



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 214 of 2007**

**PETER GITHU KABIRU .....PLAINTIFF**

**VERSUS**

**SIMPLY PERFECT DEVELOPMENT CO. LTD. .. 1<sup>ST</sup> DEFENDANT**

**JAMES GACHINGU MACHARIA ..... 2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

**Chamber Summons**

The application dated 20/4/2009 seeking orders to obtain security in a sum that might be deposited in a reputable bank to be security to cover any general damages plus interest and costs as prayed in the plaint.

This application is brought under **Order XXXVIII Rules 1, 2 and 12 Civil Procedure Rules** and **Section 3A of Civil Procedure Act**. The provisions are headed “Arrest before Judgment”. The grounds are set out on the application and supported by affidavit of Peter Githu Kabiru sworn on the same date. The plaintiff swears that he sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants for declaration that the charge registered on 17/5/1999 against Title No. L.R. 209/6911 by 1<sup>st</sup> defendant is null and void and also an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from exercising powers of sale under the said charge or law. The applicant/plaintiff has sued for the recovery of general damages plus interest and costs.

The plaintiff/applicant has had difficulties in tracing the defendants for purposes of serving him with summons to enter appearance. Already Kshs.55,680/= has been used including advertising. The place of business was Jethali Chambers, Tubman Road, but he found business was closed. Registrar of Companies’ records shows that the office is Victor House, Kimathi Street. But no trace was made there.

The defendants surfaced when the suit was fixed for hearing by formal proof on 19/3/2009. The plaintiff states that the defendants only surfaced when fighting the suit but are likely to disappear if execution is likely to be levied. That is why the plaintiff seeks orders for security.

The application is opposed on the grounds that the application has no basis in law, is made in bad faith and has no merit and no grounds are set out to justify granting the orders sought and the application is frivolous and vexatious.

Looking at the orders invoked, **Order 38 (1)**, the circumstances under which the defendant may be called upon to furnish security for his appearance are set out namely; when with intent to delay the plaintiff or to avoid process of court, has absconded or about to abscond or left the local limits of jurisdiction of court or has disposed of his property or that he is about to leave. **Rule 2** provides how security shall be given either for his appearance or to answer the claim.

In this application the supporting affidavit seems to say that the defendant attends court only when no action is taking place in court and that the office of first defendant is not known although the office of his advocate is stated as Sonalux House, 8<sup>th</sup> Floor.

Upon hearing submissions on both sides I am not convinced that the provisions of **Order 38** are properly invoked. I do not see any intention to delay the plaintiff or that the plaintiff is about to leave the country or abscond out of the local jurisdiction of the court.

All in all, I do not find any merit in this application. The same is dismissed with costs.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 3<sup>rd</sup> day of June 2009.

**JOYCE N. KHAMINWA**

**JUDGE**