



REPUBLIC OF KENYA

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

Civil Case 566 of 2006

WANJAGI MACHARIA & CO. ADVOCATES.....PLAINTIFF

VERSUS

GEORGE KANYI KIMONDO AND ANOTHERDEFENDANT

R U L I N G

When the plaintiff's application dated 28.8.2006 came up before me for hearing on 20.3.2007, Counsel for the defendants raised preliminary objection based upon grounds 1 and 2 of the defendants grounds of objection dated 8.9.2006 which are in the following terms:-

- (1) That the application is incurably defective, bad in law, an abuse of the court process and contrary to express mandatory **provisions of the Civil Procedure Act.**
- (2) **That the purported professional undertaking contained in the respondent's letters of 24.6.2004 and 25.5.2005 are unenforceable in law for want of consideration on the part of the plaintiff in that the plaintiff law firm did not provide any document i.e. original title document and discharge of a charge in exchange or pursuant to the undertaking given by the respondents and thus the plaintiff has no cause of action whatsoever.**

In his oral submissions in court, counsel for the defendants argued that the court has no jurisdiction to hear the plaintiff's application and that the same contravenes Section 77 (9) of the Constitution. Substantiating that submission, counsel contended that none of the provisions of the law invoked by the plaintiff is applicable and that the plaintiff could not even seek refuge in the inherent jurisdiction of the court. To buttress his argument on jurisdiction counsel relied upon the case of **Owners of the Motor Vessel "Lillian S". v. Caltex Oil (Kenya) Ltd. [1989] KLR.**

Counsel for the plaintiffs on his part contended that the court had jurisdiction to hear the plaintiffs' application under the provisions of the law cited and that even if the provisions were not applicable, the plaintiffs were entitled to invoke the court's inherent jurisdiction. In his view the order sought was preservative without which the Originating Summons will be rendered nugatory.

I have considered the application, the objection raised and the response thereto. I have also given due consideration to the authorities relied upon by counsel. Having done so, I take the following view of the matter.

The Civil Procedure Act Section 2 describes suit as follows:-

“Suit” means all civil proceedings commenced in any manner prescribed.” And Order LII Rule 7

(1) reads as follows:

“7 (1) – An application for an order for the enforcement of an undertaking given by an advocate shall be made

(a)

(b) in any other case by Originating Summons in the High Court.

AND Order XXXVI Rule 8 of the Civil Procedure Rules reads as follows:-

“8. The Originating Summons when filed shall be filed and entered in the register of suits but after the serial number the letters “O.S.” shall be placed to distinguish it from plaints filed in ordinary suits.”

The above provisions are clear beyond peradventure that Originating Summons is a manner of instituting a suit. Order XXXIX Rule 1 (9) of the Civil Procedure Rules reads as follows:-

1. Where in any suit it is proved by affidavit or otherwise:-

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; ...”

The court may by order grant a temporary injunction to restrain such act or make such order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court things fit until the disposal of the suit or until further orders.”

Property as used in Order XXXIX Rule 1 (a) is not defined. In my view it would not exclude the subject of the Originating Summons in this case.

Rule 2 of the same Order is even wider. It reads as follows:-

“2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind; whether compensation is claimed in the suit or not the plaintiff may at any time after the commencement of the suit and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

The rule covers a suit for restraining a defendant from committing a breach of contract or **“other injury of any kind”**.

Having found that the plaintiffs have instituted civil proceedings in a manner prescribed against the defendants and further having found that Order XXXIX Rules 1 (a) and 2 but particularly the latter would be invoked to restrain the defendants from committing “other injury of any kind” against the plaintiffs, I do not accede to the defendant’s contention that the court has no jurisdiction to entertain the plaintiff’s application.

I dare say even if there was no specific provision donated by Order XXXIX Rules 1 (a) and 2 of the Civil Procedure Rules the court would still have inherent jurisdiction to entertain the plaintiff’s application to serve the ends of justice. Section 3 A of the Civil Procedure Act merely restates the obvious. The scope of temporary injunctions should not unnecessarily be narrowed down

The second ground of objection in my view is not a proper ground of preliminary objection since a determination of the same will necessitate an enquiry into and interpretation of the evidence. I need not

say more lest I prejudice the hearing of the plaintiff's application.

In the premises, the plaintiffs Chamber Summons does not in my view contravene the provisions of Section 77 (9) of the Constitution. Indeed acceding to the defendant's preliminary objection would in my humble view offend against the provisions of the said Section.

In the end the Preliminary Objection is overruled with costs to the plaintiffs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 9th day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Ahmednasir for the defendant and Oyatta holding brief for Njagi for the plaintiff.

F. AZANGALALA

JUDGE

9/5/07