



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 206 of 2001**

**EUNICE MUNENE.....PLAINTIFF**

**VERSUS**

**NASRI SAHAC IBRAHIM.....DEFENDANT**

**RULING ON A PRELIMINARY POINT**

1. This matter came up before me for formal proof on 8/07/2008. Before the hearing proceeded, Mr. D.M. Kibicho, Counsel for the plaintiff informed the court that efforts to settle the matter out of court had failed. He also informed the court that on the 28/11/2002, the defence was struck out and judgment entered for the plaintiff for mesne profits. Midway through the testimony of the plaintiff, Mr. Kibicho asked the court for directions since the original documents, including the original lease were in the possession of the plaintiff's former advocates M/s Kahuthu & Kahuthu, Advocates, and that Mr. Kahuthu had refused to release the documents on grounds that he (Mr. Kahuthu) had a lien on them.
2. Mr. Kibicho explained further that his firm of advocates took over this matter from M/s Kahuthu & Kahuthu Advocates in 2003, and that since then, they have not been able to get the original documents. He sought leave of the court to allow him have all the documents intended to be relied upon by the plaintiff in their copies and to allow the originals to be produced later when the same have been obtained from Mr. Kahuthu. Alternatively he requested the court to summon Mr. Kahuthu to show cause why the original documents cannot be availed.
3. Mr. Kiptanui who appeared for the defendant insisted that the plaintiff should produce the original documents according to the best evidence rule.
4. After these initial submissions the court directed Mr. Kibicho for the plaintiff to look up relevant authorities to support his position in the matter. The parties appeared before me again on 16/07/2008 as ordered but Mr. Kiptanui was absent for reasons that were not made known to the court. Mr. Kibicho told the court that he had no authorities for the court, but relied on Order 15 Rule 10(1) and 10(2) of the Civil Procedure Rules and urged the court to issue summons to Mr. Kahuthu Advocate to appear and show cause why he should not produce the documents in question. The relevant provisions of Order 15 cited by Mr. Kibicho are as follows:-

***“10 (1) where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching the service or non-service of the summons.*”**

**(2) Where the court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse failed to attend or to produce the document in compliance with the summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein a copy of such proclamation shall be affixed on the outer door or other conspicuous part of a house in which he ordinarily resides.”**

5. Subrule (3) of rule 10 of Order 15 gives this court the discretion to issue a warrant either with or without bail for the arrest of such person.

6. By a letter dated 17/06/2008, addressed to M/s J.K. Kibicho & Co. Advocates, M/s Kahuthu & Kahuthu advocates acknowledged a letter written to them on 10/04/2008 by M/s J.K. Kibicho and also refer to subsequent telephone conversations and meetings between the two advocates’ firms outside the court corridors. The firm of Kahuthu & Kahuthu Advocates confirm that the original file on this matter, together with 4 (four) other files is still being held by their firm. Under item 2 of the said letter, M/s Kahuthu & Kahuthu advocates state as follows:-

**“2. HCCC 206 of 2001 Nairobi where we obtained eviction and vacant restriction orders and used directly our own money of Kshs.70,000/= towards eviction. The Defendant defence was equally struck out. The suit was pending formal proof.”**

In conclusion, the letter says

**“In the premises in order to release in all these files where we have over five (5) files. Kindly pay our minimal and fair fees of Kshs.1.5 million all inclusive.”**

7. What the letter referred to above shows is that M/s Kahuthu & Kahuthu Advocates are not strangers to the notice to produce by M/s J.K. Kibicho & Co. Advocates.

8. In his further submissions Mr. Kibicho contended that since his firm had issued a notice to produce, he could rely on section 68(1) (c) and (d) of the Evidence Act, Cap 80 by producing copies of documents that are available to the plaintiff in support of the plaintiff’s case. This section deals with proof of documents by secondary evidence. The section says:-

**“68 (1) Secondary evidence may be given of the existence; condition or content of a document in the following cases –**

**(a) When the original is shown or appears to be in the possession or power of –**

**(i) the person against whom the document is sought to be proved; or**

**(ii) a person out of reach of, or not subject to, the process of the court; or**

**(iii) any person legally bound to produce it and when after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it.**

**b. -----**

**c. When the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in a reasonable time;**

**d. When the original is of such a nature as not to be easily moveable”.**

9. In my considered view section 68 of the Evidence Act is not applicable in this case, and I must therefore fall back on Order 15 Rule 10 of the Civil Procedure Rules. When Mr. Kibicho made the above

submissions to me on 16/07/2008, Mr. Kiptanui was absent from court, so there was no response to what Mr. Kibicho said.

10. The issue that falls for determination is how this matter should proceed from now hence regarding the original documents that are in no doubt in the possession of M/s Kahuthu & Kahuthu Advocates. There is no doubt M/s Kahuthu & Kahuthu Advocates have been served since they have responded by their letter dated 17/06/2008. However, M/s Kahuthu & Kahuthu Advocates have not shown to the court how the sum of Kshs.70,000/= in respect of this case has been arrived at, nor have they shown why this file should be held together with the other four files unless the sum of Kshs.1.5 million is paid to them. For this reason, it is necessary to enquire further into the matter to confirm if there is any lawful excuse for the said firm not to produce the documents.

11. I therefore direct that this file shall be placed before the Deputy Registrar with a view to determining whether the Kshs.70,000/= claimed by M/s Kahuthu & Kahuthu Advocates is warranted in this case. To expedite the process, I direct the Deputy Registrar to require M/s Kahuthu & Kahuthu Advocates to file their Bill of Costs within fourteen (14) days from the date when the parties appear before the Deputy Registrar for mention after this ruling. I further direct that the Deputy Registrar shall expeditiously deal with this matter since the plaintiff is said to be ailing.

12. It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of September, 2008**

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:-**

..... Plaintiff/Applicant

.....Defendant/R