



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 151 OF 2010

LOTUS HOTEL PLAINTIFF

VERSUS

WATER RESOURCES MANAGEMENT AUTHORITY DEFENDANT

RULING

The Plaintiff filed an application dated 14th May, 2010 for, inter alia, the following order against the Defendant based on the plaint dated 14th May, 2010: -

“1.

2. That the Honourable Court do issue a temporary injunction restraining the Defendant, its agents, servants, employees and/or assignees from demanding any licence fee, interfering with the plaintiff’s borehole and from effecting any arrest or punitive measures against Plaintiff, pending the hearing and determination of this application interparties.

3.

4.”

The Defendant filed a Replying Affidavit sworn on 10th June, 2010 in opposition to the application. The affidavit was drawn and filed by the firm of Lumumba, Mumma & Kaluma, Advocates.

At the hearing, the Plaintiff raised a Preliminary Objection on a point of law that the Replying Affidavit dated 10th June, 2010 should be expunged from the record as firm of M/s Lumumba, Mumma & Kaluma Advocates are improperly on record. The Plaintiff argued that having served the summons, plaint and the application, the Defendant was obliged to have filed a Memorandum of Appearance and not come through a Notice of Appointment of Advocates.

I have considered the Preliminary Objection on a point of law. I agree that once summons was served, then the Defendant was required to file a Memorandum of appearance in person or through Counsel. The filing of the Replying Affidavit should have been done after appearance was entered or simultaneously.

Should the Replying Affidavit be struck out and expunged, in the circumstances? I think that in view of the provisions of Section 1A and 1B of the Civil Procedure Rules it would only defeat the objectives of expeditious disposal of the suit if the affidavit is expunged.

The Defendant's Counsel can be allowed to enter the Memorandum of Appearance and for the Replying Affidavit to be validated on record. This is possible since no step has been taken on the service of the summons to date. I find that this is a matter of procedure and technicality and there is no prejudice to the Plaintiff for the record to be put in order.

I therefore, overrule the Preliminary Objection and direct that the Defendant do enter appearance within the next 15 days after which the Replying Affidavit shall be deemed to be duly filed and properly on record. In default, the replying Affidavit shall stand expunged from the record, and the Plaintiff shall be at liberty to proceed as it deems fit.

The Defendant shall pay the costs of this application.

DATED AND DELIVERED AT MOMBASA ON THIS 4TH DAY OF MARCH, 2011.

M.K. IBRAHIM

JUDGE