



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 288 of 2007

MULTI OPTIONS LTD. (IN RECEIVERSHIP)PLAINTIFF

VERSUS

KALPANA S. JAI & 2 OTHERSDEFENDANTS

RULING ON PRELIMINARY OBJECTION

Application dated 21/5/08 chamber summons seeks orders for leave to amend Originating Summons herein in terms of draft annexed and that thereafter Originating Summons be deemed to be duly filed upon payment of fees and that leave be granted to file affidavits to comply with the amendments.

The application is grounded on the grounds stated on the application. An affidavit is sworn and filed by Ponagipalli Venkata Raman Rao in support of the application.

The proposed amendments are shown marked in red in draft exhibit K3. The first proposed amendment is the statement of the legal provisions invoked “351 and 352” Companies Act, rule 9 the Companies (High Court) Rules.” Paragraph 3 Originating Summons is also amended by inserting the name of the company and also inserting an additional property land Reference No.37/89 and its description paragraph 4 it is added prayer for documents relating to the 2nd land.

Paragraph 6 there is an amendment to include prayer in connection with 2nd land. Paragraph is inserted seeking order compelling 1st and second respondents to submit and verify statement of affairs of the applicant company. The grounds set out are also amended. The application is supported by first and second respondents saying that the application is a muddle and ought to be struck out in limine and that applicant was aware of the matters since June 2007 and therefore he is guilty of laches and undermining of discretion of court.

The property has been transferred to 3rd respondent the plaintiff has no claim over the same. The application is an abuse of process of court. These respondents filed affidavit sworn on 27th July 2007 and Supplementary Affidavit sworn on 22/8/2007. For the 3rd respondent, an affidavit was filed on 30/5/2008. It is sworn that the applicants became aware of his purchase of the suit property 10 months ago in 2007 and there has been inordinate delay in prosecuting the suit and granting orders sought will only encourage more delay. Also that the injunctive orders cannot be granted under an Originating Summons.

Then on 22/7/2008 the 3rd respondent filed a notice of a Preliminary Objection which was heard on

23/7/08. The third respondent submits that the Originating Summons is defective and also the application and that both should be struck out with costs. He relies on the case of KCB Ltd. vs. James Osebe – (1982-1988) 1 KLR 48 where it was held that Judge has no power to award damages on an Originating Summons brought under Order 36 Civil Procedure Code.

Judge Hancox stated at page 51:

“In my view the question of whether the sale was at undervalue and whether it was mismanaged are matters of fact which if disputed should not be resolved on affidavit evidence.”

Procedure under Originating Summons is primarily designed for summary and ad hoc determination of points of law or construction of certain questions of facts.

Also in the Court of Appeal decision Wepukhulu vs. Board of Governors Buruburu Secondary School – Civil Appeal No.310/2002 where an injunction was sought. The application was brought under Order 36 rule 3 Originating Summons. The court emphasized the decision in Osele’s case above and although in Wepukhulu case there was an order to take viva voce evidence the court said:

“The fact is that the dispute was outside the ambit of Originating Summons and the procedure was wrong”

Applicant opposed this Preliminary Objection citing decision of Court of Appeal in Shah vs. Shah – Civil Appeal No.34/1981 where the court held that “the Procedure under Originating Summons is not limited to matters in respect of which facts are agreed.” It is for this reason that Order 36 rule 10 exists which empowers a Judge to adjourn Originating Summons into court for hearing evidence viva voce or hearing arguments.

In this judgment the court did not specify if injunction and damages could be granted on an Originating Summons. In the case of Sirma vs. Eric Kipkurgat Kiprono Originating Summons was invoked in case of dissolution of partnership. There was Preliminary Objection raised. The court found the issues raised were complex and ordered that the court do proceed as if an Originating Summons was commenced by way of plaint. The decisions of High Court in the case of Anti Corruption vs. Pattni and others was also referred to where the court held that Originating Summons under Order 36 Civil Procedure Code is designed to deal with simple matters.

However this Originating Summons is brought under Section 348 Companies Act as well. A perusal of this Section shows that the Section refers to the powers and liabilities of receivers appointed out of court not by court orders “may apply to the court for directions in relation to any particular matter arising in connection with the performance of his functions and on any such application the court may give such directions or may make such order declaring the rights of persons before court or otherwise as the court may think proper.

The Section does not state the procedure to be taken for the application. But the Company (High Court) Rules provides that any proceedings brought under these rules shall be deemed to be a suit within the meaning of Civil Procedure Act and Rules made thereunder and the general practice of the court including the course of procedure and practice in Chambers shall apply so far as may be practicable except if and so far as the Act or these Rules otherwise provide.

The rules prescribe for petitions, notices of motion and summons and originating motion. There is no provision for Originating Summons. Therefore it is my view that the use of Originating Summons must comply with the provisions of Order 36 of Civil Procedure Code.

The Order does Not contain any provision to deal with applications under Companies Act. The application contemplated under Section 348 Companies Act should be made under the provisions of Winding Up (High Court) Rules. The court is empowered only to give directions or make orders as it thinks fit in the circumstances.

I have perused the authorities cited by the parties and it is clear that the issues to be dealt with under Originating Summons must be simple not complex. Although the court has power to adjourn Originating Summons to open court for hearing and to take viva voce evidence the issues raised must be within the ambit of Order 36 Civil Procedure Code.

In this matter the issues are highly contested and prayers for injunction cannot be granted as they involve complex issues of facts and law. Upon considering the submissions of counsel on both sides and following the Court of Appeal decisions which are binding on me, I have come to the conclusion that the Originating Summons filed on 11th June 2007 is incompetent and the application for its amendment cannot cure the defects.

I uphold Preliminary Objection raised by third respondent and supported by 1st and 2nd respondent. The Originating Summons and the application to amend are hereby dismissed with costs to the respondents.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of September 2008.

JOYCE N. KHAMINWA

JUDGE