



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil (Originating Summons) 107 of 2007**

**IN THE MATTER OF STAFF RETIREMENT BENEFITS SCHEME OF EX-STAFF MEMBERS  
OF AFRICAN RETAIL TRADERS (K) LIMITED RULES/TERMINAL BENEFITS**

**AND**

**IN THE MATTER OF VOLUNTARY WINDING UP OF A COMPANY SECTION 279 AND 241  
OF COMPANIES ACT CAP 486 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SALE OF ART (K) LTD TO PELELE LIMITED SECTION 286 OF  
TRANSFER OF BUSINESS ACT CAP 296 LAWS OF KENYA**

**AND**

**IN MATTER OF NULLIFICATION OF SALE OF ART (K) LTD TO PELELE LIMITED AND  
LATER TO ART (2005) LTD.**

**AND**

**OTULO OLOO SISO ..... PLAINTIFF**

**VERSUS**

**1. ANDRIAN SPENCER DEARING & JOHN STANELEY WARD T/A PRICE**

**WATERHOUSECOOPERS..... DEFENDANT**

**2. ROGER URION T/A KINGSLAND COURT RECEIVER AND MANAGER**

**INTERIMADMINISTRATOR (ART (K) LTD GROUP SRBS.....DEFENDANT**

3. **BARCLAYS BANK OF KENYA LTD ..... DEFENDANT**
4. **HARISH MEDIRATTA, HITESH MEDIRATTA & DEEPAK  
MEDIRATTA (DIRECTORS OF ART (K) LTD IN RECEIVERSHIP.....DEFENDANT**
5. **FARID MOHAMMED T/A PELELE LTD (ART 2005) ..... DEFENDANT**

**RULING**

This ruling is in respect of an application filed by the first defendant herein by way of chamber summons brought under **Order VI rules 13(1)(a)** and **16** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**. The application seeks striking out of the Originating Summons filed herein on the ground that it does not disclose any or any reasonable cause of action. The application was made on the following grounds:

- (a) The Originating Summons is fatally defective in form.**
- (b) The originating summons does not set out to determine matters that fall within Order XXXVI of the Civil Procedure Rules.**
- (c) The originating summons does not establish the plaintiff's locus to present the suit or allude to any special relationship between the parties as required by law.**
- (d) The originating summons is not supported by a supporting affidavit and the verifying affidavit lacks sufficient material to enable the court make any determination set out for determination by the court.**
- (e) The originating summons is vague, indeterminate, spurious and does not enable the defendant to defend themselves effectively.**

The plaintiffs filed the following grounds of opposition.

- 1. That the applicant's application is frivolous, vexatious, brought in bad faith, bad in law, premature and an abuse of the court process.**
- 2. That the application lacks merit, is misconceived, misguided and lacks proper clear legal procedure in the Civil Procedure Rules.**
- 3. That the applicant's application should be dismissed for want of legal procedure.**

Mr. Nyamurongi, who held brief for M/S Mohamed Muigai Advocate for the defendant made brief submissions in support of the application. He cited the case of **KARIUKI VS. MBATARU** [2004] 2KLR 558.

In the said case, it was held that originating summons is an expeditious procedure that is designed for relatively just relief without the complications of the procedure of a full trial. That should not be resorted to where a claim lacks certain common bases of agreement, and where the trial process is designed to be highly contentious. He urged the court to strike out the originating summons since the same had been brought contrary to the provisions of **Order XXXVI** of the **Procedure Rules**.

Mr. Osoro for the plaintiffs submitted that the application was premature because directions had not been taken. He further submitted that the application was not supported by affidavit. In his view, the claim

herein could only be brought by way of an originating summons and not a plaint.

In the originating summons the plaintiffs urged the court to determine several issues relating to a company known as ART (K) LTD. The questions for determination are as follows:

- “ 1. Was the acquisition of Art(K) Ltd by Pelele Ltd less than a year after the former was placed in receivership proper and lawful?**
- 2. Was the sale of Art (K) Ltd by receivers to Pelele Ltd without the court’s approval lawful?**
- 3. Who was responsible for the Art (K) Ltd liabilities after the sale?**
- 4. How were the debts of Art (K) Ltd settled after the sale?**
- 5. Who were the directors of Pelele Ltd and later Art (2005) Ltd?**
- 6. Was there evidence that the Barclays Bank of Kenya found that Art (K) Ltd had developed in ability to pay debt (sic) within the meaning of Section 220 of the Companies Act Cap 486 Laws of Kenya to warrant it to sell it?**
- 7. Was the Barclays Bank of Kenya right in appointing a receiver/liquidator without consulting other creditors?**
- 8. Were all other creditors given time to state their claims before the sale?**
- 9. What are the powers and duties of a receiver after appointment and to what extent?**
- 10. Was the appointment of Jay Medirata, the General Manager Art (K) Ltd, as joint receivers with Adrian Spencer Dearing proper and legal?”**

The originating summons was not supported by any affidavit. There was filed a brief verifying affidavit which stated in paragraph 3:

***“That the contents of the plaint flow from my instructions to my advocates on the record”***

Order XXXVI sets out the nature of cases that can be commenced by way of originating summons and looking at the plaintiff’s claim herein, it does not fall within the provisions of the said order. Secondly, the nature of the plaintiff’s claim is such that it cannot be adjudicated upon in a suit brought by way of originating summons. The claim seems to be complex and quite contentious. It ought to have been brought by way of a plaint. Thirdly, even if the originating summons was well premised, it is not supported by an appropriate affidavit containing all the relevant depositions as would enable the court and the other parties to understand clearly what the issues in contention are. The verifying affidavit that was annexed to the originating summons is non-suited. It is the kind of affidavit that is filed to verify a plaint, which is not the case. It appears from the contents of paragraph 3 of the said verifying affidavit that the deponent thereto was verifying the contents of a plaint.

In the circumstances, it was not necessary for the defendant to wait until directions are given before filing the present application. This is because the originating summons is fatally defective and does not lie. I strike it out as disclosing no reasonable cause of action. The plaintiff will bear the costs of the suit.

**DATED, SIGNED and DELIVERED at KISII this 6<sup>th</sup> day of June, 2008.**

**D. MUSINGA**

JUDGE

Delivered in open court in the presence of:

N/A for the plaintiff

Mr. Nyamurongi H/B for M/S. Githu Muigai & Co. for the Defendant

**D. MUSINGA**

JUDGE