



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA  
CIVIL SUIT NO. 280 OF 2010**

**IN THE MATTER OF: THE WAKF OF SHEIKH MBARUK BIN RASHID BIN SALIM EL-MAZRUI**

-AND-

**IN THE MATTER OF: AN APPLICATION FOR DISSOLUTION OF THE WAKF**

-BETWEEN-

**1. SIASA PASHUA**

**2. HAMISI DARIGUBE .....PLAINTIFFS/APPLICANTS**

**3. ALI SALIM**

-AND-

**1. MBARUK KHAMIS MOHAMED**

**2. ZIREDI MBARUK .....DEFENDANTS/RESPONDENTS**

**RULING ON A PRELIMINARY OBJECTION**

Under the umbrella of the Originating Summons suit of **12<sup>th</sup> August, 2010**, the plaintiffs herein moved the Court by Chamber Summons dated **23<sup>rd</sup> September, 2010** and brought under Order XXXVI, Rule 8 of the earlier edition of the Civil Procedure Rules. This was a purely procedural application seeking *directions* on the course of the Originating Summons proceedings.

But the respondents, through the firm of *M/s. Mabeya Buti & Co. Advocates*, filed a Notice of Preliminary Objection, dated **13<sup>th</sup> October, 2010**. In this early contest to the merits of the suit, the objectors contend as follows:

*(i) the Originating Summons as drawn “does not raise any questions for determination by the Court as mandatorily required by the Rules of Procedure”; and*

*(ii) in the alternative and without prejudice to the earlier ground, “the [Originating] Summons raises complex questions of both fact and law, and can therefore not be disposed of with the expedition expected of such Summons.”*

Learned counsel, **Mr. Buti** urged that the applicants had not complied with Order XXXVI, Rule 7 regarding the purpose, intent and design of an Originating Summons suit; and in particular the plaintiffs have not complied with (the applicable) Appendix B – which requires a party to state the nature of the

claim, and to state the questions for determination by the Court: “*the questions for determination by the Court must be framed with exactness by the party taking out the Originating Summons.*” Counsel relied on the Court of Appeal decision in ***Kibutiri v. Kibutiri*** [1983] KLR 62, in which it was stated that the Originating Summons procedure 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*” [from ***Re Giles*** (2) [1890] 43 Ch.D.391]. The Court of Appeal [***Law, JA*** at p.64] went on to state:

***“...the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.”***

Counsel urged that the instant cause by Originating Summons is inapposite: *no questions* are specifically set out for determination; the applicants have not set out questions, but have, instead, listed “*prayers in the form of what they want the Court to do for them*”; “*the omission goes right into the root of the matter, in that [the Originating Summons] does not place before the Court the requisite questions...for...determination.*” Counsel asked that the Originating Summons be struck out, with costs.

In view of the 25-paragraph supporting affidavit to the Originating Summons of **11<sup>th</sup> August, 2010**, by 3<sup>rd</sup> plaintiff, learned counsel submitted that the issues were too complex to be resolved by the procedure proposed: the period of time during which the relevant issues have evolved, spans over 70 years; over time, there has been other litigation relating to the suit properties, and so the Court, today, will have to deal with the consequences of the earlier cases; it is not known how the *res judicata* rules would apply in this case.

Counsel relied on a decision of the High Court for Zanzibar, ***Kulumbai Gulamhussein Jaffer Ramji & Another v. Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar & Others*** [1957] E.A. 699 in which it was held (*per Windham, CJ*) [at p.699]:

***“...the questions raised were neither simple nor clearcut, nor could they be determined, even if the summons were adjourned into court, with that expedition which the procedure by originating summons was designed to achieve...”***

Counsel urged that if the Court does not strike out the Originating Summons in this case, then it should exercise its discretion under Order XXXVI, Rule 10 and direct that the same matter be heard and determined as if it had been filed by plaintiff – with the replying affidavit being regarded as the statement of defence.

