



REPUBLIC OF KENYA



KENYA LAW
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**Mwambi & 2 others v Sagalla Ranchers Limited & 8 others (Civil Suit
4 of 2016) [2022] KEHC 13921 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL SUIT 4 OF 2016
MN MWANGI, J
SEPTEMBER 22, 2022**

BETWEEN

**ERICK BADA MWAMBI 1ST PLAINTIFF
MAKEO WILFRED JAMES KIDOLA 2ND PLAINTIFF
ERIC ALFRED JUMA LEGO (SUING IN A REPRESENTATIVE CAPACITY FOR
33 OTHER MEMBERS) 3RD PLAINTIFF**

AND

**SAGALLA RANCHERS LIMITED 1ST DEFENDANT
ELIUD TIMOTHY MWAMUNGA 2ND DEFENDANT
RONALD MWANYAMA 3RD DEFENDANT
CLORENT MWACHARO 4TH DEFENDANT
AMOS NYATTA 5TH DEFENDANT
RAPHAEL LEWELA MBINGA 6TH DEFENDANT
EDWIN MWAYAKA 7TH DEFENDANT
WILMONT MWADILO 8TH DEFENDANT
THE REGISTRAR OF COMPANIES 9TH DEFENDANT**

RULING

1. The plaintiff by way of an originating summons dated January 16, 2014, moved this court seeking the following orders-



- a. That this honourable court be pleased to issue an order of injunction barring the chairman and directors and any other officer of the 1st defendant from continuing with any act depriving the plaintiffs/applicants of their shares and membership in the company;
 - b. That this honourable court be pleased to issue an order of injunction barring the chairman and directors of the 1st defendant from accessing the company's account number 1104865564 at the Kenya Commercial Bank, Voi Branch and any other account operated by the company pending the hearing and determination of this suit;
 - c. That this honourable court be pleased to issue an order of injunction prohibiting the chairman and directors of the 1st defendant from disposing of any of the company's assets pending the hearing and determination of the suit; and
 - d. That this honourable court compels the registrar of companies to order an investigation into the company's affairs and report the findings to the court pending the hearing and determination of the suit.
2. The originating summons was opposed by the 1st, 3rd, 4th, 5th and 6th defendants through a replying affidavit sworn on October 8, 2021 by the 6th defendant. In opposition to the originating summons, on December 6, 2021, the 1st, 3rd, 4th, 5th and 6th defendants filed a notice of preliminary objection dated December 3, 2021, which is the subject of this ruling.
 3. The preliminary objection raises the following grounds-
 1. That the prayers sought in the originating summons suit dated January 16, 2014 are untenable for the suit presents several disputes and complex issues; and in nature of its filing, the same is beyond the scope of order 37 of the [Civil Procedure Rules, 2010](#);
 2. That the plaintiff herein lacks the requisite locus standi to inquire into the affairs of the Sagalla Ranchers Limited, the 1st defendant herein for the plaintiffs have never become members of the company or at all; and
 3. That the prayers sought in the plaintiff's suit seek to further an illegality since the plaintiffs are non-members of the Sagalla Ranchers Limited yet they are misguiding this honourable court that they are so.
 4. On December 7, 2021, the court gave directions that the preliminary objection by the 1st, 3rd, 4th, 5th and 6th defendants would be heard and determined by way of written submissions prior to proceeding with the hearing and determination of the originating summons. The 1st, 3rd, 4th, 5th and 6th defendants' submissions were filed on January 12, 2022 by KKOAA Advocates LLP, while the plaintiffs' submissions were filed on January 19, 2022 by the law firm of Gikandi & Company Advocates.
 5. Mr Kurgat, learned counsel for the 1st, 3rd, 4th, 5th and 6th defendants submitted that the originating summons was irredeemably defective and could not be rescued by article 159 of the [Constitution](#) since the allegations in the originating summons and the ensuing prayers called for a detailed discovery, issues of interrogatories and cross-examination of witnesses to establish the rights of the plaintiffs and the defendants with finality, which was not possible under an originating summons. He stated that the scope of an originating summons and the ability to deal with a contested case is minimal. He submitted that this court ought to dismiss the instant summons and leave the parties to pursue their claim by ordinary suit.



6. In support of his arguments, Mr Kurgat relied on the Court of Appeal dictum in *Kibutiri v Kibutiri* (1983) KLR 1, where it was stated that the scope of an inquiry which could be made in an originating summons and the ability to deal with a contested case was very limited. He submitted that the court also stated that when it becomes obvious that the issues raised are complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit.
7. Mr Gikandi, learned counsel for the plaintiff submitted that the issues set forth in the originating summons can be determined by the court herein as order 37 rule 19 of the *Civil Procedure Rules* grants courts the power at any stage of the proceedings to order that the suit continues as if the cause had begun by filing of a plaint. In support of his submissions, he relied on the finding in *Aun Jiwa & another v Yusuf Jiwa & another* [2020] eKLR, wherein the court upon considering the provisions of order 37 rule 19 of the *Civil Procedure Rules*, allowed the proceedings to continue as if the cause had begun by the filing of a plaint.

