REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 605 of 2008

MISCHECK GAUKU M'AMBUTU

SUING AS THE CHAIRMAN OF THE KENYA RAILWAYS GOLF CLUB,

ON HIS OWN AND IN A REPRESENTATIVE CAPACITY ON BEHALF

OF OTHER INTESTED MEMBERS OF THE

KENYA RAILWAY GOLF CLUB…….1ST PLAINTIFF

DAVID MUCHUNGU GERISHON

SUING AS THE TREASURER OF THE KENYA RAILWAY GOLF CLUB,

ON HIS OWN AND IN A REPRESENTATIVE CAPACITY ON BEHALF

OF OTHER INTERESTED MEMBERS OF THE

KENYA RAILWAY GOLF CLUB……..2ND PLAINTIFF

SAMUEL MAINA KARANJA

SUING AS THE CHAIRMAN OF THE KENYA RAILWAYS GOLF CLUB,

ON HIS OWN AND IN A REPRESENTATIVE CAPACITY ON BEHALF

OF OTHER INTESTED MEMBERS OF THE

KENYA RAILWAY GOLF CLUB…….3RD PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION …….DEFENDANT

R U L I N G

The Applications

1. This ruling is in respect of two applications. The first application is the Plaintiffs Chamber Summons dated 21/04/2009 and filed in court on 27/04/2009. The second application is the Defendants Chamber Summons dated 12/05/2009 and filed in court on the same day. By agreement of the parties, the Defendant's application dated 12/05/2009 was to be heard first.

2. The two applications arise out of an Originating Summons dated 8/12/2008 filed by the Plaintiffs on behalf of the Kenya Railway Golf Club, claiming title to land registered in the name of the Defendant allegedly on the

grounds of adverse possession, trust and/or fraud.

3. The application dated 12/05/2009 seeks the following orders, namely:-

(i) ***THAT*** *this application be certified as urgent.*

(ii) ***THAT*** *the exparete order made on 27th April, 2009at the instance of the Plaintiffs to the effect that the Plaintiffs Chamber Summons dated 21st April, 2009 be heard in priority to the Defendant's Chamber Summons dated 20th February 2009 be set aside and this application be heard at the same time as the plaintiffs' said chamber summons dated 21st April 2009 and filed on 27th April, 2009 ie on 21st May 2009.*

(iii) ***THAT*** *this Honourable Court be pleased to grant leave to amend the Defendant's chamber summons dated 20th February 2009 by adding the following ground, to be number (c) after grounds (a) and (b) on which the said chamber summons is based:*

> *"(c) This Honourable Court has no jurisdiction to grant any of the prayers contained in the plaintiffs' originating summons dated 8th December, 2008."*

(iv) ***THAT*** *the Defendant's said chamber summons, so amended, be served on the plaintiff's advocates within 7 days of the granting of the said leave.*

(v) ***THAT*** *the defendant's said chamber summons, as amended, be heard and determined in priority to the Plaintiffs' chamber summons dated 21st April, 2009 and filed on 27th April 2009 such hearing to take place on 6th July 2009.*

(vi) ***THAT*** *the cost of this application be provided for.*

4. This application was precipitated by an order of the court issued on the 27/04/2009 to the effect that the Chamber Summons dated 21/04/2009 be heard in priority to the Defendant's Chamber Summons dated 20/02/2009 which had been fixed for hearing on 6/07/2009. The application of 12/05/2009 is premised on three (3) grounds found on the face thereof, namely

(i) *The Defendant has filed a chamber summons dated 20th February, 2009 seeking an order that the plaintiff's originating summons dated 8th December 2008 be struck out on the ground that it discloses no or no reasonable cause of action against the defendant. The said application is listed for hearing on 6th July 2009;*

(ii) *The application for amendment of the said chamber summons as made herein raises a further ground for the striking out of the plaintiff's said originating summons ie that this Honourable Court has no jurisdiction to grant any of the prayers contained in the said originating summons; and*

(iii) *That the issues referred to grounds (i) and (ii) above are preliminary issues of law which should, in conformity with the settled procedure and practice of this Honourable Court, be heard and determined in limine since if they are successful they will dispense of the whole suit with resultant saving of judicial time, energy and costs.*

5. The application is also supported by the affidavit sworn by **Atanas Kariuki Maina** on the 12/05/2009. Details of the averments of the affidavit shall become apparent shortly from an analysis of the Defendants submissions dated 13/07/2009 and filed in court on the same day. I shall return to this application dated 12/05/2009 later in this ruling.

