



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

**Misc Appli 7 of 2007**

**JUST CHICKEN LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOYCE RONI WAIGANJO.....DEFENDANT/RESPONDENT**

**JUDGMENT**

The Originating Summons dated 5/1/07, is brought under S.57 (6) (8) and (II) of Chapter 281, Laws of Kenya and Order 36 rule 3B of the Civil Procedure rules, and prays for extension of the caveat beyond 45 days in the Notice of Motion of 9/10/06 posted on 18/12/06.

The caveat on L.R. No. 13797 Title No. I.R.50762 was lodged by Nancy Kavinya Kioko, the Managing Director of the Plaintiff Company herein, on 6/2/06 and Registered as No. I.R.50762/5, and is on the grounds that:

1. The Plaintiff and the Defendant entered a Sale Agreement for the sale of the above parcel of land.
2. Pursuant to the said Sale Agreement Plaintiff paid to the Defendant a deposit of K.Shs.500,000/- and took possession and physical occupation of the said parcel of land.
3. The Defendant has failed to deliver completion documents to the Plaintiff despite the Plaintiff's expression of its willingness and readiness to make final payment.
4. The Plaintiff cannot, in law, lodge a second caveat and its remedy at the moment lies in extension of the existing caveat beyond the 45 days Notice given to the Plaintiff.
5. If the caveat is not extended, the Plaintiff will be exposed to loss and it is only fair that the court extends the caveat beyond the 45 days Notice aforesaid.

Further, from the Supporting Affidavit, the applicant avers that despite demand for the completion Documents to facilitate the transfer, that has not been done, and on 13/1/06, the Defendant's lawyers referred to the relationship between the Plaintiff and the Defendant as that of licensee. It is because of that that the Plaintiff moved to protect its interest in the said property by registering a caveat on 16/2/06.

On 3/2/06 the Defendant purported to give the Plaintiff a notice to quit and vacate the premises.

On 2/1/07, Plaintiff received, by Post, a Notice to withdraw the caveat dated 9/10/06, posted on 18/12/06.

In opposition, the Defendant raised the following Preliminary Objection, **vide** a Notice dated 18/1/07:

That the Originating Summons is fatally defective and bad in law; it offends Order 36 of the Civil Procedure Rules; there is no compliance with order 36 r. 8A of the Civil Procedure Rules; the Supporting Affidavit by Nancy Kavinya Kioko, dated 5/1/07 is incompetent, fatally defective and inadmissible in law.

Upon perusal of the pleadings herein, and consideration of the submissions by learned Counsel for the two sides, this court, on 22/1/07, dismissed the Originating Summons herein, with costs to the Defendant and against the Plaintiff and reserved the reasons for such dismissal, to today.

What follows are the reasons for the dismissal of the Originating Summons.

Apart from the Notice of Preliminary Objection, the Defendant/Respondent also filed a Replying Affidavit, on 18/1/07 to which I will resort to, if need arises, in the cause of this Ruling.

One of the Preliminary objections hinges on non-compliance by the applicant, with order 36 Rule 8a of the Civil Procedure Rules, which provides as under:

**“Any party to a suit commenced by originating summons may apply to a Judge in Chambers for directions.”**

It is not disputed that the Plaintiff/Applicant did not apply for such directions. However, from the wording, the provision is not mandatory, and I intend to spend no energy on the same.

The second objection relates to the competence or otherwise of the Supporting Affidavit by Nancy Kavinya Kioko, the Managing Director of the Plaintiff/applicant company. Under the law only authorized officers of a limited company can swear valid Affidavits on behalf of the company. A company official, a term used to mean and include employees and Directors of a company, can only be so authorized by a resolution of the Board of Directors of the company, authenticated by use of the company seal. The point that is trite learning is that a person is not authorized to transact any business of a company simply by virtue of being its officer, servant or director. This is per the Companies Act Cap. 486, Laws of Kenya.

In the case before me, the Supporting Affidavit by Nancy Kavinya Kioko, does not state the deponent's source of authority. To be the Managing Director of the company is not to say that one is authorized to swear such an Affidavit. In fact, the deponent does not even state that she is authorized to swear the affidavit.

