indeed if the court was of the view that the Plaintiff is entitled to the entry of judgment the court will be at liberty to strike out the defence. The Plaintiff's application cannot be described as an omnibus application. That argument is rejected. In respect of whether an application becomes fatally defective for having been brought under a Chamber Summons when it ought to be under Notice of Motion, my response to that the application does not become defective. This indeed was the finding in **Civil Appeal No. 284 of 1997 JOHNSON JOSHUA KINYANJUI & ANOTHER AND**

RACHEL WAHITO THANKE & ANOTHER. The appropriate portion of that case is as follows:

“If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent.”

Order 50 rule 11 provides:

“Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers.”

Order 50 rule 10 provides:

“Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court.”

It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers”.

The Defendant’s objection therefore to the Plaintiff’s application having been brought under Notice of Motion is therefore rejected.

I would also add that the fact the application is predicated on section 3A of the Civil Procedure Act in conjunction with other Rules of the Civil Procedure does not make the application to be incompetent. This finding is supported by an unreported case namely **Civil Appeal No. 189 of 2001** between **POSTAL CORPORATION OF KENYA – AND – I.T. INAMDAR AND OTHERS** where the judges of appeal stated:-

In our view, the Notice of Motion that was before the Superior Court could have been better drafted and the Appellants sentiments are not altogether baseless, particularly when one considers that the application was seeking orders that were to see finality of the entire suit we do not find that the Appellants was prejudiced by the bad drafting of the Notice of Motion and thus, nothing turns out on the first and tenth grounds of appeal. Citation of a wrong Order or Rule is not necessarily fatal to an application.”

The Defendant also raised an objection to the Plaintiff’s application in regards to the exhibits that are attached to the supporting affidavit. The defendant relied on Rule 9 of the Oaths and Statutory Declaration Rules. That rule provides as follows:-

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”

The Defendant argued that the Plaintiff’s exhibits did not have the seal of the commissioner of oaths. I confirm that I have perused those exhibits. What I find is that there is no basis for the objection raised by the Defendant. What the Plaintiff has done is that each exhibit is indeed signed by the Commissioner of Oaths but the plaintiff has then used plain paper to divide the different exhibits. It is clear that the plain paper is not part of the exhibits but is used to clearly de-alienate the different exhibits. There is therefore no basis for the Defendant’s objection. The Defendant’s prayer that the said affidavit be expunged is rejected. In the end the Defendant preliminary objection dated 8th November, 2007 is dismissed with costs to the Plaintiff.

DATED AND DELIVERED THIS 6TH DAY OF MARCH, 2008.

MARY KASANGO

JUDGE