



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**Civil Suit 39 of 2004**

SARAH HERSI MOGHE .....PLAINTIFF/APPLICANT

VS

NATIONAL BANK OF KENYA.....DEFENDANT/RESPONDENT

**R U L I N G**

The defendant sought to have the plaintiff's plaint struck out via a preliminary objection in a Notice dated 7<sup>th</sup> June 2004. The defendant's main argument is that the plaint offends the provisions of Order XXXVI rule 3 A of the Civil procedure rules.

Mr. Meroka who appeared for the defendant in this matter urged this court to strike out the plaint on the ground that the plaintiff should have filed an originating summons instead as prescribed under Order XXXVI rule 3 A. He pointed out that the dispute is that between a mortgagee and a mortgagor hence can only be brought by way of an originating summons. For this reason I was asked to hold that the suit is incompletely before this court.

The preliminary objection was countered by the plaintiff who averred that the matters raised in the plaint are complex and hence cannot be disposed of in a summary manner as anticipated by order XXXVI rule 3 A of the Civil Procedure rules. It was further argued that the provisions of Order XXXVI rule 3 A are not mandatory in nature. Mr. Ocharo cited several authorities in support of his position. I will only refer to one, that is the case of KENYA COMMERCIAL BANK LTD VS OSEBE (1982) K.L.R. P. 296 where the court of appeal held inter alia.

- (i) That the procedure of originating summons is designed for the summary or adhoc determination of points of law, construction or certain specific facts or for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers.*
- (ii) That the procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve a serious question. The procedure should not be used for the purpose of determining dispute questions of fact.*

It is not dispute that the matter in issue of a misunderstanding between a mortgagor and a mortgagee. The law under Order XXXVI rule 3 A clearly states that a party who intends to assert his rights of sale, foreclosure, delivery of possession by the mortgagor, redemption, reconyance or delivery of possession by the mortgagee may take out as of course an originating summons. The wording of the law is not mandatory. In my view this does not preclude litigants from filing actions in other authorized forms such as a plaint. Therefore I am not convinced that this action is incompetent in view of the fact that the plaintiff did not comply with Order XXXVI rule 3 A.

I have perused the plaint and the defence. It is clear that the existence of the mortgage or charge is denied. It is also apparent that an issue has arisen as to whether or not certain clauses of the aforesaid documents have been breached. These are obviously disputed facts which can only be ascertained in a trial where oral evidence may be taken and documents presented in evidence. In my considered opinion these are not serious nor complex issues of fact. The court of appeal in the case between KENYA COMMERCIAL BANK LTD VS OSEBE has made the position clear that an originating summons should not be used for the purpose of determining disputed questions of fact. In view of my above findings I hold that the preliminary objection has no merit. It is dismissed with costs to the plaintiffs.

**DATED AND DELIVERED THIS 21<sup>st</sup> DAY OF January 2005**

**J.K. SERGON**

**JUDGE**