



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

Civil Case 498 of 2004

MUTHITHI INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

ANDREW S. KYENDO.....1ST DEFENDANT

AMINA MOHAMED.....2ND DEFENDANT

WILLIAM K. MWANGANGI.....3RD DEFENDANT

ROSEMARY NYOKABI.....4TH DEFENDANT

JAMES BANGA.....5TH DEFENDANT

MESHACK O. AMBUKA.....6TH DEFENDANT

BERNARD M. MUTTAHA.....7TH DEFENDANT

W. OKEYO MBATA8TH DEFENDANT

J.M. KAGAI 9TH DEFENDANT

JANE WANGECI.....10TH DEFENDANT

RAPHAEL K. THIMBA.....11TH DEFENDANT

MARY N. KAGO.....12TH DEFENDANT

DICK OUMA OCHIENG.....13TH DEFENDANT

DAVID AUMA.....14TH DEFENDANT

PATRICK NDIRANGU.....15TH DEFENDANT

SAID ALI ABU.....16TH DEFENDANT

SAMUEL NGATIA.....17TH DEFENDANT

JAMES NJOROGE.....18TH DEFENDANT
MARY NDUKU KIOKO.....19TH DEFENDANT
MAINA MUTAHI.....20TH DEFENDANT
JOHN MWAURA WAINAINA.....21ST DEFENDANT
MUDIA MUCHEMI.....22ND DEFENDANT
NAMAN OGEMBO OGWENO.....23RD DEFENDANT

RULING

By chamber summons dated 01.11.07 stated to be brought under Order VI rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap.21, the plaintiff applied for the statement of defence by the 13th – 23rd defendants dated 18.01.05 to be struck out and that the said defendants do pay to the plaintiff the costs of the application.

The grounds upon which the application is based are essentially that the plaintiff is the lawful, registered and rateable proprietor of the suit premises L.R. 23917, Nairobi and that the 13th – 23rd defendants have no sustainable claim to the property; that the defendants have made mere denials which do not constitute a sustainable defence; that the defendants have admitted on oath to settling and erecting permanent buildings on the suit premises and that their defence is a sham, frivolous and may delay trial of the suit; that the said 13th – 23rd defendants have filed a statement of defence similar in principle to the defence filed by the 1st – 12th defendants which was struck out by the High Court (Mugo, J) on grounds that it was a sham and did not raise any reasonable defence; and that it is in the interests of justice and fairness that the defence of the 13th – 23rd defendants be struck out with costs.

The application is supported by the affidavit of Mike Maina, Managing Director of the plaintiff company sworn on 01.11.07.

The application was opposed by the 13th – 23rd defendants by way of grounds of opposition.

The application came up for mention before me on 18.02.08 whereat the plaintiff/applicant was represented by learned counsel, Mr C.N. Njenga while the 13th – 23rd defendants were represented by learned counsel, Mr C.M. Njagi. I fixed the application for hearing on 14.04.08. On hearing date only the plaintiff's/applicant's counsel appeared but the 13th – 23rd defendants'/respondents' counsel did not appear. As there was no explanation for non-appearance of defendants'/respondents' counsel and the hearing date having been fixed in presence of counsel for both parties, I directed the hearing to proceed and it did.

The oral arguments advanced by plaintiff's/applicant's counsel are a matter of record and were made in elaboration of the application and the grounds on which it is based.

I have given due consideration to the application and the opposition thereto.

The court record shows that I gave three previous interlocutory rulings in this case: on 24.07.06, on 20.09.06 and on 29.10.07. In the ruling of 29.10.07 I set aside the *ex-parte* judgment I had entered in favour of the plaintiff on 24.11.05, deemed the draft defence of the 13th – 23rd defendants dated 18.01.05 as properly filed and ordered this matter to proceed to trial on merit on priority basis. The chamber summons application now under consideration seeks the striking out of the defence of the 13th – 23rd defendants dated 18.01.05 without trial on merit. The application amounts to a challenge of my decision

in the ruling delivered on 29.10.07. While the plaintiff/applicant was entitled to challenge the decision in the ruling of 29.10.07, such challenge should have been launched through the laid down procedure, i.e. by way of appeal against or application for review of the decision. Instead, the plaintiff/applicant sneaked in a challenge unprocedurally. That is not acceptable.

The upshot is that the chamber summons application dated 01.11.07 is here dismissed.

Costs shall be in the cause.

Orders accordingly.

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

B.P. KUBO

JUDGE