



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 160 of 2005

RICHARD ARAP CHEMUNYANI)

WILSON CHEMUNYANI)

SAMUEL ARAP CHEMUNYANI).....PLAINTIFFS

JONA ARAP CHEMUNYANI)

VERSUS

MPASI OLE NGOGONI.....DEFENDANT

RULING

The Defendant/Applicant herein sought for orders that:-

The Plaintiff's/Respondent's Originating Summons dated 9th August, 2005, be struck out.

Three arguments were provided in support of this application as follows:-

(a) That the Plaintiff's failure to annex a

Certified copy of the Extract of Title

of the suit premises renders the said

suit incompetent.

According to the Applicant the provisions of Order 36

Rule 3D (2) of the Civil Procedure Rules require that a certified extract of the title to the land in question should be annexed to the

Affidavit in support of the Originating Summons.

In the case of the Plaintiff they annexed the copy of an Official Search and subsequently purported to annexe an Extract of Title on a replying affidavit. Counsel for the Defendant argued that this is serious defect that cannot be cured and thus the entire application should be struck out.

Secondly, Counsel for the Defendant submitted that the suit is bad in law as the Plaintiff has laid a claim on the suit premises based on an allegation that there was a sale transaction. In this respect the present suit is not sustainable as the proper procedure would be a suit by way of Plaint.

Lastly Counsel for the Defendant argued that there was a further claim by the Plaintiffs based on a claim of an estate of their deceased father and yet they have not disclosed whether they are seized with the Letters of Administration of their father's Estate.

On the part of the Plaintiff/Applicant Mr. Njiru their Counsel argued that the present application is in itself defective as it is premised on the wrong provisions of the law that is Order 36 rule 3D(1)(2) and 12.

Whereas the proper procedure should have been Order VI Rule 13 of the Civil Procedure Rules which expressly provides for striking out of pleadings either filed by way of Plaint or Summons.

Secondly, Counsel argued that there is no difference between a certified extract of title and a search certificate and the omission to include the certified extract of title is not fatal and can be cured by an amendment. Secondly, Counsel for the Plaintiffs argued that the certified extract of title is extracted from title, it should not be confined to Green Cards but should also include a certified copy of the title which are all meant to identify the suit premises.

Two Court of Appeal decisions i.e. the case of KWEYU -Vs- OMUTO (1990) KLR709 and KASUVE - Vs- MAANI INVESTMENTS LTD (2004) KLR 184 quoted by the Applicant in support of his arguments were distinguished. Mr. Njiru argued that the suits were heard and the Plaintiff failed to produce a certified extract of Title, which is different from the present case where the suit has not been heard and directions have not been taken.

I have duly considered all these submissions with an anxious mind. The question that all these arguments raise is the difference between

Certified Extract of Title and

Certificate of Official Search.

To my mind the difference is like sprinting of hairs. The intention of

the provisions of the rule was to ensure that there was proper identification of the suit premises.

I agree with Counsel for the Plaintiff the two Court of Appeal decisions are in respect of an appeal from a matter which was heard fully and determined but not in respect of an interlocutory application where directions have not been given and the Originating Summons has not been set down for hearing.

Another point worthy to mention is that this was an application for striking out of pleadings and the same should have been filed under the provisions of Order 6 Rule 13, of the Civil Procedure especially sub-rule (3) which provides:-

“so far as applicable this rule shall apply

to an Originating Summons and a Petition

*as if the Summons or Petition were a
pleading.”*

For the above reasons I dismiss the application and order that costs be in the cause.

Ruling read and Signed on 10.2.2006.

MARTHA KOOME

JUDGE

10TH FEBRUARY, 2006.