



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 339 OF 2009 (O.S.)

KIAMBU COFFEE ESTATE LIMITED.....APPLICANT

-VERSUS-

ORBIT DEVELOPERS LIMITED.....DEFENDANT

RULING ON A PRELIMINARY OBJECTION

What is substantially before the Court is the plaintiff's Originating Summons by which it appears to be claiming title to land parcel No. 104 Diani Beach, Kwale. The said Originating Summons bears 29th September, 2009 as the date of signing and the date of filing. And just over a week later, on 8th October, 2009 the respondents filed a preliminary objection in brief terms –

“TAKE NOTICE that the above-named respondent ORBIT DEVELOPERS LIMITED herein shall at the hearing of this suit or any application or proceedings arising therefrom raise an objection to the competence of this suit on the grounds that:

This suit is fatally and incurably defective and incompetent as it offends the mandatory provisions of Order XXXVI rule 3D of the Civil Procedure Rules and should be struck out with costs.”

Learned counsel **Mr. Abed**, for the objector raised the objection that the Originating Summons had not complied with the terms of Order XXXVI (3)(b) which required that the suit be supported by affidavit and an extract of title for the suit land; the Originating Summons and the supporting affidavit were not accompanied by a certificate or extract of title, or by a postal search conducted at the Land Registry. Consequently, it was unclear which land the applicant was referring to – and on that account it was submitted that the Originating Summons suit was fatally defective.

Learned counsel relied on the Court of Appeal decision in **Maina Njuguna v. Paul Njuguna Mwangi, Civil Appeal No.151 of 1999** in which it had been held that a suit brought by way of Order XXXVI, rule 3D had to be started by way of an Originating Summons supported by an affidavit and a copy of the title to the land adversely claimed.

Learned counsel **Mr. Kinyanjui**, for the applicant, in effect admitted the shortcomings of his client's application, but urged that: “rules of procedure should not exclude an accrued right”; rules should help the course of trial, not hinder it”; “Draconian orders were being sought – and these would expel the applicant from the seat of justice.”

Mr. Kinyanjui contended that the notice of preliminary objection itself was defective, for not specifying which provisions of the law had been offended.

Mr. Kinyanjui urged that there was no further obligation on the applicant to annex to his application the document of title for the suit land, as the applicant had annexed the survey plan. Counsel submitted that the preliminary objection failed to show any prejudice suffered by the objector, on account of the shortcomings in the application.

I have endeavoured to see the best sense to be made out of the plaintiff's Originating Summons application of 29th September, 2009 in the light of the objections raised by the respondent. It is clear that the plaintiffs are claiming plot No. 104, Diani Beach, Kwale – but it is not clear whether the claim is on the basis of adverse possession, or some other foundation of entitlement. This point must be made clear – for claims in adverse possession fall to be made by way of Originating Summonses; but other kinds of claim are appropriately made by suit by plaintiff.

The application fails in its professional crafting, as it contains two sets of general ground number 3 – and the two paragraphs of identical numbering do not convey the applicant's intent.

Apart from the specific objections raised by the respondent, the Originating Summons as cast is incapable of moving the Court, as it does not speak clear language, or express clear intent to the Court. It follows that the Court is not in a position to consider for granting, such prayers as the applicant would have in mind.

For these several reasons, I hereby uphold the respondent's objection, and strike out the Originating Summons suit as incompetent. The plaintiff/applicant shall bear the respondent's costs.

Orders accordingly.

SIGNED:

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J.B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 26th day of February, 2010.

J.B. OJWANG

JUDGE