



**REPUBLIC OF KENYA**

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

**Civil Case 700 of 2006**

**PURPLE ROSE TRADING COMPANY LIMITED.....PLAINITFF**

**VERSUS**

**BHANO SHASHIKANT JAI .....DEFENDANT**

**AND**

**MISCELLENEOUS CIVIL APPLICATION NO. 1289 OF 2006**

**BHANO SHASHIKANT JAI.....APPLICANT**

**versus**

**STANLEY KIGERA THUO..... RESPONDENT**

**RULING**

This Ruling relate to the two matters as shown above which were argued together and with the consent of the parties it was agreed that the court would rule on the two matters at the same time. Indeed as it would become apparent the matters are inter related.

I will begin by considering the chamber summons dated 21<sup>st</sup> December 2006 filed in HCCC NO. 700 OF 2006. It is brought under order XXXIX Rule 1 [a] 2, 2 A and 3 of the Civil Procedure Rules. The Plaintiff Purple Rose Trading Co. Ltd in that application seeks a temporary order of injunction to stop the Defendant from selling or advertng for sale, letting or charging the suit property LR No. 5/87 Nairobi, pending the determination of this suit. The affidavit in support of that application is sworn by the plaintiff's Director. It is a common ground that by an agreement for sale dated 1<sup>st</sup> February 2006 the Plaintiff Company contracted to purchased from the defendant the parcel known as LR NO. 5/87 (hereinafter called the suit property). The Plaintiff Company executed the sale agreement and paid the requisite 10% deposit of kshs 3.4 million to the Defendants advocates. The completion date of that transaction was 90 days from the date of execution of the agreement which was to be the 1<sup>st</sup> of May 2006. The sale agreement was subject to extension of the lease by the Government of Kenya

t was stated in the agreement that should the extension not be obtained before the completion date, the Defendant was to return the deposit paid and the sale was to be regarded as terminated. By letters of 25<sup>th</sup> April 2006 and 5<sup>th</sup> of June 2006, the defendant sought the extension of the completion date by a further 30 days. By a letter dated 20<sup>th</sup> of June 2006 the Defendant sought a further extension of a completion date for a further 30 days. It is accepted that the completion date was then extended upto the 20<sup>th</sup> of July

2006. The Plaintiff however states that because the defendant's advocates requested the Plaintiff's advocates to prepare the transfer documents on the 20<sup>th</sup> of July 2006 the completion date then became what the plaintiffs advocate called *Open ended*. The parties continued to correspond and by a letter dated 11<sup>th</sup> of September 2006 the Defendants advocates returned the Plaintiffs deposit of kshs 3.4 million together with the earned interest and further stated that the completion date had passed bringing an end to the transaction. The Plaintiff through its director registered a caveat against the suit property. It does seem that before the registration of that caveat the Defendant changed her advocate and the new advocates entered into correspondence with the Plaintiff and accepted for extension upto the 25<sup>th</sup> of October 2006 at 12 noon. This is a date that had also been accepted by the plaintiff to be the completion date. It ought to be mentioned that during the time when the defendant had stated that the agreement had ended the plaintiff had also given the defendant completion notice under the Law Society Rules. It does seem that the plaintiff did not make the payment on the 25<sup>th</sup> of October 2006 but instead made that payment on 30<sup>th</sup> of October 2006. That payment was returned by the defendants advocate and in so returning the defendant's advocates stated that there was no transaction in existence between the Defendant and the Plaintiff. It is after that final return of the plaintiff's cheques that the plaintiff's director registered a caveat against the suit property.

The application is opposed by the Defendant. In the affidavit sworn by the Defendant she has stated that completion date was extended for the last time to the 20<sup>th</sup> of June 2006. That there being no extension of the completion date beyond 20<sup>th</sup> of June the contract for sale lapsed and became null and void. The defendant stated that the plaintiff had failed in presenting this case to explain why it had failed to comply with the Clause 3 B of the Agreement for Sale. This Clause provided that the Plaintiff was to pay the balance of the purchase price 5 days clear before the completion date. The defendant further deponed that the fresh offer to sell the suit property to the plaintiff was firstly, conditional on payment of the entire purchase price by 4 pm on the 19<sup>th</sup> of October 2006. That the plaintiff in response made a counter offer for payment to be made on the 25<sup>th</sup> of October 2006 by 12 noon but failed to honour that counter offer. The defendant further stated that the sale having lapsed on the 20<sup>th</sup> of June 2006 any subsequent action was done by the advocates and was outside the scope of the contract for sale.

