



**Kivae Residents Farmers Association (Suing through its officials Peter Ndeti, Daniel Kasamba Muia & Benedict Ndunda Nzomo) v Chief Land Registrar & another (Environment & Land Case E018 of 2022) [2023] KEELC 20194 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20194 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E018 OF 2022  
CA OCHIENG, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**KIVAE RESIDENTS FARMERS ASSOCIATION (SUING THROUGH ITS OFFICIALS PETER NDETI, DANIEL KASAMBA MUIA & BENEDICT NDUNDA NZOMO) ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Applicant’s Chamber Summons Application dated the February 22, 2023 where it seeks the following Orders:
  1. That this Honourable Court do order that the Originating Summons hereof be converted into a Complaint and the proceedings continued as if the cause had begun by filing of the Complaint.
  2. That costs of this Application be granted.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Silvester Peter Ndeti. The Applicant explains that this suit relates to an unregistered parcel of land known as LR No 339/1 and 339/4. It contends that the question before the Court is whether the Applicant is entitled to be registered as proprietors of the aforementioned parcels of land. It explains that it is equally clear that the question can be determined by way of Originating Summons or Complaint. Further, that based on the matters raised in the instant Originating Summons and 1<sup>st</sup> Respondent’s response to the claim, it would appear the issues raised herein should be heard by way of oral evidence.
3. The Respondents did not file any response to controvert the instant Application.



4. The Applicant filed written submissions to canvass the instant Application but the 1<sup>st</sup> Respondent opted to rely on its submissions filed on February 14, 2023 in respect to the Notice of Preliminary Objection dated the January 27, 2023 where it had sought to strike out the Originating Summons.

### Analysis and Determination

5. Upon consideration of the instant Chamber Summons Application, Supporting Affidavit and respective submissions, the only issue for determination is whether the Originating Summons should be converted into a Plaintiff.
6. The Applicant in its submissions insists it should be allowed to convert the instant Originating Summons into a Plaintiff and the proceedings continued as though the cause had begun by filing a Plaintiff. To support its averments, it relied on the following decisions: Jaswant Harilal Chudasama v Shubhikant Harilal Chudasama [2017] eKLR; Kibutiri V Kibutiri (1983) eKLR and Mnazi Moja Estates Limited V Mistry & 5 Others (1987) KLR 269.
7. The 1<sup>st</sup> Respondent in its submissions contend that the instant suit is contra statute and a nullity *ab initio*. It argues that the suit land is subject to litigation previously instituted, with ELC 13 of 2017 being the lead file and it is not clear if the disputes were resolved. It insists that the suit as instituted cannot be saved by the provisions of order 37 rule 19 (1) of the Civil Procedure Rules. To support its averments, it relied on the following decisions: Wakf Commissioner V Mohammed bin umeya bin Abdulmaji bin Mwijabu (1984) KLR 346; Kibutiri V Kibutiri (1983) eKLR and Siasa Pasua & 2 Others V Mbaruk Khamis Mohamed & Another (2012) eKLR.
8. On conversion of an originating summons to a plaintiff, order 37, rule 19 (1) of the Civil Procedure Rules provides that:

"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 plaintiff, 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."
9. In the case of Kibutiri Vs Kibutiri (1982-1988) 1 KAR 60, it was held that:

"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."
10. While in Jaswant Harilal Chudasama v Shubhikant Harilal Chudasama [2017] eKLR, it was observed that:

"Order 37 rule 19 of the Civil Procedure Rules gives the court power to convert an originating summons into a plaintiff. Where that is done, the parties have to comply with order 11 of the Civil Procedure Rules which require filing of documents and witness statements."
11. In this instance, the Applicant has sought to convert the originating summons into a plaintiff and explained that it realized there are contentious issues to be dealt with, that cannot be handled if the suit proceeded as it is. The 1<sup>st</sup> Respondent insists that this suit is contra statute *ab initio*. I have perused the instant Originating Summons and find that there are indeed contentious issues raised herein that cannot be dealt with if the suit proceeded as it is. Further, I note that there is already a related suit



touching on the dispute herein. It is trite that Article 50 of the Constitution grants a party a right to be heard while Article 159(2) (d) of the Constitution directs that justice should be administered without undue regard to procedural technicality.

12. In the circumstances, while relying on the legal provisions I have cited above as well as associating myself with the decision quoted, I find that the instant Originating Summons should indeed be converted into a Plaint and parties directed to adhere to the provisions of Order 11 of the Civil Procedure Rules.
13. In the foregoing I find the Chamber Summons Application dated the February 22, 2023 merited and will allow it.
14. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

