



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 184 of 2006

JECINTA WANJIRU MUIRURI [Suing for and on behalf of the Estate of

James Karanja Maina (DECEASED).....PLAINTIFF

VERSUS

JANE WANGARE MWANGI.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

By a plaint dated 24th February 2006 and filed on 27th February 2006 the plaintiff sought judgment against the defendants jointly and severally for a permanent injunction restraining the defendants, their agents, employees and/ or servants from interfering in any manner whatsoever with the plaintiff's rights and interest over Plot No. D2827A. He also sought damages costs and interest.

Simultaneously with the plaint, the plaintiff brought a chamber Summons under Certificate of Urgency seeking a temporary injunction to restrain the defendants either by themselves or through their employees, servants and/or agents from alienating, encroaching, developing, trespassing and/or dealing with in any manner whatsoever that is prejudicial to the plaintiffs proprietary rights and interests over Plot no. D2827A Dandora Estate Phase II pending the hearing and determination of this suit.

On 28th February 2006 the plaintiff brought a draft amended Chamber Summons seeking leave to amend the earlier Chamber Summons filed on 27th February 2006.

The defendants on being served with the draft amended Chamber Summons raised a Preliminary Objection dated 4th July 2006 by Notice dated 4th July 2006 and filed on 10th July 2006 on the ground that a Chamber Summon is not a pleading before the eye of the law and it is therefore not capable of being amended. The amended Chamber Summons by the plaintiff dated 28th February 2006 is therefore a fatally defective application which is incompetent and no orders are capable of being issued on the basis of a fatally defective application that in law cannot lie.

Mr. Kariuki for the defendants submitted that the amended Chamber Summons dated 28th February 2006 ought to be struck out since there is no competent application to move the court in seeking the orders being sought. Mr. Kariuki referred the court to the case of **BOARD OF GOVERNORS – NAIROBI SCHOOL VS. JACKSON IRERI GETAH CIVIL APPEAL NO. 61 OF 1999** where an issue of what a pleading is came up. The Court of Appeal was asked to decide whether a Chamber Summons is a pleading within the meaning of the terms as used in the Civil Procedure Act and the rules made thereunder. “Pleading” is defined in Section 2 of the Civil Procedure Act as follows:-

“.....includes a petition or summons, and the statement in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any defence or counterclaim of the defendant.”

Mr. Amolo for the appellant urged the view that the general practice of the High court and the wording of the aforequoted definition suggests that the term pleading may be extended to cover a Chamber Summons and other pleadings commenced otherwise than by plaint, petition or Originating Summons.

The Court of Appeal had this to say:

“He cannot be right. The definition above is couched in such a way as to accord Order VI Rule 1 which prescribes the manner of commencing a suit, which rule provides that:

‘Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed’”

Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made thereunder.

Mr. Githinji in opposing the Preliminary Objection submitted that even if there was a defect in the application it only amounted to deviation from form which is met fatal if the deviation does not affect the substance of the form or which is not calculated to mislead.

Mr. Githinji referred the court to the case of **ECHARIA VS. ECHARIA CIVIL APPEAL NO. 247 OF 1997** unreported in which the Court of Appeal said:

“We agreed that the Notice of Motion is defective, but the defect is curable for that reason, and Ms Karua having applied for leave to amend the Notice of Motion, we grant leave for the respondent to amend the Notice of Motion so as to comply with the requirement of Rule 42(1) of the Rules of the Court.

But be it as it may, a defective amended Chamber Summons cannot be cured. The only option open to the respondent is to withdraw the Chamber Summons in its entirety and file a fresh one.

The upshot of all this is that the defendant’s Preliminary objection is upheld and the plaintiff’s amended Chamber Summons dated 28th February 2006 is struck out with costs to the defendant.

Dated and delivered at Nairobi this 23rd October 2006.

J.L.A. OSIEMO

JUDGE