



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPLICATION NO.589 (O.S) OF 2000**

**JAMES KITHUKA NDOLA.....APPLICANT**

**= V E R S U S =**

**1.WAMBUA KENZI**

**2.MUNYAO KENZI**

**T/A KENZI & KENZI ADVOCATES.....RESPONDENTS**

**R U L I N G**

The Originating Summons dated 29.11.00 was set down for hearing on 17.5.01 when learned counsel for the Respondent raised an objection that the hearing was premature since no directions were sought prior to the date being taken. It is an Originating Summons taken out under O.52 r.4(1)(e) and 2 of the Civil Procedure Rules. Under those provisions, learned counsel for the Applicant Mr. Master submitted, there was no requirement for any directions to be taken out. The only issue to determine is therefore whether in Originating Summons taken out under the provisions of Order 52 of the Civil Procedure Rules, the provisions of O.36 of the same Rules apply.

The application is filed against Advocates of this Honourable Court, M/s Kenzi & Kenzi, seeking to compel them to release their clients file to another Advocate. The Advocates have not responded to the application or the Affidavit filed in support thereof. They say there is no requirement that they make any response by way of Affidavit and their wish is to present their case orally in open court where they may be cross-examined and also crossexamine the Applicant. The manner in which the response should be made should therefore be decided at the stage of directions.

The Rules invoked in the application State:-

***“O.LII. r.4. (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for -***

***(e) the delivery up of papers and documents to which the client is entitled.***

***(2) Application under this rule shall be by Originating summons, supported by Affidavit, and shall be served on the Advocate.”***

And the Rule in Order 36 that requires that directions be taken states:-

***“8A. Any party to a suit commenced by Originating Summons may apply to a Judge in Chambers for directions”.***

That is the Rule Mr. Kenzi submits applies to all matters commenced by Originating Summons.

Not so, says Mr. Master. O.52 is an order peculiarly applicable to Advocates only and it is not affected by the generality of Order 36. Even if the Advocates wish to give oral evidence, they must respond to the Affidavit filed first, which in this case they have not done.

It is by no means a matter that is clear cut. And the reason I think is because O.52 is a recent inclusion by the Rules Committee tailored to resolve expeditiously disputes between Advocates and their clients. It came by way of L.N.5/96 on 1.2.1996 which deleted the old provisions and substituted a new Order and Rules thereunder..

O.36 has always existed to provide quick procedural relief on matters specified under that Order. That there is a mandatory procedure for seeking directions before hearing is not only reasonable but necessary to narrow down issues and to avoid delay. If the same procedure was however intended to apply to applications under O.52 there is no reason why the Rules Committee could not have stated so by reference or amended O.36 itself to include the provisions of Order 52.

It seems to me that the intention of separating the two provisions was to provide different special and complete Rules under the Advocates Act. On this, I agree with Mr. Master. But the procedure under the Order does not stop with Rule 4(2) (above). None of the two learned counsel referred me to O.52 r.10 (1) & (2) which states:-

***“10.(1) An Originating Summons under this Order shall be made returnable for a fixed date before a Judge in Chambers and, unless otherwise directed, shall be served on all parties at least seven clear days before the return date.” (2) No appearance need be entered to the Summons and no Affidavit in reply need be filed and all parties may be heard without entering an appearance”.***

That is as complete a procedure as can be. It accomplishes the objective of expedition.

In my view there was no sufficient reason for raising the objection since a date had already been taken for the hearing of the Originating Summons and the Advocates were at liberty to tender oral evidence at that hearing. Equally there was no basis for the Applicant to insist on a Replying Affidavit when none is required.

I order that the Originating Summons shall proceed to hearing without further delay and in any event within the next 14 days. It will be heard on 25.6.01. The costs of the Preliminary Objection shall be borne by the Respondents.

**Dated this ...13th....day of...June.....2001.**

**P.N. WAKI**

**J U D G E**