



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 328 of 2009

BHARVA BADIANI APPLICANT

VERSUS

MICROSOFT CORPORATION KENYA RESPONDENT

RULING

The Applicant came to court by way of a Notice of Motion dated 4th May, 2009. The Notice of Motion was brought under Section 3 and 3A of the Civil Procedure Act. The same was supported by the affidavit of ***Bharva Badiani***, dated 4th may 2009.

The Respondent filed grounds of Preliminary Objection & Replying Affidavit both dated 26th May, 2009, in opposition.

The applicant sought for order:

- (i) **That the Respondent herein do reveal the true identity of one of it's clients operating an e-mail account with it under the names janoo64@hotmail.com, januu.64@hotmail.com and januu54@hotmail.com, as reflected in the Respondent's records and database.**
- (ii) **That the e-mail accounts janoo64@hotmail.com, januu.64@hotmail.com and januu54@hotmail.com be blocked and the said accounts closed forthwith.**

The applicant's case is that since 17th January, 2007 she has been receiving threatening and abusive e-mails from a person using the defendant's e-mail services. That the respondent knows the true identity of the sender of the e-mails, and is in a position to reveal the identity of the said sender. The applicant claims that she is apprehensive and the revelation of the sender's identity will accord her peace of mind.

The respondent in opposing the application argued that the application was misconceived, unsustainable and bad in Law. The applicant a further argued that the issue bordered on being a criminal complaint and that the applicant ought to have involved the police within her jurisdiction which in this instance is Tanzanian police.

The Respondent's counsel pointed out that the applicant initiated the suit through a Notice of Motion which is contrary to section 2 of the Civil Procedure Act. That this being an interlocutory application the court cannot make orders as being sought as the same are final orders. In support of the Respondent's argument learned counsel relied on the following authorities

1. **KENYA NATIONAL FEDERATION OF CO-OPERATIVES LIMITED (KNFC) vs. ECONET WIRELESS KENYA LIMITED & OTHERS** Misc. Application 955 of 2006,
2. **FLORENCE MAKORI T/A OUR CONNECTIONS & ANOTHER vs. FURTHER PROPERTIES LTD & ANOTHER** Civil Case No.353 of 2006
3. **RAMJI DEVJI VEKARIA & ANOTHER vs. MUNICIPAL COUNCIL OF ELDORET** HC.C.C. No. 145 of 2004.

The issues before the court are -

1. Whether the application before the court is competent
2. Whether the court can issue the final order as prayed for by the applicant in an interlocutory application.

The finding in 1 above may dispose of the second issue depending on the outcome.

Section 2 of the Civil Procedure Act defines relevant words as follows as –

“Pleading includes a petition or summons, and the statement in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant.”

“Suit” means all civil proceedings commenced in any manner prescribed”

Order VI rule 1 prescribes the manner of commencing suits.

“Every suit shall be instituted by presenting a plaint in court, or in such other manner as may be prescribed.”

Can the Chamber Summons herein be deemed to be a pleading in terms of the definition of **“pleadings”** in the Civil Procedure Act?

Is this one of the method or manner prescribed in the Civil Procedure Rules? I do not think so. I do agree with the counsel for the defendant that the Chamber Summons cannot fit in the definition of pleadings as defined by section 2 of the Civil Procedure Act, neither can it be considered to fall within the description given by Order IV Rule or XXVI.

In my view the court cannot invoke its inherent discretion under S. 3 & 3A where there are specific Orders addressing the issue before the court. On this score therefore the application cannot stand.

On the second issue It is my view that, the court can only grant mandatory orders at an interlocutory stage, where the court is convinced that there are special circumstances requiring such an order to be made. I find no special circumstances that would require such an order. In any event the suit is incompetent in terms of prayer one.

Having come to the conclusion as set above I hereby dismiss the application with costs.

Dated and delivered this 8th June, 2008.

ALI - ARONI

JUDGE