



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 227 OF 1997 (O.S.)

ANNE NDINDA NGOKA.....PLAINTIFF/RESPONDENT

VERSUS

DR. WILSON MWONGA NGOKA..... DEFENDANT/APPLICANT

RULING

The Applicant, who conducted his own case, drew and filed a Chamber Summons application on 30th December, 2003. The application was brought under Order V rule 17(1), (2) and (4) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21), and its prayers were as follows:

- i. that the application be heard *ex parte* in the first instance;
- ii. that the notice of preliminary objection dated 18th December, 2003 be served upon the Plaintiff/Respondent by affixing a copy thereof on the door of her house at Kirichwa Estate, Argwings Kodhek Road;
- iii. that the service of such documents on the Respondent also be effected by sending copies to her by registered post to her Post Office Box No. 35928, Nairobi;
- iv. that substituted service to her be effected by affixing a copy of the application on door No. 7 at the University of Nairobi Health Services, Students' Clinic;
- v. that substituted service to her be made by advertisement;
- vi. that the cost of this application be provided for.

The Applicant swore on 30th December, 2003 a supporting affidavit in respect of the application. It is averred in the affidavit as follows:

- i. that the Plaintiff/Respondent has avoided service in the past;
- ii. that the Advocates of the Plaintiff/Respondent have also avoided service
- iii. that the Plaintiff/Respondent has in the past treated process servers with disdain and hostility;
- iv. that in the past, in the case of Civil Appeal No. 68/2003 which was a divorce petition, the Court of Appeal had ordered substituted service upon the Plaintiff/Respondent.

I took note of a couple of points about this Chamber summons, from the very beginning. Firstly, the entire application and its supporting affidavit were concerned with the question of mode of service upon the Plaintiff/Respondent; there was no substantive application to be the subject of the modes of service prayed for. Secondly, the Applicant's oral presentation in Court did not address this mode-of-service question so much as it focussed upon the Applicant's Amended Originating Summons dated 25th May, 1999. The Applicant's real gravamen was that the said Originating Summons should be struck out as an abuse of the Court process. The Applicant also prayed for costs of the application and of the suit.

The said Originating summons has been challenged on the basis that service was not properly done. It is stated that service was effected two-and-a-half years late, on 22nd November, 2001 and on this account it was invalid service; the consequence being that the Respondent has taken no action to prosecute her suit for more than two years since close of pleadings.

In aid of his submissions, the Applicant did cite such authorities as SHAKHALAGA KBWA JIRONGO & ANOTHER v. THE BOARD OF TRUSTEES OF NSSE, Civil Case No. 957 of 2000; WILFRED ODHIAMBO MUSINGO v. HABO AGENCIES LTD., Civil Suit No. 2047 of 2000; ABDUL AZIZ NGOMA v. MUNGAI MATHAYO & ANOTHER [1976] KLR 61; DAVID WAKAIRU MURATHE v. SAMUEL KAMAU MACHARIA, Civil Appeal No. 171 of 1998. And his final submissions are that the said Originating Summons application is invalid, unprocedural and an abuse of Court process; the suit should be dismissed, with costs to the Applicant.

Now the submissions and the authorities relied upon, as I have already indicated, are not in tune with the relevant Chamber Summons application, that of 30th December, 2003. The Chamber Summons application is purely procedural, being concerned exclusively with mode of effecting service; and it is not attached to any other application turning on substantive matters of the rights of parties. Yet the entire submission rendered by the Applicant is about rights of parties.

No decision can in these circumstances be rendered which addresses the formal application as set out in the Chamber Summons; and I have no option but to declare the hearing which was conducted on 28th April, 2004 a mistrial. Specifically I will make the following Orders:

1. There being a striking mismatch between the formal application by Chamber Summons and the submissions of the Applicant, the entire hearing was conducted on an invalid footing, and consequently I declare it a mistrial.
2. The Applicant shall review his several applications pending on file, and obtain dates for hearing in a proper order.
3. The Applicant shall bear his own costs.

DATED and DELIVERED at Nairobi this 4th day of June, 2004.

J.B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

Defendant/Applicant in person

Plaintiff/Respondent not represented