



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1266 of 2004 (OS)**

**NJANGO CHEGE.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**RAPHAEL WAWERU CHEGE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**LAWRENCE WAMBAKI MUIRURI.....DEFENDANT/APPLICANT**

**R U L I N G**

By chamber summons dated 06.05.08 stated to be brought under Order VI rule 13(b), (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap. 21, the defendant sought the following orders:"

**(a) *That the originating summons filed herein be struck out with costs for being fatally defective.***

**(b) *That the costs of this application be provided for.***

The application is stated to be supported by the affidavit of Lawrence Wambaki Muiruri (defendant) sworn on 06.05.08. The only substantive ground in the said affidavit is contained in paragraph 3 thereof, namely:

***'3. That my advocates had previously raised another preliminary point but the respondents were allowed to cure the defect although I am still entitled to appeal against the decision.'***

On 23.09.08 the 2<sup>nd</sup> plaintiff/respondent filed a replying affidavit of the same date sworn on his own behalf and on behalf of the 1<sup>st</sup> plaintiff/respondent whose essence is that similar preliminary objections to the suit of the plaintiffs by way of originating summons have been filed by the defendant previously; that one such objection was dismissed on or around 11.10.06; that another such objection dated 10.12.07 was filed but remains unprosecuted; and that the defendant has now filed the present objection. The plaintiff/respondents herein aver through the 2<sup>nd</sup> plaintiff's/respondent's replying affidavit of 23.09.08 that the present preliminary objection is one in a series whose sole objection is to prevent the plaintiffs' suit from being heard on merit.

At the hearing of the present application on 13.11.08, the defendant/applicant was represented by learned counsel, Mr. V.A. Otieno while the plaintiffs/respondents were represented by learned counsel, Mr. S.K.M. Wandaka.

Defendant's/applicant's counsel said his client sought to have the amended originating summons dated 01.12.06 struck out on the grounds set out in the chamber summons application dated 06.05.08. On the other hand, plaintiffs'/respondents' counsel said his clients opposed the defendant's application, relying on the 2<sup>nd</sup> plaintiff's replying affidavit sworn on 23.09.08.

I have given due consideration to the application and opposition thereto.

The amended originating summons dated 01.12.06 sought to be struck out is brought under Order XXXVI rule 3D, which provides, *inter alia*, as under:

***'3D. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.***

***(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.'***

The suit is stated to be founded on adverse possession, which of necessity imports provisions of the Limitation of Actions Act. There is annexed to the supporting affidavit of Njango Chege, 1<sup>st</sup> plaintiff sworn on 01.12.06 a certified extract of the title to the suit land. *Prima facie*, the basic procedural requirements of Order XXXVI rule 3D have been met. In the premise, I find the chamber summons application dated 06.05.08 to be without merit and the same is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 16<sup>th</sup> day of December, 2008.**

**B.P. KUBO**

**J U D G E**



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