



**GEORGE NDUNGU KAMITI vs GEORGE MURIAINI MUHORO**

**REPUBLIC OF KENYA**

**HIGH COURT COURT OF KENYA AT NAIROBI**

**May 20, 2002**

**MILIMANI COMMERCIAL COURTS**

**T Mbaluto, Judge**

**CIVIL CASE NO. 1957 OF 2000 (O.S.)**

May 20, 2000 T Mbaluto, Judge delivered the following ruling.

The plaintiff has taken out this Originating Summons under Order XXXVI rule 37 (sic) for the following orders:-

(a) The defendant/respondent – George Muriani Muhoro T/A G.M. Muhoro Advocate be ordered to refund Kshs 90,000 together with interest, paid to him as stakeholder for Sale of the part marked E2 of L R No Makuru/Kimorori/Block 1/597.

(b) THAT the said Kshs 90,000 be refunded with interest with effect from February 18, 2002 till payment in full.

The Originating Summons is supported by an affidavit sworn on November 2, 2000 by George Ndungu Kamiti.

When the matter came up for hearing on May 2, 2002, learned counsel for the Respondent raised a preliminary point of law in limine in the course of which he argued that the summons was fatally defective in form and substance and that there was no cause of action against the Respondent in that the same offends the express and mandatory provisions of Order XXXVI of the Civil Procedure Rules.

In the course of arguing the application it emerged that one of the Respondents quarrels with the Originating Summons was the manner the document was entitled. In that regard I note that the Originating Summons is expressed to be under Order 36 rule 37. The latter rule does not of course exist and reference to it is obviously erroneous. However, this Originating Summons is clearly authorised by Order XXXVI rule 1, which permits a trustee under a deed or instrument to take out, as of course, an Originating Summons for the type of relief which the plaintiff/applicant seeks in this matter. That being the case the reference to rule 37 is clearly a typographical error, which I am not prepared to hold against the applicant. And in respect of the same argument I do not think that the authority cited by learned counsel for the Respondent, namely the case of Salume Namukase v Josefu Bukya (1966) EA 433 is really relevant.

In my judgment, this objection arises from the Respondents total misconception of what a stakeholder is. In my view this is a simple term whose meaning the Respondent should have no difficulty in interpreting, unless, of course, the problem is intentional and designed to delay the recovery of the stake. Generally, a stakeholder is a third party chosen by two or more persons to keep on deposit property or money, the right to possession of which is contested between them, and to be delivered to one who shall establish his right to it. In the circumstances of this case, it should be plain and obvious as to who is entitled to the money and the Respondent is clearly wasting time by bringing the type of defence I have seen in this matter.

The Preliminary Objection wholly lacks merit and is overruled with costs.

**T Mbaluto,**

**Judge**