



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 48 of 2006

JOHN KAVOSA ILLIONA JAMES SIGU OGUTU & OTHERS....PLAINTIFFS

VERSUS

AVITON ENTERPRISE LTD.DEFENDANT

R U L I N G

The Chamber Summons dated 15th March, 2006 is filed by the Defendant herein and is premised under Section 3A of the Civil Procedure Act and Order VI Rule 13(1) and Order XXV Rules 1 and 6 of the Civil Procedure Rules.

It seeks prayers that the Originating Summons be struck out being fatally defective and, in the alternative, seeks security of costs to the tune of Kshs.1.5 million and the costs.

The main ground in support of the application is that the Plaintiffs have not complied with provisions of Order XXXVI Rule 3D(2) in that they have not annexed the certified extract of title in the affidavit in support of the Originating Summons. It is evident that the Originating Summons filed is based under section 38 of the Limitation of Actions Act.

This court gave them an opportunity to produce the same. Vide their supplementary affidavit sworn by one Erastus Ambundo, who did so purportedly with authority of his co-Plaintiffs (though no such authority is on record, the Plaintiffs produced a photocopy of the certificate of lease which was obtained from the record of previous case. I do not have a sight thereof. Moreover it shows the position of the ownership as at 1st November 1995.

It shall be difficult for me to accept the said copy of ownership as the true picture specially in view of the averments made by the Respondent/Applicant that the land has since been sub-divided and sold to several purchasers and which averment is supported in the affidavit sworn on 14th March, 2006 by Jackson Kingori – the Chief of Umoja II Location of Embakasi Division.

It is true as contended by the learned counsel for the Respondents/Plaintiffs that the application ought to have been filed under Order XXXVI Rule 3D of Civil Procedure Rule. However, the omission to place the said provision in the title of the application is in the circumstances of the case, an irregularity. The point raised is an issue of law and the Respondents are not prejudiced by the said irregularity as they were given an opportunity to regularize the defect in the Originating Summons. Even in view of the provisions

of Order L Rule 12 of Civil Procedure Rule, I reject that objection.

In view of the aforesaid fact, it is difficult to be assured that the Defendant/Applicant is the current owner of the suit property.

I may also add that the Plaintiffs/Respondents have failed to controvert the allegations of the Defendant/Applicant to the effect that the suit property is vacant except for sub-division activities and which fact is supported by the affidavit of the Area Chief.

The wording of the wordings of provision of Order XXXVI Rule 3D(2) are in mandatory terms and its rationale was to ascertain that the court gives orders of declaration of adverse possession against the right owner of the premises.

The Plaintiffs having failed to do so, the Originating Summons are incompetent due to non-compliance of the aforesaid Rule.

I thus allow the application and order that the Originating Summons be struck out with costs.

In view of this order, I do not deal with the alternative prayer.

Dated, Delivered and Signed at Nairobi this 9th day of October, 2007.

K.H. RAWAL

JUDGE