



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E024 OF 2020 (O.S)**

**KANTILAL L. DODHIA.....PLAINTIFF**

**=VERSUS=**

**JANE MMBAITHA**

**(T/A SCOPE INTERNATIONAL DESIGNERS).....DEFENDANT**

**RULING**

1. The plaintiff took out an originating summons dated 4/11/2020 under **Order 37 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. Through the originating summons, he sought the following orders against the defendant:

- a) That the defendant be evicted from the said parcel of land being Land Reference No 209/591, Nairobi Shop Number 4.*
- b) That the defendant do pay all rent due and payable for continued occupation of the property until the final determination of the summons.*
- c) That the plaintiff be granted leave to attach any and/or all assets in the name of the defendant in recovery of all the rent due and payable to the plaintiff.*
- d) That the defendant to bear the costs of this application.*

2. The originating summons was supported by the plaintiff's affidavit dated 4/11/2020, in which he deposed that he was one of the registered proprietors of **Land Reference Number 209/592** (the **suit property**) and one of the landlords of the defendant in respect of Shop No 4 (the **suit premises**) located on the suit property. He added that the defendant had fallen into rent arrears that stood at Ksh 669,000/- as at November 2020. He further deposed that the defendant had disobeyed order of the Business Premises Rent Tribunal (the Tribunal) by failing to pay the monthly rent of Ksh 27,500/- as directed by the Tribunal. He added that despite not having any tools of trade in the suit premises, and despite not paying rent, the defendant had continued to occupy the suit premises. Consequently, he urged the court to grant the orders sought in the originating summons.

3. Upon being served with the originating summons the defendant brought a notice of preliminary objection dated 23/12/2020, urging the court to strike out the originating summons in *limine* on the following verbatim grounds:

- a) That the originating summons as commenced is incurably defective as it offends the mandatory provisions of Order 37 Rule 1 of the Civil Procedure Rules, 2010.*
- b) That the matters in issue are directly and substantially in issue in a previously instituted suit known as Miscellaneous Application No E2646 of 2020; Jane Mmbaitha versus Jeremiah Kiarie Muchendu & Another and BPRT Case No 259 of 2018; Jane M'mbaitha versus D.P Nandhia & others*

4. The preliminary objection was canvassed through written submissions dated 11/02/2021, filed through the firm of *Khaminwa & Khaminwa Advocates*. On the first ground of objection, counsel for the defendant submitted that the originating summons was not properly before the court in so far as it had been brought pursuant to **Order 37 Rule 1** of the **Civil Procedure Rules**. Counsel contended that an originating summons under **Order 37 Rule 37** is not the platform for seeking eviction orders. It was the view of counsel that the platform for seeking eviction orders is a notice of motion under **Order 51 Rule 1** of the **Civil Procedure Rules**.

5. On the second ground of objection, counsel submitted that the suit herein offended the *res sub-judice* rule as set out under Section 6 of the Civil Procedure Act. Counsel contended that there subsisted **Business Premises Rent Tribunal (BPRT) Case No 259 of 2018; Jane Mmmnaitha vs D P Nandhia & Others** relating to the same tenancy dispute. Counsel added that there was similarly a pending application

filed by the defendant in the Chief Magistrate Court at Milimani, to wit, **Nairobi CMC Misc Application No E2646 of 2020; Jane Mmbaitha vs Jeremiah Kiarie Muchendu & Another** relating to the same tenancy dispute. Counsel urged the court to strike out the suit.

6. In response to the preliminary objection, the plaintiff filed written submissions dated 26/02/2021 through the firm of *Shabana Osman & Associates*. On the first ground of objection, counsel submitted that rules of procedure should not be given a pedantic interpretation. Counsel argued that upholding the preliminary objection would result in an injustice because the defendant had disobeyed previous orders of the court and had continued to deny the plaintiff their right to enjoy the suit property. Counsel added that the defect identified by the defendant was curable under **Order 37 rule 19(1)** of the **Civil Procedure Rules**.

7. On the second ground of objection, counsel for the plaintiff submitted that **CMCCC No E2646 of 2020** was a plea for police assistance in an exercise relating to distress for rent and stood spent. Counsel added that **Business Premises Rent Tribunal Case No 259 of 2018** is a rent dispute between the parties therein. Counsel urged the court to reject the objection.

8. I have considered the grounds of objection and the parties' submissions. The first ground relates to the plaintiff's invocation of **Order 37 rule 1** as the platform on which to seek eviction orders against the defendant. **Order 37 rule 1** provides as follows:

*1) The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—*

*a. any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;*

*b. the ascertainment of any class of creditors, devisees, legatees, heirs, or others;*

*c. the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;*

*d. The executors or administrators of a, (d) the payment into court of any money in the hands of the executors, administrators or trustees;*

*e. directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;*

*f. the approval of a sale, purchase, compromise or other transaction;*

*g. the determination of any question arising directly out of the administration of the estate or trust.*

9. **Order 37 rule 1** is clear on the categories of litigants who can take out an originating summons and seek a determination on that platform. A landlord seeking eviction orders is not one of the parties permitted to take out an originating summons under **Order 37 rule 1** of the **Civil Procedure Rules**. The plaintiff in this suit seeks an eviction order. He also seeks unpaid rent. Further, he seeks leave to attach the defendant's assets to recover unpaid rent. The suit premises is a shop. Without saying much, this is a dispute to be litigated in the Business Premises Rent Tribunal (**the BPRT**) within the framework of the **Landlord & Tenants (Shops, Hotels & Catering Establishments) Act, Cap 301**. It is not a question to be determined in this court on the platform of an originating summons under **Order 37 rule 1** of the **Civil Procedure Rules**.

10. Counsel for the plaintiff contended that the above defect is curable under **Order 37 rule 19(1)** of the **Civil Procedure Rules**. I do not agree. I do not agree because disputes relating to controlled tenancy are reserved for adjudication under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. The platform of adjudication is set out under that Act. Taking out an originating summons under **Order 37 rule 1** to seek orders of eviction, attachment and recovery of rent relating to a controlled tenancy cannot be curable under **Order 37 rule 19(1)** of the **Civil Procedure Rules**. It is therefore my finding that the originating summons herein is fatally defective and cannot be sustained.

11. The second ground of objection relates to allegation of existence of other suits. A preliminary objection is supposed to be canvassed on the basis of pleadings and the law. Existence of other related suits is a factual issue that requires evidence. Pleadings relating to the other suits are supposed to be exhibited to the court through affidavits. That is not a question to be canvassed on the platform of a preliminary objection. The proper platform on which to canvass that ground is a formal motion supported with an affidavit. I will disallow the second ground of objection because it cannot be canvassed on the platform of a preliminary objection in the circumstances of this suit.

12. The first ground of objection having been upheld, the suit herein is struck out. The defendant shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JULY 2021

B M EBOSO

JUDGE

**In the Presence of: -**

Mrs Shaban Osman for the Plaintiff

N/A for the Defendant

Court Assistant: June Nafula