I have considered the argument placed before the court and the first issue that I wish to highlight because it has been a nagging issue is that the transfer that was forwarded to the defendant for execution indicated the purchaser as MOONLIGHT VILLAS INVESTMENT LTD. The parties did not address this issue before court and it is not clear to the court when the right of the plaintiff to purchase the suit property was assigned to the said entity. That as it may be it may very well be an issue that will need to be addressed at the full hearing of this action. As it can be seen from the arguments presented by the parties it is clear that the suit when it comes for full hearing will concentrate on determining the date when the completion of the Sale Agreement was indeed reached. According to the plaintiff the completion date was *Open ended* and that therefore the plaintiff was entitled to tender the full purchase price as it did on the 30<sup>th</sup> of October 2006. On the other hand the defendants argues that the sale agreement lapsed on the 20<sup>th</sup> of June 2006. In considering this interlocutory application it is of utmost importance that the court will try as much as it can not to make final decisions on the issues that are raised before it because it is very clear that they are the same issues to be determined after a full hearing. Having however considered the arguments I am of the view that the plaintiff has raised an issue that would need to be fully examined by the court at the full hearing for the court to decide when completion date was. In other words on a prima facie basis I am of the view that the plaintiff has shown a case with probability of success. For that reason, I am of the conviction that the Plaintiff should be given an opportunity to tender its evidence for the court to reach a conclusion on the completion date of the sale agreement. I am of the view that the temporary orders that are sought by the plaintiff are merited but an injunction which will be given can only be for a limited period because on the other hand, considering the rights of the Defendants it would be detrimental if any injunction granted was for a long period. Also considering the prayers that the plaintiff has sought it is too wide because in my view, the defendant cannot be injected from letting the suit property. At the most that the court will consider is to grant an injunction restraining the defendant from selling or mortgaging the suit property. However before granting the final orders it is essential to consider the application filed in HCC MISC. CIVIL APPLICATION 1289 OF 2006.

In that matter the Plaintiff BHANOO SHASHIKANJ JAI as can be seen from this ruling is the Defendant in HCCC 700 OF 2006. As stated previously the Director of Purple Rose Trading Co. Ltd registered a caveat on the suit property on the 13<sup>th</sup> of September 2006 in so registering that caveat the said Director lay a claim as a purchaser of the suit property. The Plaintiff in this matter was aggrieved by that caveat and filed this Miscellaneous Suit by way of a Chamber Summons dated 17<sup>th</sup> of November 2006. The parties did argue the matter before me but at the conclusion of their arguments I raised a question addressed to the plaintiff counsel asking him whether in filing this suit by way of Chamber Summons the plaintiff had correctly approached the court as required by the Civil Procedure Act. In response the plaintiff counsel relied on section 57 [5] of the Registration of Titles Act. In so relying on that section the plaintiff counsel stated that the court could only be moved by way of an originating summons. He also in that regard relied on the case of Mwalagaya – v – Bandali [1984] KLR. It was held in that case as follows:

“The jurisdiction conferred on the court by the Registration of Titles Act (Cap 281) Section 57 [5] is invoked by the procedure of originating summons”

The Defendant on being asked to respond to the court’s question stated that there was no suit before Court since the Plaintiff had moved by way of a miscellaneous application by Chamber Summons. The defendant therefore sought amongst other reasons that the same be dismissed.

Suit under section 2 of the Civil Procedure Act is defined to mean, all civil proceedings commenced in any manner prescribed. When one goes to the Civil Procedure Act, one finds that proceedings in civil action can be commenced only by way of a petition or by originating summons. The Civil Procedure Rules and Act do not recognize that proceedings can be commenced in the manner that the plaintiff did herein that is by way of a chamber summons. It ought to be noted that the plaintiff on realising that she possibly had made an error in the manner of starting this action sought through her advocate to amend the chamber summons. That application to amend was refused and the court stated that in its ruling which is the present ruling it would give its reasons. I am of the view that an amendment could not cure the error made by the plaintiff in approaching this court or in commencing these proceedings by way of Miscellaneous Application rather than a Plaint or originating summons. It is clear that in case of a Plaint there is of necessity a verifying affidavit which is filed at the same time with the plaint. In the case originating summons the same on being commenced seeks the respondent to respond within a given time. It was not clear what amendment the plaintiff could have made to cure this position and to make a chamber summons to be a plaint or originating summons and even if an amendment was allowed what was coming for hearing and is the subject of this ruling to the courts mind was an interlocutory application and not an originating summons. To bolster this holding that a party cannot approach a court in the manner the plaintiff did there has been a decision of the Court of Appeal where the Court of Appeal held that a chamber summons is not a pleading. The case in mind is Miscellaneous Application 955 of 2006, the court held as follows: -

“However, before we conclude this judgment, we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. “*Pleadings*” is defined in section 2 of the Civil Procedure Act as follows:-

*“includes 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 counterclaim of a defendant:”*

Mr Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggests that the term “*pleadings*” may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that:

*“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be*

*prescribed.*”

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of the term “*summons*” in the definition of the term “pleading’ must be read to mean ‘*Originating summons*’ as that is “a manner .....prescribed” for instituting suits”.

The courts finding therefore is that the plaintiffs application brought by way of that chamber summons dated 17<sup>th</sup> of November 2006 is misconceived and the same does fail. The final orders of the court are as follows: -

In respect of HCCC 700 OF 2006 and the chamber summons dated 21<sup>st</sup> December 2006 the following orders are made:

- 1) The plaintiff is granted a temporary injunction to subsist for 30 days only restraining the defendant by herself, her servant or agent from selling or charging or mortgaging the property LR NO. 5/87 Nairobi
- 2) That the parties are granted leave to fix this suit for hearing on priority basis.
- 3) That the costs of the chamber summons dated 21<sup>st</sup> December 2006 shall be in the cause.

In respect of Misc. Civil Application No. 1289 of 2006 and in respect of the chamber summons dated 17<sup>th</sup> of November 2006 the court makes the following order: -

- 1) That the chamber summons dated 17<sup>th</sup> of November 2006 is hereby struck out for being incompetent with costs to the Defendant.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 2<sup>nd</sup> day of February 2007.

**MARY KASANGO**

**JUDGE**