



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

Civil Suit 1118 of 2006 (O.S.)

**ALKA REHMAT ALIPLAINTIFF/
RESPONDENT**

VERSUS

**LINTON PLAZA LTD..... 1ST
DEFENDANT/APPLICANT**

**RECREATIONAL FACILITIES MANAGEMENT LTD..... 2ND
DEFENDANT**

RULING

By chamber summons dated 21.11.06 stated to be brought under Order XXXVI rules 3D and 12 as well as Order VII rule 1 (2) and (3) of Civil Procedure Rules, the 1st defendant applied for the following orders:-

1. THAT the honourable court be pleased to strike out the plaintiff's suit filed herein.
2. THAT the plaintiff do pay the costs of the suit and the application.

The grounds upon which the application is based are that:-

- a) The suit is fundamentally defective and incompetent.
- b) The suit violates the mandatory provisions of the Civil Procedure Rules.
- c) The suit amounts to an outright abuse of the court process.

The application is supported by the affidavit of Madatali Chatur, director in the applicant company sworn on 21.11.06.

At the hearing of the application, the 1st defendant/applicant and the 2nd defendant were represented by learned Counsel, Mr. O. Omogeni while the plaintiff/respondent was represented by learned counsel, Mr I. Mandala.

Counsel for 1st defendant/Applicant and 2nd defendant reiterated the chamber summons application and relied on Kweyu -vs- Omuto [1990] KLR 709 to make the basic point that the Court of Appeal in that case held that an originating summons based on adverse possession under section 38 of the Limitation of Actions Act must be supported by an affidavit to which a certified extract of the title to the land in

question has been annexed. It was the counsel's case that the requisite extract had not been annexed and urged this court to strike out the originating summons and condemn the plaintiff to pay costs of the originating summons and the chamber summons application.

On the other hand, plaintiff's/respondent's counsel opposed the application relying on the replying affidavit of Alka Rehmat Ali sworn on 23.02.07 and filed on 26.02.07. The essence of the replying affidavit is that the chamber summons application has no merit for the following reasons:-

- a) That it does not comply with Order XXXVI rule 8A providing for directions to be taken and that in any case rule 9 of the same Order empowers the court to order the summons to be supported by such further affidavit as it may deem necessary and that the court also has power to make amendments necessary to make the summons accord with existing facts.
- b) That the chamber summons application brought under Order VII rule 1 (2) and (3) is misconceived and does not apply to originating summons as prayed by the 1st defendant/applicant.
- c) That Order XXXVI rule 3D is not mandatory.
- d) That there was fraudulent transfer of the suit property and that efforts to get a copy of a further transfer in favour of the 1st defendant/applicant has not been fruitful because the file cannot be traced.

Plaintiff's/respondent's counsel also referred the court to paragraph 7 of Alka Rehmat Ali's replying affidavit sworn on 23.02.07 and drew attention to the fact that the plaintiff/respondent had annexed to her aforesaid replying affidavit a certified copy of the alleged fraudulent transfer, to the 2nd defendant, of the suit land. Plaintiff's/respondent's counsel reiterated that the chamber summons application dated 21.11.06 be allowed.

I have given due consideration to the rival representations of the parties.

The suit herein was brought by originating summons dated 23.10.06. The originating summons was stated to be brought under Order XXXVI rule 3D of the Civil procedure Rules. The plaintiff averred in the originating summons that she has been in continuous and uninterrupted occupation of the suit land for over 12 years; that the alleged titles of the defendants to the suit land have been extinguished by operation of sections 7 and 17 of the Limitation of Actions Act; and that the plaintiff, who interchangeably also described herself as applicant, is entitled to be registered as the proprietor of the suit land by way of adverse possession in the place of the defendants in accordance with provisions of sections 37 and 38 of the Limitation of Actions Act. The originating summons dated 23.10.06 is accompanied by a supporting affidavit sworn on 23.10.06. No extract of the title in question was annexed to the supporting affidavit and no explanation appears in that affidavit for the omission. It is when the plaintiff/respondent was responding, vide her replying affidavit sworn on 23.10.07, to the 1st defendant's/applicant's chamber summons application dated 21.11.06 that the said plaintiff/respondent herein alluded to efforts to get a copy of the further transfer made to the 1st defendant/applicant as having been unfruitful ostensibly because the file had subsequently gone missing. The plaintiff's/respondent's replying affidavit sworn on 23.10.07 is in reply to the defendant's/applicant's chamber summons dated 21.11.06 and its annexed copy transfer to 2nd defendant (Annexure "AA2") does not constitute the affidavit mandatorily required by Order XXXVI rule 3 D to support the originating summon filed way back on 26.10.06. It has been held in a long line of authorities, including *Kweyu -vs- Omuto (supra)* that Order XXXVI rule 3 D is in mandatory terms. Failure to comply therewith renders the originating summons in this case fatally defective and incompetent.

In her replying affidavit sworn on 23.02.07 the plaintiff/respondent sought refuge in Order XXXVI rules 8A and 9. Rule 8A provides that any party to a suit commenced by originating summons may apply to a judge in chambers for directions. Presumably the plaintiff/respondent was making the point that no directions were sought or obtained. The rule is in permissive but not mandatory terms. Non-obtaining of directions thereunder cannot be fatal to the chamber summons dated 21.11.06. Rule 9 empowers the

court to order the summons to be supported by such further affidavit as it may deem necessary and also empowers the court to make amendments necessary to make a summons accord with existing facts. The powers conferred on the court by rule 9 are discretionary and may be used in an appropriate case. In the present case, the plaintiff/respondent failed to comply with the mandatory provisions of Order XXXVI rule 3 D and gave no timely explanation for the omission. I hold that this is not an appropriate case for the court to exercise its discretionary powers under rules 8A and 9 to aid the plaintiff/respondent who has violated the mandatory provisions of Order XXXVI rule 3 D and I decline to exercise the powers conferred by rule 9 of the said Order.

The upshot is that I allow the chamber summons application dated 21.11.06 and hereby strike out the suit brought by way of originating summons dated 23.10.06. The plaintiff shall bear the defendants' costs of the originating summons dated 23.10.06 and the chamber summons dated 21.11.06.

Orders accordingly.

Delivered at Nairobi this 15th day of April, 2008.

B.P. KUBO

JUDGE