



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 49 of 2007

SAMWEL BARKOIYET KANGOGO

KIPTANUI ARAP MONING

DOROTHY JEMUTAI YATOR

SAMWEL KIPRONO KANGOGO.....PLAINTIFFS

VERSUS

DANIEL NDUNG’UDEFENDANT

R U L I N G

The Chamber Summons application dated 24-4-09 is made under Order X Rule 11A(1) (2) and (3) Civil Procedure Rules and section 3A of the Civil Procedure Act.

The application seeks that the court do order time within which the defendant should file and serve a list of documents in terms of Order X Rule 11a (1) Civil Procedure Rules.

It is based on grounds that:

- (a) Plaintiff has since complied with Order X rule 11A(1) and (2) Civil Procedure Rules.
- (b) Despite demand having been made, the defendant has without any justifiable cause failed to comply with provisions of Order X rule 11A(1) thus frustrating the speedy trial of this matter.
- (c) It is necessary that there be made an order by this court directing defendants to comply with the provisions within such times the court shall deem just and convenient.

The application is opposed and the respondent has filed grounds of opposition stating that the application is incompetent and defective and is utterly misconceived and bad in law.

Further that the application is an abuse of the court process. However those grounds were only filed and served on the morning of hearing and respondent’s counsel opted to abandon them.

At the hearing, Miss Chesaro for the applicant submitted that the last time parties were before the court on 16-10-07, the case could not proceed to hearing because of non compliance by the defendant. She explained that, parties were to do discoveries and file documents so that the matter could proceed. She sought to rely on the supporting affidavit sworn by herself in which she pointed out that the defendant was served with draft issues and list of documents through the defence counsel but defendant never responded either by approving the draft issues or amending them, or even filing his list of documents.

So far two letters (marked JC1) have been sent to defendant, seeking that he complies with the provisions of Order X

Rule 11A, (1) but to date there's been no compliance.

The respondents having realized the late service of the grounds of opposition thus indicated to the court that he would only rely on points of law.

He submitted that the application should have been made by way of Notice of Motion instead of Chamber Summons citing the provisions of Order L Rule 1, and that the provisions of Order X Rule 23 clearly provide that it is only applicants under rule 2 and 11 which are made by Chamber Summons.

Miss Chesaro's response is that although procedure ought to be followed, there could still be a cure by way of amendment under section 100 Civil Procedure Act so as to delete the words Chamber Summons and insert Notice of Motion, since the content will remain the same.

She urges the court not to strike out the application simply on non compliance of rules and to consider the purpose for which the application has been made.

Order X Rule 11A addresses discovery in the High Court as follows:-

“(1) Notwithstanding anything contained in Rule 11, within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filling and serving on the opposite party, a list of documents relating to any matter in question in the suit which are or have been in his possession or power.

(2) Any party on whom a list of documents is served under subrule (1) may give notice to the party making discovery requiring verification on affidavit of the list of documents and the affidavit shall be filed within fourteen (14) days of the request.

(3) On the default of a party to comply with subrule (2) application may be made in answer to the court for the fixing of a time limit within which the party must comply with this rule”

Applicant served list of documents and even wrote twice to respondent seeking that respondent complies with those provisions of Order X Rule 1A – there has been no response. At the hearing, respondent had no reason to offer, instead preferring to go technical about procedure.

It is not denied that at one point the matter came up for hearing but could not proceed simply because respondent had not complied – it appears this is the respondent's way of delaying the matter. The provision of Order X rule 23 on procedure requires that application under rules 2 and 11 be by way of Chamber Summons – and the position drawn is that application under the other rules should be by way of Notice of Motion as provided under Order L rule 1.

Is this so fatal as to warrant striking out the application. It is only the title of the application which is faulty, the substance remains the same and occasions no prejudice whatsoever to the respondent.

An application is deemed to be on pleading under the interpretation section of the Civil Procedure Act which states that “pleading” includes a petition or summons.

If that be the case, then Order VI which deals with pleadings, has a provision under rule 12, that

“No technical objection may be raised to any pleading on the ground of any want of form”

My considered view is that the court has a duty to ensure the ends of justice are met and that section 3A gives this court wide discretion for that purpose. It is clear in my mind that to allow for striking out on the basis of a technical omission, in this particular instance would be encouraging respondent to totally abuse the court process by simply further delaying the matter – I have a duty to put a stop to such mischief and rule that the mis-heading of the application to read Chamber Summons instead of Notice of Motion causes no prejudice to the respondent and under section 100 Civil Procedure Act, I amend the title to read Notice of Motion.

The respondent must comply with the provisions of Order X Rule 11A (1) by filing and serving the applicant list of documents relating to the matter in question in this suit or which have been in his possession or power within fourteen (14) days from today.

The respondent shall bear the costs of this application.

Delivered and dated this **8th** day of **July 2009** at Malindi.

H. A. Omondi

JUDGE