6. The second application is the Defendants Chamber Summons dated 21/04/2009 and filed in court on 27/04/2009. This is the application that sought an order that the application be heard in priority to the Defendant's Chamber Summon dated 20/02/2009, among other orders. The main ground in support of the application is that the Defendant and the Plaintiffs were not in agreement as to the correctness and sufficiency of the facts set forth in

the Originating Summons and the Defendants Affidavit and that it was necessary to take directions on whether the Originating Summons should be heard by affidavit evidence or continued as if the action had been begun by filing a plaint in any event before the hearing of the Defendants Chamber Summons dated 20/02/2009. It is as a result of the said application that the court issued the order of 27/04/2009.

7. The Plaintiffs' application is supported by the affidavit sworn by **Misheck Gauku M'Ambutu** dated 21/04/2009 in which the deponent reiterates the grounds on the face of the application and says that it was necessary to take directions on the Originating Summons. The Plaintiffs also prayed for orders of substitution.

8. The applications proceeded by way of written submissions. Following agreement that the Defendants Chamber Summons dated 12/05/2009 be considered first, I shall start with the submissions made by the Defendant in support of the said application and in opposition to the Plaintiff's application dated 21/04/2009. It is to be noted that the two applications are the direct outcome of the Defendant's application dated 20/02/2009 which application sought to strike out the Plaintiffs Originating Summons on the ground that the Originating Summons disclosed no or no reasonable cause of action. The Defendant averred that the said application was filed solely for the purpose of frustrating the Defendants' efforts to proceed with the hearing of its application dated 20/02/2009. The court (Osiemo J) granted prayer number 2 of the Plaintiffs Chamber Summons dated 21/04/2009 and ordered that the other prayers of the application namely prayers 4,5 and 6 be heard interpartes on 21/05/2009. Prayers 4, 5 and 6 of the Plaintiff's Chamber Summons dated 21/04/2009 read as follows:-

"4. *Directions be issued that the Originating Summons be heard and determined by way of oral evidence.*

5. Directions be issued that the Originating Summons be supported by any such further evidence as may be necessary as for the trial of the issues arising thereupon.

6. Directions be issued that the proceedings herein do continue as if the cause had been begun by filing a plaint and the Affidavits filed stand as pleadings with liberty to any of the parties to apply for particulars of the affidavits."

9. The Defendant contends that the order made by Osiemo J on 27/04/2009 was made exparte and that the order is thus liable to being set aside by this court, especially now that Osiemo J is no longer sitting and hearing cases in Nairobi. The learned Judge has since June 2009 been transferred to the High Court in Eldoret. Counsel for the Defendant referred the court to the Court of Appeal decision **Aga Khan Education Service –vs- The Republic [2004] IEA 1** at page 4 (bottom) where the court stated the following, among other matters:-

> *"Again, by their very nature, ex parte orders are provisional and can be set aside by the Judge who has granted it (sic), of course, if the Judge is still available to do so. We think that if the Judge who granted leave cannot sit, for one reason or the other, then another Judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all Judges of the Superior Court ---"*

Counsel for the Defendant has urged this Honourable Court to set aside Osiemo J's exparte orders of 27/04/2009 on the basis of the ten (10) reasons set out in the Defendant's written submissions.

10. The first reason why the Defendant wants the exparte order set aside is that under the advertised justice system obtaining in Kenya, it is against the rules of natural justice for a court to issue orders without hearing both sides; and that there should be departure from such a rule only in cases of exceptional circumstances warranting the issuance of the exparte orders. Counsel for the Defendant contended that the burden of proving exceptional circumstances lies with the party seeking such an order, and that the Plaintiff, through Mr. M'Ambutu failed to discharge that onus of proof, either through the grounds set out on the face of the Plaintiff's application dated 21/04/2009 or the supporting affidavit sworn by Mr. M'Ambutu on 21/04/2009.

