



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC NO. 443 OF 2003

LUCKY SUMMER ESTATE LTDPLAINTIFF

VERSUS

KARIUKI & GATHECHA RESOURCE LTD DEFENDANT

RULING

Coram: Mwera J.
Wambugu for Plaintiff
Nabutete for Defendant
Court clerk Njoroge

By a notice of motion dated 20/5/11 the plaintiff invoked the powers donated by Order 1 rule 10 and Order 8 rule 4 of Civil Procedure Rules. The main prayer was:

i) that the applicant be granted leave to amend the Originating Summons herein in terms of the draft presented.

The grounds stated that there was need to join one Dominic Gathecha Kinyanjui to the proceedings in order that the real dispute in issue is determined.

Patrick Gakura Muraya, a director of the plaintiff company, swore the supporting affidavit. From the reconstructed file an Originating Summons (OS) was brought to court under the now repealed Order XXXVI rule 3D Civil Procedure Rules and section 38 of the Limitation of Actions Act. The 3 - pronged questions to be answered were whether the applicant company had acquired 120 acres of property comprising LR No. 31, 31/4 and 31/24 by virtue of adverse possession against the defendant/respondent. So far not much need be gone into at this stage unless, as of necessity, because when that application dated 20.5.11 was poised for hearing, the defendant company filed a notice of preliminary objection dated 6.6.2011 which the court decided to deal with first. There were 3 points:

- a) that the entire suit was *res judicata*;
- b) the case was an abuse of the process of court; and
- c) that the applicant was guilty of non-disclosure of material facts.

The above grounds were expanded on in the submission by the defendant that the plaintiff had failed to

disclose past litigation with the defendant, in which matters were substantially the same as in the Originating Summons herein. That, there had, even been some contempt proceedings. Then the defendant went into the history of its litigations with the plaintiff over the same claim – 120 acres of the suit land. Such included HCCC 2587/94, instituted by way of plaint which was amended several times and was subject to many interlocutory applications. But then it was concluded in favour of the defendant by Okubasu J as he was then, on 14.7.10. The plaintiff appealed unsuccessfully to the Court of Appeal. That, all this was not disclosed to court. Then the plaintiff failed to pay the costs following the proceedings in this court and the Court of Appeal.

So it was abusing the process of the court by litigating the same matters on and on and was in contempt of court by not paying costs.

The plaintiff's position was that the intended move to join Dominic Gathecha Kinyanjui to the Originating Summons is because the suit property has been transferred to him, a thing that was not known when the Originating Summons was filed. Then it proceeded to posit that the Originating Summons was not *res judicata* because HCCC 2587/94 was only struck out on a technicality.

To cut the long story short both sides went on in error as if what was before this court constituted arguments about the merits of the Originating Summons i.e. whether it was *res judicata* or not; whether there was non- disclosure of material facts. A preliminary point of objection is purely based on a point of law, assuming that whatever is pleaded is correct and if successfully argued, disposes of the case.

The matter before court is by way of notice of motion dated 20.5.11 to amend the Originating Summons by adding Dominic Gathecha Kinyanjui in order to determine the matters in controversy finally. That is all – not the merits of the Originating Summons itself or what it involves/entails. So a preliminary objection and the response thereto should have been whether on a point of law, the notice of motion should be entertained or not – not even its merits. Those can only be addressed when the motion itself is being argued.

In the result there was no valid notice of preliminary objection placed before this court for determination. It is rejected with orders that the notice of motion dated 20.5.11 be set down for hearing.

Each side to bear its own costs.

Orders accordingly.
Delivered on 5/7/11

J. W. MWERA
JUDGE