



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 158 of 2007

FRANCIS NYAMAI MWANZIA.....PLAINTIFF

VERSUS

ROSE WANGARI NDEGWA.....DEFENDANT

RULING

I have heard counsels' submissions on the Preliminary Objection raised by counsel for the plaintiff. The Preliminary Objection challenges the defendant's Notice of Motion on the basis that it seeks distinct orders that can be given on a Chamber Summons and/or a Notice of Motion. The Preliminary Objection further challenges the inadequacy of the application and lastly the Preliminary Objection challenges certain paragraphs of the affidavit supporting the Notice of Motion of the defendants.

With respect to the challenge raised on the basis that orders sought can be granted in a Chamber Summons and/or Notice of Motion, I am afraid the objection is misconceived. Where an applicant seeks orders that can be given on a Chamber Summons and a Notice of Motion, it has been held that the Notice of Motion is the appropriate mode to approach the court. The Court of Appeal has gone further and indeed settled the issue and stated that an application should not be defeated merely because the incorrect procedural mode has been used.

With respect to the objection raised on, the basis that the defendant's Notice of Motion offends the provisions of Order VI Rule 13 of the Civil Procedure Rules, I am afraid the objection has not been well taken as failure to adequately comply with any specific provision of the Law cannot be the basis of Preliminary Objection. In any event inadequacy in the facts supporting an application is not a proper basis for a Preliminary Objection.

With regard to the objection raised against certain paragraphs of the supporting affidavit, I am also of the view that the objection has been improperly raised. Even if the impugned paragraphs were to be struck out, that perse would not invalidate the defendant's Notice of Motion.

For all those reasons the Preliminary Objection is overruled with costs to the defendant.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms Mango for the Plaintiff and Mr. Kinyua for the Defendant.

F. AZANGALALA

JUDGE

2ND JUNE 2009