



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

CIVIL SUIT 119 OF 2004

(MILIMANI HCC 167 OF 2003)

RAHITO TRADING CO. 1ST DEFENDANT

LITTLE DUBAI CO. 2ND DEFENDANT

VERSUS

AL MUFTAH 1ST PLAINTIFF

SHARIF M.A. OMAR 2ND PLAINTIFF

Coram: Before Hon. Justice Mwera

Kimatu for the Plaintiff/Respondent

J. Munyithya for the Defendant/Applicant

Court clerk – Sango

RULING

On 6-9-04 the defendants filed a notice of motion under O. 12 r.6, O. 50 r. 1 Civil Procedure Rules and S. 3A Civil Procedure Act for orders that judgment be entered here for Sh.1,575,699/- on admission with costs to the defendants/applicants.

By an affidavit of service sworn on 29-11-09 it was deponed that the application was duly served on the plaintiffs' lawyers M/s Arimi Kimathi & Co. Advocates of Nairobi. This was not in dispute and the hearing of the application came on due date.

On 5-11-04 the plaintiffs filed a notice of preliminary objection to the said application stating that its supporting affidavit was fatally defective and thus not sustainable in law because it contravened the provisions of, so the court was told S.35 Advocates Act (Cap. 16)

Come the hearing day and Mr. J. Munyithya implored this court to consider and deal with the notice of motion in question as unopposed under O. 50 r. 16 Civil Procedure Rules because no grounds of opposition or a replying affidavit had been filed 3 clear days before the hearing day or at all. That this was a procedural lapse on the part of the plaintiffs even if their filing of a preliminary objection was a

legally allowed and proper thing to do. That the notice of preliminary objection could not be taken in lieu of filing either grounds of opposition and/or an affidavit in reply as required under O. 50 r. 16. That although the respondents would still file the preliminary objection, they had to file papers in opposition and in time. That that had not been done.

Mr. Kimathi conceded that no papers in opposition were filed because his clients were entitled to bring the said preliminary point in law on the basis that once the application did not comply with S.35 Advocates Act, they had no obligation to reply in opposition to document that was invalid. That all that warranted the plaintiffs stand at this point.

O. 50 r. 16 Civil Procedure Rules says:

“16. (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.

(2) ----- (3) -----.”

As for S.35 (Cap.16), it refers to endorsing of instruments with name and address of the makers of such instruments (under S.34 relating to conveyancing, company formation, partnership agreements, and dissolution, filing or opposing grants, legal proceedings).

It was not quite clear to this court as to what was desired by Mr. Kimathi’s invoking of this S.35 particularly that he declined to have his preliminary objection come in as a ground of opposition and also because the court was not entertaining that objection at this point at all. The issue however was whether the plaintiffs had, as per procedure, complied with O. 50 r.16 Civil Procedure Rules if they desired to oppose the notice of motion in issue.

In this court’s view the plaintiffs had not complied with O. 50 r. 16 Civil Procedure Rules. The Civil Procedure Rules govern the way and course to approach/bring proceedings of a civil nature before the court while S.35 is not a procedural provision at all. Accordingly the defendant’s application dated 5/5/04 is considered unopposed.

In this court’s view the plaintiffs should have complied with the procedural aspects of the matter and brought up the substantive matters of law either as grounds of opposition or preliminary objection.

In sum the application in question is considered unopposed and its hearing thereof shall proceed ex parte.

Orders delivered on 25th November, 2004.

J.W. MWERA

JUDGE