



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 87 of 2007**

**ALLOYSIUS MUTHIANI KIVUSYU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**WILLIAM MWANZIA.....1<sup>ST</sup> DEFENDANT**

**REGINA WAIRIMU.....2<sup>ND</sup> DEFENDANT/APPLICANTS**

**R U L I N G**

By a chamber summons dated 23<sup>rd</sup> March, 2007, William Mwanzia (hereinafter referred to as the applicant), seeks to have this suit which was brought against him and one Regina Wairimu by Alloysius Muthiani Kivusyu (herein referred to as the respondent), by way of an originating summons, struck out. It is contended that the proceedings were wrongly commenced by way of an originating summons as under Order XXXVI Rule 3F no application under the Registered Land Act can be made by way of an originating summons unless there is a pending suit involving the same land.

Relying on: -

1. Civil Appeals No. 219 of 2003 *Kiprop Kanda vs Gabriel Biwott Kanda and 3 Others* and
2. Civil Appeal No. 223 of 2000 *Triple Eight Investments Kenya Ltd vs City Finance Bank Ltd & Another*.

It was submitted that the originating summons was incompetent. Relying further on Kenya Commercial Bank Ltd vs James Osebe 1982-88 1KAR 48, it was submitted that the originating summons was incompetent as the applicant was seeking general and special damages for breach of contract and therefore ought not to have come by way of originating summons. Although the respondent's advocate was duly served with the application no replying affidavit or grounds of objection were filed nor did counsel for the respondent attend court for the hearing of the application. Hearing therefore proceeded ex-parte.

Having carefully considered this application and the authorities cited, I find that under Order XXXVI Rule 3F an application under Section 133 of the registered Land Act Cap 300 is required to be made by an originating summons unless there is pending before the court a suit involving the suit land in which case the application may be made by summons in chambers in that suit.

In this case, it is evident that there was no other suit pending before court involving the suit land. According to the applicant there were proceedings initiated before the Land Registrar under Section 133(2) of the Registered Land Act. However, the Registrar of Lands advised counsel for the respondent to file a suit in court to have the caution removed. The proceedings before the Land Registrar were however not a suit and there was nothing to bar the applicant from filing an appropriate suit in court. Thus the suit filed by way of originating summons was in accordance with Order XXXVI Rule 3F of the Civil Procedure Rules.

It is true that the originating summons also seeks mesne profits and general damages for wrongful maintenance of a caution. In this regard the respondent suit was defective as the court cannot award damages on an originating summons under Order XXXVI. I therefore grant the application to the extent of striking out prayers No. (b) and (d) of the originating summons dated 1<sup>st</sup> February, 2007. To this extent only does the application succeed.

Dated this 8<sup>th</sup> day of May, 2008

**H.M. OKWENGU**

**JUDGE**

Delivered in presence of Ongicho for Applicant

Muidni for the Respondent