

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 106 OF 2019

DIANA ISENDI MURUNGA.....PLAINTIFF/RESPONDENT

VERSUS

PHILIP ATITWA MUMANYI

GRADO WAKHU

MARY MUGUNA..... DEFENDANT/APPLICANTS

RULING

The applications is dated 29th January 2021 and is brought under Order 2 rule 15 (1) (a), (b), (c) & (d) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders;

1. The originating summons herein dated 6th February, 2018 and or the suit as against all the respondents be struck out and or dismissed with costs for being incompetent, a non-starter, incurably defective, scandalous, frivolous and vexatious and for failing to disclose any cause of action and or for being untenable and an abuse of the due process of the court.
2. Costs of this application be awarded to the respondents/applicants.

It is based on the annexed affidavit of Philip Atitwa Mumanyi, Grado Wakhu and Mary Mugunda, the respondents/applicants and on the following principal grounds that the applicant/respondent herein filed her originating summons dated 6th February, 2018 which she claimed was to be based on her affidavit but which affidavit she has never filed to-date. Order 37 Rule 7 (2) of the Civil Procedure Rules provides that such an originating summons must be supported by an affidavit without which the originating summons is a non-starter, incompetent and unmaintainable. Despite numerous reminders and notifications, the applicant/respondent has to-date completely filed and or refused to file her affidavit and her originating summons is thus devoid of any basis or foundation and it ought to be struck out and or dismissed.

The respondent's advocate submitted that the originating summons herein dated 6th February, 2018 was mistakenly filed and served without a supporting affidavit. That the mistake having been brought to their attention they prayed for leave of this honourable court to file and serve the supporting affidavit. That having been granted time to file and serve the supporting affidavit by this honourable court, their efforts to trace their client to give them instructions have not been successful until recently when she visited their office. That they have since been able to file the said supporting affidavit.

This court has considered the application and the submissions therein. It is the applicant's contention that the applicant/respondent herein filed her originating summons dated 6th February, 2018 which she claimed was to be based on her affidavit but which affidavit she has never filed to-date. Order 37 Rule 7 (2) of the Civil Procedure Rules provides that such an originating summons must be supported by an affidavit without which the originating summons is a non-starter, incompetent and unmaintainable. The respondent's advocate submitted that the originating summons herein dated 6th February, 2018 was mistakenly filed and served without a supporting affidavit. That the mistake having been brought to their attention they prayed for leave of this honourable court to file and serve the supporting affidavit. They could not trace their client but that they have since been able to file the said supporting affidavit. I find that the omission has now been cured and this is a land matter which is sensitive in nature and the respondent should be given a chance to prosecute her claim. Parties are advised to comply with order 11 of the Civil Procedure Rules and take an early hearing date of this matter. This application is dismissed and costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021.

N.A. MATHEKA

JUDGE