



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Succession Cause 3561 of 2003**

**IN THE MATTER OF THE ESTATE OF NAHASHON KIHARA WAWERU (DECEASED)**

**JOEL WAWERU KIHARA**

**PAULINE NJERI KIHARA**

**ALICE WAMBUI KIHARA (Suing as Administrators of the**

**Estate of NAHASHON KIHARA WAWERU) .....APPLICANTS/RESPONDENTS**

**VERSUS**

**DAVID WAINAINA KIHARA**

**JOHN KIHARA**

**ROBERT MUTAGURI KARIUKI**

**KARIUKI MWANGI**

**CYRUS MWATHA..... RESPONDENTS/APPLICANTS**

**RULING**

This Ruling relates to a preliminary objection raised by applicants/respondents on 04.10.06 at the hearing of chamber summons dated 17.08.06.

When the chamber summons application came up for hearing before me on 04.10.06, the respondents/applicants were represented by learned counsel, Mr. S.W. Ndegwa while the applicants/respondents were represented by learned counsel, Mrs R.A. Murithi.

No sooner had respondents'/applicants' counsel announced his readiness to proceed with the chamber summons application dated 17.08.06 than applicants'/respondents' counsel informed the court that she had filed a notice of preliminary objection on 19.09.06 and that she wanted to argue it first. At that juncture respondents'/applicants' counsel informed the court that the notice of preliminary objection had

been served on him that very day outside the court, but he was all the same ready to deal with the preliminary objection.

The court treated the matter as under:

‘The preliminary objection having been filed way back on 19.09.06 should have been served on the opposing side earlier - to avoid ambush. However, since counsel for respondents/applicants says he can handle the preliminary objection even at such short notice, I shall hear it.’

Thereafter the court proceeded to hear the preliminary objection.

Applicants’/respondents’ counsel then proceeded to launch her attack on the chamber summons application which was supposed to be heard that day. Her first salvo was that the application was, *inter alia*, stated to be brought under Order XXXIX \_ which does not exist. She followed up her attack by faulting the reference in the application to rules 1, 2, 3 and 4 of the Civil Procedure Rules. She seemed to assume in the respondent’s/applicants’ favour that the reference to rules 1, 2, 3 and 4 was to rules 1, 2, 3 and 4 of Order XXXIX and proceeded to discount all the four rules cited as follows:-

- a) That rule 1 relates to temporary injunctions and that such is not the case here.
- b) That rule 2 relates to injunction to restrain repetition or continuance of breach. Counsel left the matter hanging but I assume she intended to say that the present case does not relate to restraining or continuance of breach.
- c) That rule 3 relates to notices being granted to the other (opposing) side. Again counsel left the matter hanging but I believe her position was that the present case does not relate to the granting of notice to the opposing side.
- d) That under rule 4, the court can only vary orders made, discharge or set aside such orders. Here too applicants’/respondents’ counsel did not develop her point of objection further but I take it that her position was that the present case is not covered by rule 4.

It was applicants’/respondents’ counsel’s case that the chamber summons application dated 17.08.06 is incompetent.

In his rejoinder, respondents/applicants’ counsel conceded that there is no Order XXXIX A in the Civil Procedure Rules; that the citation of Order XXXIX A was a clerical error; and that the correct citation should have been of just Order XXXIX. He, however, pointed out that the chamber summons application dated 17.08.06 was also brought under section 3A of the Civil procedure Act (Cap.21), which empowers the court under its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court and as such the court can allow an amendment – to meet the ends of justice. Respondents’/applicants’ counsel submitted that rules of procedure are handmaidens of justice and in essence urged that the court can and should exercise its wide discretion and inherent power under section 3A to entertain the application, with due regard to the substance of the application, in priority over form or procedure. Respondents’/applicants’ counsel, therefore, urged the court to dismiss the preliminary objection and proceed to hear the application.

In reply, applicants’/respondents’ counsel submitted that rules are made to assist the court in making the right decisions and on good grounds. She said there is no indication of stay or the applicable contingency and that there is no provision on which to base the stay sought. Applicants’/respondents’ counsel reiterated that the orders sought by the respondents’/applicants’, especially the ones of stay, cannot be granted by the court as the application therefor was brought under non-existent Order and Rules and that the said application is, therefore, incompetent.

