



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc. Civ. Appli. 386 of 2006

BRIDGEUP CONTAINERS SERVICES.....APPLICANT

VERSUS

GICHANA BW'OMWANDO.....RESPONDENT

T/A GICHANA BW'OMWANDO & CO ADVOCATES

R U L I N G

The applicant/plaintiff by its Originating Summons filed on 11.4.2006, seeks to enforce a professional undertaking against the respondent/defendant a firm of advocates. On being served with the Originating Summons the respondent lodged the application by Chamber Summons dated 9.5.2006 seeking one primary Order that the Originating Summons filed on 11.4.2006 be struck out with costs. The reasons for the application are that the Originating Summons is inappropriately filed and that there exists no Advocate/client relationship between the applicant/plaintiff and the respondents/advocates; that the Originating Summons violates the mandatory provisions of Order XXXVI of the Civil Procedure Rules; that the matters sought to be determined are riddled with ambiguity and that the Originating Summons is an abuse of the process of the court. Although there is no supporting affidavit the plaintiff/applicant has opposed this application on the basis of a replying affidavit sworn by one Joseph Gathitu Mukumah a director of the plaintiff/applicant. In the affidavit it is deponed on advise of counsel, that the Originating Summons is correctly before the court. It is further deponed that by a Sale agreement dated 9.2.2006 the respondent who acted for the vendor was to hold Kshs.1,500,000.00 as a stake holder pending registration of a transfer. It is then deponed that the vendor was not able to complete the sale as the Title Deed of the subject property was a forgery. It is further deponed that the respondent accepted the said sum of Ksh.1.5 Million on his undertaking to unconditionally refund the said sums in the event of failure of registration of the transfer. It is further deponed that the respondent has failed to effect the refund hence the Originating Summons. In the premises the plaintiff/applicant contends that the advocate's application is without merit and is merely intended to delay recovery of the said sum.

The application was canvassed before me on 3rd July 2008 by Mr. Buti Learned Counsel for the firm of advocates and Mr. Ndegwa Learned counsel for the plaintiff/applicant. Counsel for the advocate elaborated on the grounds in the application and the counsel for the plaintiff/applicant restated the position taken by his client in the replying affidavit.

I have considered the Originating Summons, the application by the advocate, the Replying Affidavit and the Submissions of counsel. Having done so, I take the following views of the matter. On the objection raised against the Originating Summons on its want of form, I am of the view that the objection

has not been well taken. I say so, because whereas the form used is strictly not in accordance with the form provided under Order XXXVI of the Civil Procedure Rules, the purport of the application is quite clear and has certainly not left the advocate/respondent in any doubt as to the orders sought. In any event Rule 7 of order XXXVI permits variations as circumstances may require.

The other limb of objection raised by the advocate is predicated on the absence of an advocate/client relationship between the plaintiff/applicant and the advocate. With respect, that objection is misconceived as that is not the basis of the plaintiff/applicant's Originating Summons. An undertaking by an advocate need not be to his client as counsel for the advocate seemed to mistakenly contend. Indeed most actionable professional undertakings are usually made by advocates to their counter parts acting for parties on the other side of the dispute.

In the premises, I am unable to agree with counsel for the advocate that the plaintiff/applicant's Originating Summons is riddled with ambiguity and is an abuse of the process of the court. I will in the circumstances reject the Advocates application. The application dated 9.5.2006 is hereby dismissed with costs to the plaintiff/applicant.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JULY 2008

F. AZANGALALA

JUDGE

Read in the presence of:-

Ndegwa for the respondent and Buti for the applicant.

F. AZANGALALA

JUDGE

24TH JULY 2008