



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Akoth (Originating Summons E043 of 2021)
[2022] KEHC 10864 (KLR) (Civ) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10864 (KLR)

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

CIVIL

ORIGINATING SUMMONS E043 OF 2021

CW MEOLI, J

JUNE 24, 2022

BETWEEN

WILSON NJOGU MBURU APPLICANT

AND

ESTHER AKOTH RESPONDENT

RULING

1. Wilson Njogu Mburu (hereafter the Applicant) approached the court by way of an originating summons (O.S) dated 1st February 2021 citing Esther Akoth as a respondent (hereafter the Respondent). The Applicant seeks that the honorable court makes a determination as to the rights of the parties herein ; grants appropriate remedies in respect of their competing claims concerning an online transaction involving the parties; and in particular, determine whether the Applicant owes the Respondent any money, and if so, determine how much is due and payable to the Respondent; whether in all the circumstances of the online business investments by the parties, the Respondent owes the Applicant any monies in respect of his input and or contribution and investment in the business; and that the court makes such other orders as it shall deem appropriate to ensure that each party makes good to the adverse party what is determined to be due, owing and payable.
2. The O.S is expressed to be brought inter alia under Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA) and Order 37 Rule 3 of the *Civil Procedure Rules* (CPR). The O.S is anchored on the grounds on the face of the summons as amplified in the supporting affidavit sworn by Applicant.
3. The affidavit is to the effect that sometimes in February 2020, the Respondent approached the Applicant with a proposal that they each invest a sum of Kshs. 250,000/- in an online crypto currency business. That the parties jointly invested a total sum of Kshs 500,000/-. He goes on to depose that subsequently, the crypto currency business crashed with the onset of the Covid-19 pandemic and the parties failed to get anticipated returns out of the joint investment; that at the end of March 2020, in



response to the Respondent's insistence, liquidated the crypto currency and disbursed a total of Kshs. 65,000/- to the Respondent.

4. The Applicant further deposes that the Respondent had insisted on a refund of the invested sums with interest and asserts that the said claim does not lie as the monies had already been invested before the market crashed. He points out that the Respondent has not compensated him for any of his services and labour towards the joint venture and it is in the interest of justice that the matters in dispute between the parties be determined and appropriate relief be granted.
5. The Respondent raised a preliminary objection in opposition to the O.S. The gist of the objection is that the subject matter of the O.S does not fall within matters contemplated in Order 37 of the Civil Procedure Rules; that the suit is null and void ab initio and an abuse of the court process; and that the suit is incurably defective, incompetent, bad in law and ought to be struck out with costs to the Respondent.
6. Directions were taken for the preliminary objection to be canvassed by way of written submissions. Despite being given ample opportunity the Applicant failed or opted not to file his submissions.
7. Counsel for the Respondent on his part anchored his submissions on the provisions of section 19 of the Civil Procedure Act and the decision in Cyril J Haroo & Another v Uchumi Services Limited & 3 Others [2014] eKLR. He argued that jurisdiction of the court to handle a suit is invoked when a suit is filed in accordance with the rules. He contended that the alleged claim involving crypto currency business is not contemplated by Order 37 of the Civil Procedure Rules to be a claim that can be initiated an O.S and the suit herein is therefore fatally defective. He asserted that while a court should aim at sustaining rather than striking out a suit, this court ought to find that the O.S is beyond redemption as it does not disclose any reasonable cause of action and should be dismissed with costs.
8. The Court has considered the averments in the O.S, the Applicant's affidavit and the Respondent's submissions on the preliminary objection. The Applicant's O.S invokes the provisions of Order 37 Rule 3 of the Civil Procedure Rules (CPR). The Rule is entitled, Summons by vendor or purchaser of land and states:

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract)”.
9. It is evident from a cursory perusal of the averments in the O.S and the Applicant's affidavit material that the subject matter of the suit is not one related to the sale or purchase of immovable property, nor is the relationship between the parties herein one of vendor/purchaser concerning such property. The Rule cited is therefore inapplicable to the matter at hand. Moreover, none of the instances within the purview of Rules 1,2 to 12 of Order 37 CPR contemplate the kind of issues or matters pleaded in the O.S herein as qualifying to be raised through an O.S. If anything, the O.S as drafted appears more akin to an application for accounts as anticipated in Order 20 of the CPR which contemplates a suit commenced by way of a plaint. Order 3 Rule 1(1) of the CPR provides that “Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed”.
10. The procedure invoked by the Applicant is therefore erroneous. It is also inappropriate because the summary procedure prescribed in Order 37 CPR is intended for matters specified therein that are simple, and that can be quickly and inexpensively settled by the Court. Rather than matters involving



complex and contested issues of fact or law. The kind of inquiry that can be undertaken in an O. S is limited. So that even in instances where the Rules allow the institution of a suit by way of an O.S, the Court retains discretion under Order 37 Rule 19 of the CPR where it considers the issues of law and fact raised therein to be complex and contentious, and hence requiring a more extensive interrogation, to order that the suit proceeds as one commenced by a plaintiff.

11. As observed in *Bhari v Khan* (1965) E.A. 94 the jurisdiction and scope of enquiry of a court in an originating summons is limited. Per Newbold, Ag. V P: -

“An originating summons is a form of legal proceeding designed to give, in certain specified circumstances, a quick, summary and inexpensive remedy”.

12. It was further stated in that case that the procedure is not generally appropriate for complex or obscure matters which require extensive inquiry. For his part, Spry JA observed that:

“The word “suit” may, and I think does, in certain contexts of the ordinance include proceedings begun by originating summons, but it is, to my mind, quite clear that the whole object of 0.36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit.”

See also *Kibutiri v Kibutiri* (1983) KLR 1.

13. In *Kivanga Estates v National Bank of Kenya Limited* (2017) eKLR, the Court of Appeal stated that:

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations...

Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous, and vexatious”.

14. The suit before the court is a non-starter. Where the CPR provides for the institution of a suit by way of a prescribed procedure, such procedure must be followed. The suit herein offends the provisions of Order 37 of the CPR which do not contemplate the initiation of the kind of claim herein by way of an O.S and secondly, the matter appears to require an inquiry more extensive than is possible under the O.S procedure. For the former reason, the court is of the view that the suit herein is incompetent ab initio and the provisions of Rule 19 above offers no succour thereto. The Court has no jurisdiction to entertain an incompetent O.S or to deem it as a suit initiated by way of a plaintiff. Accordingly, the suit is hereby struck out with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JUNE 2022.

C.MEOLI

JUDGE



In the presence of:

For the Applicant: Mr Gituma

For the Respondent: Ms Michira

C/A: Carol