Accordingly, the Affidavit is by a stranger to the suit and is incompetent and inadmissible as evidence, in law. Accordingly, I strike out the Supporting Affidavit for being incompetent. The legal effects of that is that the Originating Summons is left naked, and there is no evidence to verify or in support of the averments in the Originating Summons. Without the Supporting Affidavit, the application [Originating Summons, which is effectually a suit] has no supporting evidence. It has no legs on which to stand. It must equally be struck out for incompetence. The foregoing is sufficient to dismiss the originating summons herein.

However, just in case the above is not sufficient to dispose of this Originating Summons, or that the Supporting Affidavit were held to be competent, which it is not, the Replying affidavit of the Defendant has enough material on which the Originating Summons would still be struck out.

The Sale Agreement of the suit premises was subject to the Law Society Conditions of Sale, and these were not complied with by the Plaintiff. Paramount of these conditions, at least for the purposes of this case, is condition No.4, which deals with completion. The clause provides as under:

**4 (1)Completion shall, unless otherwise agreed in writing between the parties or their advocates and the advocates for any mortgagee, take place at the office of the vendor's advocate.**

**(2) Completion shall take place in manner set out hereunder, namely;**

**(a) Upon completion, the purchaser shall pay the purchase money to the vendor's advocate who shall hold the same as stakeholder until registration of the conveyance. If registration of the conveyance shall not be effected within 30 (thirty) days of completion the vendor may, without prejudice and in addition to any other right or remedy, give notice to the purchaser requiring him to effect the registration of the conveyance within such period (not being less than thirty (30) days from the date of the notice) as may be specified in the notice. If the conveyance shall not have been registered on or before the expiry of the notice, the purchaser shall, within 7 (seven) days after such expiry:**

**(i) pay and release to the vendor unconditionally the whole of the purchase price and all other sums payable under the contract, or**

**(ii) treat the contract as rescinded whereupon the purchaser shall return all documents delivered to him by the vendor against repayment of any sums paid by way of deposit or otherwise and the purchaser shall, at his own expense, procure the cancellation of any entry relating to the contract in any register;**

**(b) where the vendor has agreed that the whole or any part of the purchase money shall not be paid upon completion but shall be secured by an undertaking from the purchaser's advocate..... the relevant undertaking, in form and substance satisfactory to the vendor, shall be delivered to the vendor's advocate upon completion together with the payment of any unsecured balance of the purchase money."**

In the present case, while admitting the Sale Agreement of the suit property, it is the Defendant's case that the agreement was terminated by effluxion of time and as a consequence of the Plaintiff's failure to complete the same as stipulated in the said Agreement.

The Plaintiff and the Defendant were represented by one firm of Advocates, in the Sale Agreement herein. The Defendant obtained all completion documents and passed them to the joint advocates who are holding onto the same. Thus, failure was not by the Defendant, but by the Plaintiff who did not deposit the balance of the purchase price with the Advocates, to be held in a stakeholder capacity, on the completion date. Without that, the documents could not be released for registration.

As on 12/1/06 the Plaintiff had not deposited the balance of the purchase price, in readiness for the completion of the sale. This is clearly stated in the Plaintiff's letter dated 12/1/06 by the Plaintiff's Advocate.

It is superfluous to stress that the breach of the condition of sale, namely that the Plaintiff shall deposit the whole of the purchase price with the Defendant's Advocates before completion terminated the Agreement. Accordingly the question of registration does not arise.

I further find, and hold, that the purported registration of the caveat against the title to the suit property, by the Plaintiff, is, under the circumstances, without any legal basis.

All in all, and for the reasons above, I rule as under:

The prayer to extend the caveat on L.R. No. 13797 title No. I.R. 50762 beyond the (45) forty five days in the notice of 9/10/06 and posted on 18/12/06 is rejected and dismissed, with costs against the Plaintiff/Applicant and to the Defendant/Respondent.

The caveat had no legal basis, in the first instance.

DATED and delivered in Nairobi this 13<sup>th</sup> day of March, 2007.

O.K. MUTUNGI

JUDGE