

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 418 of 2000

QURDOBA ENTERPRISES LIMITEDPLAINTIFF/RESPONDENT

Versus

TOTAL KENYA LIMITED DEFENDANT/APPLICANT

RULING

The Defendant's/Applicant's Counsel Mr. Marete who appeared before me alone and told me that the date 12th March, 2008 for the hearing of Chamber Summons dated 10th August, 2000 had been taken by consent by the two firms of Advocates acting in this suit added that the only pending prayers in the Chamber Summons pending hearing is prayer number two.

This is an old Chamber Summon with six prayers five of them inconsistent. If therefore all except one of them have been disposed off, how and why did prayer number 2 remain? Why has there been no consent between the parties in respect of that prayer number 2 especially if there is no replying affidavit and the Respondent's Advocates has been served as Mr. Marete claims? Prayer number 2 seeks. Transfer of this suit from this Civil Division to the Commercial and Taxation Division of this Court at Milimani although its wording is as if the transfer is from one High Court station to another High Court Station.

But the questions I have raised above apart, let me state that when on 12th March, 2008 I called out this case at about 9.15 a.m., I learned that the Respondent's counsel had not arrived although Mr. Marete was present. He told me the hearing date had been taken by consent on 20th September, 2007 before Justice Osiemo. On hearing that, I put the case file aside as I dealt with other cases up to 10.50 a.m. when the case was called out again.

Mr. Marete was present but the absence of the Respondent and its counsel had not changed. There was no need for evidence of service as I had been told by the Applicant's counsel that the hearing date had been fixed by consent of counsel on both sides. Mr. Marete therefore prosecuted prayer number 2 of the Chamber Summons dated 10th August, 2000 stating among other things, that he is not aware of the Respondent's replying affidavit concerning this issue of transfer of the suit. At the end: I fixed to-day's date for the ruling.

But when I sat down to write the ruling, I discovered that the date taken by consent before Justice Osiemo on 20th September, 1997 was 8th October, 2007 and not 12th March, 2008. I further discovered that the date 12th March, 2008 for hearing of the Chamber Summons was taken by the Applicant's counsel at the Registry ex-parte on 6th December, 2007 and that therefore the Applicant's Counsel was required and was told to issue hearing notice to the Respondent. I discovered also that no hearing notice has been issued and that therefore the Respondent's counsel has not been served to be present before me on 12th March, 2008 for the hearing of prayer number 2 in the Chamber Summons.

In the circumstances when there is misleading of the court in that manner what fair order can the court make? Is it true therefore that the Respondent has filed no replying affidavit and that in the Chamber Summons prayer number 2 remains to be determined?

We are in the eighth year since the Chamber Summons dated 10th August, 2000 was filed and in view of what I have said above in this ruling, prayer number 2 in the said Chamber Summons be and is hereby dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 11th day of April, 2008

J.M. KAHMONI

JUDGE