



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
Civil Suit 47 of 2004
IN THE MATTER OF PARCEL NO. BUKHAYO/BUYOFU/803
AND
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22
LAWS OF KENYA
BETWEEN
ANTONY WECHULI ODWISA.....
.....PLAINTIFF
VS
ALFRED KHISA MUNYANGANYI.....
.....DEFENDANT
RULING

By an application by way of Chamber Summons, pursuant to the provisions of Order XXXVI Rule 8A of the Civil Procedure Code, the applicant seeks orders:

- (a) *That directions be taken.*
- (b) *That costs of this application be costs in the cause.*

The application is based on the grounds that:

- (i) *The pleadings herein have been closed.*
- (ii) *The plaintiff wishes to set down the case for hearing.*

The application is predicated upon the annexed affidavit of *Shem Sanya Balongo* sworn on 6th January 2006.

For the applicant, it was argued that the pleadings are now closed and since the applicant wishes to set

down the suit for hearing, it is necessary that directions be taken.

It transpired that directions had been scheduled for 27th April, 2006 but aborted due to the absence of the parties. However, summons to Enter Appearance had neither been taken out nor served.

Memorandum of Appearance was entered by

J. O. Makali advocate for the applicant without summons being issued and served as enjoined by Order XXXVI Rule 3D. The said advocate also put in a replying affidavit sworn on 26th January, 2005 in response to the application.

In effect, the application to take out summons and serve the same is sought retrospectively. I have agonized over the anomaly. The application in issue is made pursuant to the Provisions of Order XXXVI Rule 3D of the Civil Procedure Rules and Section 37 and 38 of the Limitation of Actions Act.

Order XXXVI Rule 3D provides:

“(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.”

It is instructive to note that Rule 3D provides that the court shall direct on whom and in what manner the summons shall be served. Clearly, therefore, summons must be issued and served. It cannot be a mere irregularity. See CRAIG -VS- KANSEEN (1943) 1 K.B. at page 262:

“The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex-parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which in my opinion, cannot be sustained.”

The applicant admits that summons was neither issued nor served. The matter is compounded by the respondent having entered appearance before service of summons. In my view, the entering of appearance is a nullity in law. The originating summons as it stands now does not comply with the mandatory provisions of Order XXXVI Rule 3D. Had the defendant invoked my jurisdiction to strike it out I would have done so.

However in the present circumstances, I strike out the Originating Summons dated 15th December, 2004 suo moto. Each party to bear his own costs.

DATED and DELIVERED at BUSIA this 31st day of July 2006.

N.R.O. OMBIJA

JUDGE

Mr. Balongo for the applicant

Mr. Ashioya for Makali for the respondent.