



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 76 of 2007 (OS)**

**SALIM SAID KOI .....APPLICANT/PLAINTIFF**

**VERSUS**

**HATIMY GROUP LIMITED .....DEFENDANT/RESPONDENT**

**R U L I N G**

The substantive matter in these proceedings is expressed in the Originating summons dated 5<sup>th</sup> April 2008. In the aforesaid Originating Summons, Salim Said Koi, the plaintiff herein, is seeking to be declared to have acquired plot numbers 204/1/MN and 203/1/MN by adverse possession from Hatimy Group Ltd., the defendant herein. The plaintiff filed the Chamber Summons dated 21<sup>st</sup> April 2008 in which he prayed for an order of temporary injunction to be issued to restrain the defendant from evicting the plaintiff and or demolishing the plaintiff's structures standing on the suit premises pending the hearing and determination of the Originating Summons. When the summons came up for hearing interpartes. The defendant raised a preliminary objection against the application and the Originating summons in a notice dated 25<sup>th</sup> April 2008. The Preliminary objection is the subject matter of this ruling. Mr. Kinyua, learned counsel on the part of the defendant argued the following preliminary points with a view of convincing this court to strike out the application and the Originating summons.

First, it is said that the Originating Summons does not comply with the Mandatory provisions of Order XXXVI rule 3D(2) of the Civil Procedure rules. The learned advocate pointed out the fact that the plaintiff did not annex to the Supporting Affidavit a certified copy of the extract of the title but has instead attached to the affidavit a copy of two certificates of postal searches. Mr. Kenga, learned advocate for the plaintiff opposed this ground by stating that the notice of Preliminary Objection was imprecise in that it did not specify Order XXXVI rule 3D(2) of the Civil Procedures. I have considered the arguments of both learned counsels over this issue. There is no dispute that the plaintiff annexed to the affidavit filed in support of the Originating Summons two copies of certificates of postal searches. Order XXXVI rule 3D(2) of the Civil Procedure clearly states that the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. Two issues have arisen from learned counsels' arguments for my determination first, is whether or not the notice of preliminary is fatally defective for failing to cite the provisions of order XXXVI rule 3D(2) of the Civil Procedure rules.

Two, whether the objection if upheld can dispose of the entire Originating Summons. Let me start with the second issue. It is a question of whether or not it is sufficient to annex to the affidavit in support a search instead of the extract of title. Extract means a portion or segment of a document or writing. On the other hand a search in the context of this case means an examination of public documents or records for information. In my humble view when one files the postal search instead of the extract of title, it is

not fatal

because the two documents serve the same purpose of giving the details required to establish the ownership and the transactions over the property sought to be acquired by adverse possession under Order XXXVI rule 3 D of the Civil Procedure Rules. The second issue is whether the Preliminary Objection rendered is fatally defective when the defendant failed to cite the required provision which was allegedly breached. Mr. Kinyua urged this court to spare the preliminary because order L rule 12 took care of such defects. It is not in dispute that the notice does not specify the provisions of Order XXXVI rule 3 D(2) of the Civil Procedure Rules. Law J.A. in Mukisa Biscuit Co. -vs- West End Distributors [1969] E.A. page 700 said as follows:

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit.”**

It is admitted by Mr. Kinyua that his notice of Preliminary Objection is imprecise. The order sought is drastic hence the notice must be very clear and unambiguous. The notice at paragraph 4 cites order XXXVI. That order consists of a total of twelve rules and several sub-rules. In my humble opinion I do not think order L rule 12 of the Civil Procedure Rules can cure this defect. That rule relates to substantive applications and not preliminary objections. The later requires that any party who raises any preliminary objection to be crystal clear in his notice otherwise the objection should not be accepted because it brings the element of surprise. In this case it was very difficult for the plaintiff to anticipate the case he would face when the preliminary objection came up for hearing. In this regard I will adopt the position taken by Mr. Justice Maraga in Mombasa

H.C.C. A No. 34 of 2005 Guinness Construction & Housing Co. Ltd.

-vs- Abdalla Nassor (unreported) in which the learned judge expressed himself as follows:-

**“I have perused the Appellant’s notice of preliminary objection. It is imprecise. It states:**

.....  
.....

**It does not state what provision of the law it is referring to. Preliminary Objections being to state succinctly and clearly the points of law taken and if reference is to be made to any particular provisions of law those provisions should be precisely stated. That way the preliminary point taken is understood and the other side is not taken by surprise. An imprecise notice of preliminary objection like the one in this case is itself defective and the court should not allow it to be taken.”**

In the end I find the notice of preliminary objection to be defective.

The second ground argued relates to the defects on the affidavits filed by the plaintiff. With respect, that issue was not raised as a ground the notice of the preliminary objection. That suffers the same fate like the first ground.

At this stage and in view of the fact that I will order for the notice of the preliminary objection to be struck out I do not need to consider the remaining grounds. Consequently the notice of Preliminary Objection dated 25.04.2008 is order struck out with costs to the plaintiff.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of June 2008.**

**J.K. SERGON**

**J U D G E**

In open Court in the absence of the plaintiff and in the presence of Mr. Kadima h/b kinyua for the defendant.