I have given due consideration to the arguments in support of the preliminary objection and the arguments in opposition to the preliminary objection.

The citation by respondents/applicants in their chamber summons application dated 17.08.06 of Order XXXIX A is clearly wrong as there is no such Order in our Civil Procedure Rules. Respondents'/applicants' counsel who, rightly, conceded the point explained that the addition of 'A' to the cited Order XXXIX was a clerical error and that the correct citation should be simply to Order XXXIX. I accept the explanation given and hereby deem the application to be under Order XXXIX. But applicants'/respondents' counsel's contention is that even if the application is deemed to be under Order XXXIX as I have now deemed it to be, that is no saviour because even rules 1, 2, 3 and 4 of Order XXXIX are inapplicable to the present case for the reasons outlined by her hereinabove.

As I understand it, the principal anchor of the applicant'/respondents' preliminary objection is the citation of Order XXXIX A instead of simply citing Order XXXIX. Having deemed the application to be under the latter Order (XXXIX), I have to consider next whether the other cited provisions of law are of any avail to the respondents/applicants. The said other cited provisions are rules 1, 2, 3 and 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

Among the criticisms levelled by applicants'/respondents' counsel at the respondents'/applicants' chamber summons application is that rule 1 cited in support of the application relates to temporary injunction and that the present application has nothing to do with temporary injunctions and that there is no indication as to the duration of stay or the applicable contingency. With respect, I think applicants'/respondents' counsel is wrong. When the applicants in the summons for injunction dated 04.07.06 came before this court *ex-parte* on 07.07.06, they were granted prayers 1, 3 and 5 in that application, which are as follows:

**'1. That this application be certified as urgent.**

**3. That the defendants/respondents by themselves their servants and/or agents be restrained by way of injunction from transferring disposal of and/or in any manner dealing with any parcel of land forming part of the Estate of Nahashon Kihara Waweru and in particular the parcel of land known as LR. LOC 3/Githumu/344 pending the hearing and determination of this suit.**

**5. That an injunction restraining the defendants by themselves servants, agents or otherwise howsoever from molesting, intimidating or otherwise harassing the Administrators of the Estate of Nahashon Kihara Waweru and restraining them by themselves, their servants, agents or otherwise howsoever from going near the said administrators, their homes or families members.'**

On 19.09.06 the parties appeared before this court for *inter-partes* hearing of chamber summons dated 17.08.06. Counsel for respondents/applicants said he had been served with a replying affidavit to the chamber summons dated 17.08.06 which raised issues his clients wished to respond to by affidavit and sought leave to file affidavit response. Counsel for applicants/respondents said she had no objection but urged that the orders issued on 07.07.06 should remain in force until confirmation of the grant in question. The court granted respondents/applicants 7 days to file a supplementary affidavit and also granted the applicants'/respondents' counsel's request for extension of the interim orders issued on 07.07.06.

The prayers sought vide chamber summons dated 17.08.06 include the following:

**'a) That this application be certified urgent and heard *ex-parte* in the first instance.**

**b) That the orders of Honourable Justice Kubo issued on July 7<sup>th</sup> 2006 be stayed.**

**c) That the matter do proceed for *inter-partes* hearing at a date to be given by the court.'**

As I understand it, the *inter-partes* hearing alluded to in the chamber summons dated 17.08.06 relates to the said chamber summons, which seeks stay of the interim orders made on 07.07.06 until the chamber summons application is heard and determined. These are clear, temporary arrangements. It is, therefore, not correct to say that the chamber summons application dated 17.08.06 has nothing to do with temporary

injunctions. Equally, it is not correct to say there is no indication as to the duration of stay or as to the applicable contingency. The duration of stay sought vide the chamber summons is until the said chamber summons application is heard and determined while the contingency is the hearing and determination of the chamber summons. In view of the foregoing, I find the preliminary objection to be devoid of merit and the same is hereby dismissed. Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 16<sup>th</sup> day of October, 2006.**

B.P. KUBO

JUDGE