REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2015

PHILIP MUCHIRI MUGO…….APPLICANT

VERSUS

MBEU KITHAKWA…….....RESPONDENT

RULING

By a notice of motion dated 24th February, 2015 said to have been brought under **sections 1A, 3A** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules** the applicant sought for the following orders:-

"1. THAT the Honourable Court be pleased to certify that the application is very urgent and the same be heard and disposed ex parte in the first instance.

2. THAT the officer commanding Kerugoya police station be ordered to provide security on the material day, of the burial of the remains of Mugo Kithakwa (dcd).

3. THAT the order be served upon the;

a) Chief/Assistant chief in the location

b) Priest proposed to conduct the ceremony.

c) County Deputy Commander."

The application is based on the grounds that the applicant had obtained limited grant of letters of administration of the estate of Mugo Kithakwa and:-

"ii. **THAT** Mbeu Kithakwa the respondent herein or anyone else in the family be restrained from causing chaos on land parcel **Inoi/Kerugoya/769** which lawfully belongs to Mugo Kithakwa (dcd) during the burial of his remains.

iii. **THAT Inoi/Kerugoya/769** belongs to Mugo Kithakwa (dcd).

The application was supported by the affidavit of the applicant sworn on 24th day of February, 2015 and filed in court the same date.

The respondent opposed the application and filed both grounds of objection and a replying affidavit. In that affidavit he claimed that he is the registered owner of the land referred to as **Inoi/Kerugoya/769**

where he has lived with his family for the past fifty years. He contended that the applicant, his deceased father and their entire family have never lived on that particular parcel of land.

I gather from the application and the response thereto that there is a long standing dispute over ownership, title to and use of land parcel **Inoi/Kerugoya/769;** this dispute has been in and out of court in various forms and at different times. It would have been appropriate to set out here the chronology of these suits and their outcomes but such an exercise would be unnecessary and of little relevance in determination of this application.

The single question whose answer should determine this application is whether a suit can be initiated by way of a notice of motion as the applicant has purported to do. As far as I can see from this motion the major issue is not just whether the applicant needs protection from the respondent to bury his deceased father; he is also, by implication, seeking a restraint order against the respondent or any of his agents from interfering with the burial on the basis that the suit property on which he wants to bury the deceased belongs to him (the deceased).

I would think that if the applicant has a viable claim against the defendant and if he is genuinely apprehensive that the defendant is likely to interfere with the applicant's use of the suit property which, in his view, belongs to the deceased then it was incumbent upon him to commence a suit in either of the ways prescribed by the **Civil Procedure Act (Cap 21)** and not through an application. On this question **section 19** of that Act says:-

19. Institution of suits Every suit shall be instituted in such manner as may be prescribed by rules Order 3 of the rules which **section 19** of the Act speaks of states:-

ORDER 3

FRAME AND INSTITUTION OF SUIT

1. (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

While the plaint is expressly prescribed in the rules as one of the ways through which a suit may be instituted, nowhere in those in those rules is it stated that a suit may be commenced by way of a notice of motion as the applicant has purported to do.

It is interesting to note that in one of the suits in a string of suits filed between the applicant and the respondent, the applicant himself successfully resisted the respondent's suit which had been instituted against the applicant by way of an application. Incidentally, the magistrate's court had sustained the application without a substantive suit and granted the orders sought therein.

The applicant herein appealed against the order of the magistrate and to demonstrate that he is not ignorant of the manner a suit should be instituted, this is what he said in his own grounds of appeal:-

"1. ***That the learned magistrate erred in law and in fact in not holding that the suit was improperly instituted by way of a Notice of Motion which is not permissible in law.***

2. **That the learned magistrate erred in law and in fact in giving absolute orders in an interlocutory application which was not supported by a plaint**.

3. **That the learned magistrate erred in law and in fact in giving injunctive orders whereas the application seeking the orders was not based on a plaint as required by law."**

These three grounds which the applicant raised in his appeal against the respondent in **Civil Appeal Case No. 4 of 2007** summarise, **to** some extent, the correct interpretation of the law on the manner of institution of civil suits under the Civil Procedure Act and the rules made thereunder. Indeed in its judgment, the

court agreed with the applicant and held that:-

> ***"Considering those provisions (that is Order VII and Order XXXVI of the then Civil Procedure Rules) it becomes clear that the Respondent in instituting this suit approached the court in a manner not recognised under the law. This indeed was the holding in the Court*** **of Appeal Case No. Civil Appeal No. 61 of 1999** between **Board of Governors, Nairobi School and Jackson Ireri Geta**."

The Court (Kasango, J) went further to quote the Court of Appeal in that case in which it held:-

> ***"However, before we conclude this judgment, we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. "Pleadings" is defined in section 2 of the Civil Procedure Rules as follows:-***
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> > ***"…includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."***
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> ***Mr Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggest that the term "pleadings" may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule1, which prescribes the manner of commencing suits, which rule provides that:***
>
> > ***"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."***
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> ***Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of the term "summons" in the definition of the term 'pleading' must be read to mean 'Originating summons' as that is "a manner…prescribed" for instituting suits."***

This decision, as noted, was made in favour of the applicant in his appeal against the respondent and was in respect of a dispute over the same parcel of land, title number, **Inoi/Kerugoya/769;** it is difficult to understand, in these circumstances, why the applicant himself should ignore the legal provisions which he has been exposed to and commence civil proceedings contrary to those same provisions. Whatever his reasons might be, I can only say his suit is incompetent and it is hereby struck out with costs.

Dated, signed and delivered in open court this 15th May, 2015

Ngaah Jairus

JUDGE