

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 196 of 2005

DUNCAN MWANGOVYAPLAINTIFF

VERSUS

MEENA BHANGWANDAS PATELDEFENDANTS

R U L I N G

In a summons dated 20th September 2005, Duncan Mwangovya, the plaintiff herein, applied for various interlocutory orders against Meena Bhagwandas Patel, the defendant herein in respect of Plot No. 3240/I/M.N. However when the application came up for interpartes hearing, the plaintiff only urged for prayers 3 and 5 namely:

3. *An order for the release of the applicant's Motor vehicle*

Registration No. KAR 650F Subaru Legacy Saloon by Veteran Auctioneers on 15.9.2005 forthwith and unconditionally.

5. *Costs of the application.*

The summons is opposed by the defendant who filed the replying affidavit of Meena Bhagwandas Patel sworn on 4th October 2005.

The history behind this case is that sometimes in the year 2004 the defendant purchase plots numbers 3239/I/M.N and 3240/i/M.N. from one James Kanyotu. At the time of purchase, Duncan Mwangovya (Plaintiff), was a sitting tenant of James Kanyotu. The transaction was made open to the plaintiff through a letter written by the Defendant's advocate. The plaintiff was also given notice increasing the monthly rent from Kshs.27,500 to Kshs.60,000/-. It would appear the plaintiff did not agree with the terms of the new landlord although he remained in occupation. Shortly he fell into arrears. The new landlord then distressed rent for in the sum of Kshs.159,000. The amount is stated in a proclamation of 22/1/2005. In the thick of things the plaintiff's motor vehicle Reg. No. KAR 650F Subaru Legacy was seized by Mwara Investments Ltd. These events prompted the plaintiff to file this suit hence the summons now before court.

When the summons came up for interpartes hearing, Mr. Omollo learned advocate for the defendant raised a preliminary point and urged this court to strike out the affidavit of Duncan Mwangovya which was filed in support of the summons. It is pointed out that the affidavit is in breach of Section 5. of the oaths and Statutory Declarations Act in that it is not dated. This defect is admitted to exist by Mr. Kinyanjui learned plaintiff's counsel. He however urged this court to excuse the defect and admit the affidavit. He claimed that the same was an inadvertent mistake committed by his office.

I have carefully considered these submissions. I know order XVIII rule 7 of the civil procedure rules gives this court the discretion to accept an affidavit if the defect pointed out relates to misdescription of parties, title or any other irregularity in form. The Act, i.e. the Oaths and Statutory Declarations Act is clear in Mandatory terms in Section 5 that the affidavit must state the date the oath or affidavit was taken or made. Parliament did not give this court the discretion to ignore that provision. In my view order XVIII rule 7 of the Civil Procedure Rules did not envisage such a defect because the rules cannot override

a statutory provision. In the end I find the preliminary point well founded. It is upheld with the result that the affidavit of Duncan Mwangovya sworn on an unspecified date is ordered struck out with costs to the respondent. This leaves the summons dated 20.9.2005 without a foundation under order L rule 7 of the Civil Procedure Rules. Consequently it stands incompetent hence it is hereby ordered struck out with costs to the Respondent.

Dated and delivered at Mombasa this 21st Day of February 2007.

J.K. SERGON

J U D G E

In open court in the absence of the parties with notice.