

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 1686 of 2007

FRANCIS NGIGE WAWERU APPLICANT

VERSUS

DEVSON INVESTMENT LTD RESPONDENT

RULING

- (1) On the 16th October, 2007, the Defendant filed a Chamber Summons in the subordinate court seeking orders that the Defendant be granted leave to amend his Amended Defence and Counterclaim.
- (2) Learned counsel for the Plaintiff filed a Notice of preliminary objection on the 12th November, 2007 in which he challenged the Defendant's application as being incurably incompetent and seeking that it be struck out.
- (3) On the 14th November, 2007, the Plaintiff's application came up for hearing before the Hon. Mrs. Kimingi (SPM) and Her Honour stood the application over generally. Consequently, the application is still pending before the Chief Magistrate court.
- (4) Even before prosecuting his application in the lower court, the Defendant filed the Notice of Motion now before me on the 5th December, 2007 seeking that the suit in the lower court be transferred to this court on grounds "**that the subordinate court does not have jurisdiction to hear and determine the draft Amended Defence and Counterclaim.**"
- (5) The Plaintiff has taken issue with the application by filing a Notice of Preliminary Objection contending that the Application is vexatious and an abuse of process.
- (6) In his Defence and Counterclaim filed on the 21st June, 1995, the Defendant prays for judgment against the Plaintiff for "**costs of renovation, partitioning, construction and all the improvements all to be assessed by this Honourable court.**" There has been no assessment or determination or finding by the lower court or otherwise that the Defendant's claim in the counterclaim exceeds the jurisdiction of the lower court. There is therefore, no basis for the Defendant's contention "**that the subordinate court does not have jurisdiction to hear and determine the draft amended Defence and Counterclaim**" for the simple reason that the draft Amended Defence and Counterclaim has not even been deemed to have been duly filed. That will only occur if the pending application in the lower court is heard and determined in the Defendant's favour. I would, therefore, agree with Mr. Ashiruma that the application before me is premature and an abuse of process and consequently uphold his preliminary objection filed on the 29th January, 2008.
- (7) The order which must follow is that the Defendant's Notice of Motion filed on the 5th December, 2007 is incompetent and it is accordingly hereby struck out and expunged from the record with the costs thereof to the Plaintiff/Respondent.

So ordered.

Dated and delivered at Nairobi this 15th day of April, 2008.

P. Kihara Kariuki

Judge