Determination.

The issue for determination is if the preliminary objection should be sustained.

8. I have considered the preliminary objection, the submissions made and the authorities cited. It is trite that a valid preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, Law JA stated thus-

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. In *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, (as he then was) expounded on the issue of a preliminary objection by stating that it must be based on pure points of law and not contentious factual issues requiring evidence to be adduced for their authentication. He stated as follows-

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

10. In this instance and based on the two authorities above, it is evidently clear that grounds No 2 and 3 of the notice of preliminary objection dated December 3, 2021 do not meet the threshold set out in *Oraro v Mbaja* (supra). Having failed the aforesaid test, grounds No 2 and 3 will not be considered in this ruling.
11. In ground No 1 of the notice of preliminary objection dated December 3, 2021, this court has been called upon to dismiss the suit herein with costs because it presents several disputed and complex issues that go beyond the scope of the provisions of order 37 rule 19 of *Civil Procedure Rules*. The plaintiffs in reply have submitted that if the issues raised in the originating



Summons are indeed complex, then the said provisions ought to be applied so as to convert the instant originating summons into a plaint.

12. Both parties herein are in concurrence that originating summons are meant for determination of simple matters, which do not involve complex questions of law and fact. That is the correct position. The Court of Appeal in *Beatrice Nyambura Mucheru v Joyce Wanjiru Mucheru* [2000] eKLR held as follows-

...But can the same be said about the first question set out in the originating summons, that is, whether Teresia Mucheru was entitled to bury her dead husband? We would say, no! What is more, the issues involved in the originating summons were ... of a complex nature and which should not have been dealt with by way of the originating summons in *Kibutiri v Kibutiri* (1982-88) 1 KAR 60 Law J A had this to say: "The procedure by way of originating summons is intended - 'to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.'"

13. A perusal of the originating summons herein shows that the plaintiffs are seeking orders of injunction barring the chairman and directors and any other officer of the 1st defendant from selling the company's assets, accessing the company's account number 1104865564 at the Kenya Commercial Bank, Voi Branch, and continuing with any act depriving the plaintiffs/applicants of their shares and membership in the company. Further, the plaintiffs seek an order for the registrar of companies to be compelled to order an investigation into the company's affairs and report the findings to the court pending the hearing and determination of the suit.
14. The 1st, 3rd, 4th, 5th and 6th defendants filed a detailed replying affidavit in opposition to the plaintiffs' claims. From the foregoing, it is my finding that the prayers sought by the plaintiffs cannot be said to constitute simple matters that can be dealt with summarily. I agree with the 1st, 3rd, 4th, 5th and 6th defendants' argument that the procedure adopted herein is not the appropriate one.
15. Should the procedural breach then attract an order of dismissal as sought by the defendants? It is noteworthy that the 1st, 3rd, 4th, 5th and 6th defendants have not cited any injustice that has been occasioned or which will be occasioned to them by the procedure the plaintiffs have adopted. What they have done and correctly so, is to point out the procedural shortcoming in the originating summons. In my considered view, the said shortcoming should not attract the extreme sanction of dismissal as sought by the defendants.
16. As has been held in numerous cases, no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and is incurable by amendment. The suit by the plaintiffs herein can be injected with life by amendment and the plaintiffs deserve to be given their day in court. The rationale for this is because the exercise of the powers for summary dismissal are draconian, coercive and drastic. It also leads to a party being deprived of his right to trial, hence courts exercise the power of dismissal of suits with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. See *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1.
17. Order 37 rule 19 of the *Civil Procedure Rules* provides the following-

Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had



been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.

2. Where the court makes an order under subrule (1), order 11 shall apply.
3. This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
4. Any reference in these rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).”

18. Based on the above provisions, this court has the leeway to order that the case herein though filed by way of originating summons should proceed as if it had been commenced by way of a plaint. In the said circumstances, I hereby dismiss the notice of preliminary objection dated December 3, 2021. I further make the following orders-

- a. That the proceedings herein shall continue as if this cause had been commenced by filing the plaint;
- b. The originating summons dated January 16, 2014 and the affidavit in support thereof shall be deemed to be the plaint and witness statement, respectively;
- c. The plaintiffs will file and serve the relevant documents as provided in order 3 rule 2 (b), (c) and (d) of the *Civil Procedure Rules* within 21 (twenty-one) days from the date of delivery of this ruling;
- d. The defendants will file and serve their statement of defence and all compliance documents within 21 (twenty-one) days of service of the documents referred to in paragraph (c) of this ruling; and
- e. Costs of the preliminary objection shall be borne by the plaintiffs who brought their claim before the court under the wrong procedural requirements.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT VOI ON THIS 22ND DAY OF SEPTEMBER, 2022.
RULING DELIVERED VIRTUALLY.**

In the presence of:-

NJOKI MWANGI JUDGE

Ms Randa holding brief for Mr. Gikandi for the Plaintiffs Mr. Moses Kurgat for the Defendants

Mr. Otolu – Court Assistant.

NJOKI MWANGI, J

