REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 150 of 2007

MASENO UNIVERSITY …… PLAINTIFF

-VERSUS-

PROF. OCHONG OKELO ……..……. RESPONDENT

R U L I N G

Coram:

Mwera J.

Wasuna for Applicant

Nyakundi for Respondent

Ngayo CC.

By a chamber summons dated 25.1.2008, the respondent herein sought this court's orders under O6 r. 13 CPR and S. 3A CPA, to strike out the originating summons (O.S) which was filed on 2.11.2007.

It was stated in the application that the originating summons was scandalous, frivolous, vexatious and an abuse of the court process. And the grounds were that the originating summons constituted an imprudent, scurrilous, mischievous and rabid attempt calculated to conceal contempt of court. It did not lie in law and further that seeking interpretation specific to the applicant was discriminatory and unconstitutional.

The respondent/applicant (Prof. Ochong Okelo) swore an affidavit to support the application which Mr. Nyakundi argued. Mr. Wasuna opposed it as per the replying affidavit sworn by one Mathew Ouma Onyango.

Although the applicant did not state in the heading of his chamber summons what parts of O6 r. 13 CPR he was invoking, it appears that the prayers were under r. 13 (1) (b) (d). And indeed there was an affidavit in support. Mr. Nyakundi's view is that where a party files an originating summons under O.36 r. 5 CPR as the University did here, the suing/applying entity must be a person claiming interest under a deed, will or other written instrument. The provision of law was specific as to the nature of documents/instruments which should not be read to include terms and conditions of service or judgments and other judicial decisions which the applicant University seeks interpretation of. That as of now there

was no dispute between the present applicant and the University about the right or interest between the two.

Mr. Wasuna countered that O6 r. 13 CPR is for striking out pleadings and the originating summons brought under O36 r. 5 CPR was not a pleading. He made to distinguish two types of originating summonses under O36 CPR. That under O36 r. 8B CPR the originating summon there required appearance (by the other side?) while under O36 r. 5 CPR was just an application like a chamber summons or a notice of motion of which are not pleadings as provided for under S. 2 CPA. Therefore this court should move to hear the originating summons herein and not strike it out at this stage. It was not a pleading and the three instruments to be interpreted, terms and conditions of 1990, 1997 and 2001 had been duly appended to the summons.

Before going further, it may be pertinent to confess that what was at stake in these proceedings did not come out quite clearly. Nonetheless, let us begin by looking at the provisions of law counsel referred to:

S. 2 Civil Procedure Act defines a pleading as including " --- a petition or summons, and the statements 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 counter – claim of a defendant."

Mr. Wasuna appeared to be telling the court that his client's originating summons brought under O36 r. 5 CPR is not a pleading. It should be treated as a chamber summons or notice of motion and thus it cannot be impeached under O6 r.13 CPR as the respondent/applicant now seeks. The court was not quite certain about the validity of that argument. There was no material or authority on which to find that the summons contained in S. 2 (above) did not mean and include any kind of originating summons. Looked at as a whole, the definition in S. 2 encompasses any way by which a party moves to court to seek or resist sought relief, declaration, remedy e.t.c. Such are petitions, summonses, plaints (statements of claim), defences, replies, counter – claims. Those are pleadings and one can seek to strike them out under out under O6 r. 13 CPR.

There was then this distinction Mr. Wasuna strenuously attempted to bring between provisions of O36 r. 5 and r. 8A:

"**5. Any person claiming to be interested under a deed, will or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."**

And:

"**8A. Any party to a suit commenced by originating summons may apply to a judge in chambers."**

All the court heard was that under r. 5 there need not be appearance (by the opposite side?) while under r. 8A appearance is necessary. Be that as it may. At this point the court is not determining whether the "instruments" the applicant University desires to be interpreted are instruments as per r. 5 or not. Or even their substance and validity. All it was asked is whether the originating summons should be struck out now or it should be heard on its merits.

In the circumstances of this case may, the originating summons dated 31.10.2007 proceed to hearing on the dates the parties will take.

Costs in the cause.

Ruling delivered on 9.7.2008.

J. W. MWERA

JUDGE

JWM/hao