In the submissions of learned counsel, **Mr. Jengo** for the applicants, by contrast, the preliminary objection is “*frivolous, vexatious, and an abuse of Court process*”: because “*it does not address itself to...current judicial trends...and...the Constitution which is the fundamental law of the land...*” Counsel invoked **Article 159(2)(d)** of the **Constitution** which requires that justice be administered “*without undue regard to procedural technicalities.*”

Counsel submitted that the objector’s case-authorities are not in keeping with more recent developments; he relied on the High Court (***Visram, CA*** – as he then was) decision in ***Agip (K) Limited v. Jimmy Komo t/a Kiambu Stores***, in which the following passage appears:

***“It is now established beyond peradventure that irregularities as to form which do not go to jurisdiction and which do not cause prejudice to the other side are not sufficient to invalidate proceedings before the Court.”***

Counsel submitted that “*the Originating Summons [in the instant case] is well drawn..., and even if it has some flaws...they do not go to the root of the jurisdiction...*” Counsel did not maintain that the issues

raised in the pleadings are not complex; he acknowledged the option of the Court to resort to the exercise of discretion under Order XXXVI, Rule 10 and to order that the Originating Summons be treated as a *plaint*. Counsel submitted that the authorities relied on by the objector had been made before the gazetting of Legal Notice No 216 of 1985 which introduced Order XXXVI, Rule 10 of the Civil Procedure Rules.

Counsel submitted that on principle, the Court should not strike out the suit in its current form; and the principle should be read from the Court of Appeal decision in ***D.T. Dibia & Co. (Kenya) Limited v. Joseph Mbaria Muchina & Another***, Civil Appeal No. 37 of 1978 in which the following passage in the Judgment of *Madan, JA* appears:

***“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing....***

***“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 incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”***

From perusing the Originating Summons as filed herein, certain perceptions that are material to the Ruling herein emerge: several units of *landed property*, of quite considerable sizes, are involved; so there is a significant scope for claims of *property rights*; there is a *plurality of parties* – and thus, there are *gravamina* attributable to several suitors; reference is made to property claims by *numerous other persons* – “*the residents of Gasi*”; attributions of real property to a corporate entity, “*the Wakf of Sheikh Mbaruk Bin Rashid Bin Salim El-Mazrui*, is involved; *contest* is signalled as between such corporate entity and “*the Residents of Gasi.*” Such a scenario is replete with *contested claims*, which must be resolved by judicial process. I must, in these circumstances, draw the conclusion that the Originating Summons of **12<sup>th</sup> August, 2010** bears serious matters of controversy which ought to be laid before the Court, for determination.

The issues involved, and the attendant facts, as signalled in the supporting affidavit sworn by 3<sup>rd</sup> plaintiff, appear complex enough to require the full hearing founded on a *plaint*. I am in agreement with counsel for the objector, that the Originating Summons is not the right procedure for litigating this case. The law relating to Originating Summons is not in vain: the several learned Judgments of the past (in ***Kibutiri v. Kibutiri; Kulumbai Gulamhussein Jaffer Ramji & Another***) – have clearly stated the design and purpose of the Originating Summons, a shortened procedure for answering quite specific questions which relate to the claims and rights of parties.

The obligation placed upon the Courts by the *Constitution*’s requirement (**Article 159(2)(d)**), that they are to render justice without undue regard to procedural technicalities, does not, in my opinion, negate the *orderly scheme of litigation* provided for by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified.

I will make Orders as follows:

***(1)The initial pleadings in the instant case shall remain the Originating Summons of 12<sup>th</sup> August, 2010 and the supporting affidavit of 11<sup>th</sup> August, 2010.***

***(2)The said Originating Summons shall be treated as a normal plaint.***

***(3)The defendants shall, within 21 days of the date hereof file and serve a replying affidavit, which shall constitute their statement of defence.***

***(4) The plaintiffs shall act with diligence to move the pre-trial arrangements.***

*(5)The cause shall be listed for mention and trial directions within 60 days of the date hereof.*

*(6)There shall be no Order as to costs.*

**SIGNED at NAIROBI .....**  
**J.B. OJWANG**  
**JUDGE**

**DATED and DELIVERED at MOMBASA this 12<sup>th</sup> day of March, 2012.**

**MAUREEN ODERO**  
**JUDGE**