



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

Misc Appli 225 of 2006

**KENNETH GAGAI.....
.....PLAINTIFF**

VERSUS

**THE TOWN CLERK CITY COUNCIL OF NAIROBI.....
.....DEFENDANT**

RULING

This Ruling is delivered in the Defendant/Respondents Preliminary Objection filed under a Notice dated 26th March 2006 challenging the Plaintiff/Applicant's Chamber Summons dated 24th March 2006 seeking, inter alia the following orders.

1. That the Respondent, its servants, agents and/or otherwise (sic) be temporarily restrained from harassing intimidating, frustrating, and/or interfering with the Applicant and his business at Amber House, Hakati Road Nairobi, pending the determination of the Applicant's Notice of Motion dated 6th March 2006.
2. That the Notice of Motion dated 6th March 2006 be heard on priority basis.
3. That the City Court cases Nos 1191 and 2273 of 2006 be stayed pending the hearing and determination of the Notice of Motion dated 6th march 2006.

The Preliminary Objection is grounded on the following points:

1. That the supporting Affidavit sworn on 24th March 2006 offends the provisions of Section 34 and 35 of the Advocates Act in failing to disclose the drawer thereof
2. That the prayer for injunction cannot issue as the same is res judicata
3. That there being no plaint filed the injunction has no foundation and therefore cannot issue.

To support the first preliminary point above the Respondent has cited the authority of **BARCLAYS BANK OF KENYA VERSUS DR SOLLOMON OTIENO ORERO H.C.C.C. No. 1736 of 2001** wherein it was held that the provisions of section 34 and 35 of the Advocates Act are mandatory and non compliance therewith renders an affidavit fatally defective.

The same position was held in the cases referred to in the said authority, MIBEN (K) LTD VERSUS MARK MWANGI MUCHENI T/A BORDER SERVICE STATION & OTHERS H.C.C.C. No. 234 of 2001 and JEVENNA E.A LTD VERSUS SILVESTER ONYANGO & OTHERS H.C.C.C.C No. 1086 of 2002 (Milimani Commercial Court) which I consider relevant and equally persuasive. That the affidavit does not disclose the drawer is evident from the document itself.

Counsel for the applicant has submitted that this non disclosure is of no consequence on the ground that the affidavit having been annexed to the application, should be presumed to have been drawn by the same advocate who drew the application. It is clear to me that the mandatory nature of Section 34 and 35, particularly Section 35(2) which criminalizes such omissions do not leave room for assumptions. Whilst Counsel is right in submitting further that Section 34(1) is intended to prohibit the drawing of documents or pleadings by unqualified persons, he is not right in suggesting, as he has, that proof that a document was so drawn is necessary in order to sustain an objection as has been raised herein. Under Section 35(2) the Registrar is empowered mandated refuse to accept or recognize any document or instrument which does not comply with the requirement that the drawer or preparer thereof be disclosed.

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That the supporting affidavit could have been rejected right at the filing stage makes it liable for striking out as prayed. I therefore uphold the objection and do strike out the supporting affidavit with the result that the application is unsupported by evidence.

The second preliminary point raised herein is that the prayer for injunction has already been issued in the Chief Magistrates Court at Milimani in C.C No. 11027 of 2005. Counsel referred to the order annexed to the Supporting Affidavit as “**KG-1**” to support the objection, which is an order for the release of the Applicants goods, not for an injunction. This objection is overruled for that reason.

However, the Supporting affidavit having been struck out the annexure is of no consequence.

Regarding the third objection that in the absence of a Plaintiff the application for an injunction is incompetent, I wish to refer to Order XXXIX Rules 2 and 9 under which the present application is brought. Clearly from the wording of these provisions the injunctive orders such as are sought herein cannot issue where there is no suit. Rule 2 of the Order reads as follows:

“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...”

Rule 9 refers specifically to application brought under Order XXXIX Rules 1 and 2 and provides that the same shall be by Summons in Chambers.

Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by Rules. In the same light Order IV Rule 1 provides that every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.

I have seen the Notice of Motion dated 6th march 2006 filed herein on the same date as a Miscellaneous Civil Application No. 225 of 2006. The same seeks Orders for the punishment of the Respondent for contempt of Court under Section 5 of the Judicature Act. Even without making deeper inquiry into the competence or otherwise of the said Notice of Motion it clearly cannot form the basis of the orders sought in the Chamber summons challenged by the Respondent herein which, as rightly put by the Respondent can only be founded on a plaint wherein the cause of action giving rise to the right of injunction has been disclosed., I find that the provisions of Order XXXIX 2 have not been complied with in that there is no suit filed for the restraining of the Defendant in the manner sought herein. For that reason the third preliminary objection is also upheld.

I find that the preliminary objection raised herein as Nos 1 and 3 pose fundamental challenges to the Chamber Summons dated 23rd March 2006 in that the same is incurably defective and cannot stand. I find the same to be incompetent, lacking in foundation and do hereby strike it out. I make no orders as to costs.

Dated and delivered at Nairobi this 14th day of July, 2006

M.G. MUGO

JUDGE

Delivered in the presence of

No appearance for the Applicant

Ms Omulo holding brief for Omoti for the Respondent