11. The second reason why the Defendant want the exparte order of 27/04/2009 set aside is that the ground given in support of the order, namely ground No. 5 in the Plaintiffs Chamber Summons dated 21/04/2009 is hollow in substance. The ground reads:-

> " *"The Defendant and the Plaintiffs do not agree to the correcness and sufficiency of the facts set forth in the Originating Summons and the Defendant's Affidavit and it is therefore important that directions be taken on whether the Originating Summons should be heard by Affidavit evidence or continued as if the action had been begun by filing a Plaint in any event, before the hearing of the Defendant's Chamber Summons dated 20th February 2009 and fixed for hearing on 6th July, 2009."*

12. Counsel for the Defendant submitted that mere disagreement between parties over the correctness or sufficiency of the facts of a case did not amount to exceptional circumstances as to justify the making of the ex parte order in question, which order subjugated the hearing of the Defendants Chamber Summons application dated 20/02/2009 to the Plaintiff's application dated 21/04/2009. In the view of the Defendants counsel, if there is disagreement between parties over facts, then there is even a greater need for an interpartes hearing of such a matter in which the discrepancy has arisen. Counsel relied on the provisions of Order 36 rules 8A and 9 of the Civil Procedure Rules to support their argument for interpartes hearing.

13. The third reason why the Defendant wants the exparte order issued on 27/04/2009 set aside and their application dated 20/02/2009 allowed to proceed to hearing is that the Plaintiff's claim based on adverse possession is unsustainable under S.4(1) (d) of the Limitation of Actions Act (Cap 22) and further that the club on whose behalf the suit is brought is an unincorporated body which does not possess the legal persona to enable it acquire any land by way of adverse possession. The Defendant states that the date of 6th July 2009 which was the interpartes hearing date for the Defendants application dated 20/02/2009 was taken by consent before Kihara Kariuki J. That the said application was to be heard in priority to the Plaintiff's application dated 9/12/2008 for an injunction. The Defendant contends that if their application dated 20/02/2009 was heard and determined in favour of the Defendant, then the whole of the Plaintiff's Originating Summons would be disposed of.

14. Counsel for the Defendant has contended under ground number four in support of Defendants application to set aside the exparte order of 27/04/2009 that it is a rule of practice that any application brought under Order 6 rule 13(1)(a) of the Civil Procedure Rules seeking to strike out a pleading on the ground that it discloses no cause of action or no reasonable defence, should always be heard before the full trial of the suit, or Originating Summons by virtue of Order 6 rule 13(3). Counsel has argued that the Defendant's application dated 20/02/2009, which seeks to strike out the Plaintiff's Originating Summons on grounds that this court has no jurisdiction in the matter ought to have been heard and disposed of in priority to the Plaintiff's application dated 21/04/2009.

15. Relying on the Court of Appeal decision in **The Owners of the mv Lilian S –vs- Caltex Oil [1989] KLR 1,** counsel for the Defendant argued that once the issue of jurisdiction is raised at any stage of the proceedings, the court ought, as a matter of priority, to hear and dispose of such an issue before the proceedings are taken to the next level. Counsel quoted from page 14 and 15 of the report where Nyarangi JA (as he then was) said the following regarding the issue of jurisdiction as a preliminary point at page14 as follows:-

> *"With that I return to the issue of jurisdiction and to the words of Section 20(2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no*

jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [emphasis supplied].

And at page 15 of the report the court stated the following:-

> *"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined".*

16. Counsel for the Defendant also referred the court to the Court of Appeal decision in the case of **Humphrey O. Muranda –vs- Yakobet N. Wabuko Civil Appeal No. 2006** (unreported) in which the court stated, rather categorically, the following words on the issue of jurisdiction which is raised as a preliminary issue –

> *"Before embarking on the hearing of any matter, every court must be satisfied that it has the jurisdiction ie the legal power or authority to hear the matter. If the court has that power, then and only then does it proceed to hear the matter; but if the court determines that it has no jurisdiction then as was said in the case of THE OWNERS OF THE MOTOR VESSEL "LILIAN S" VS. CALTEX OIL (KENYA) LTD. (1989) KLR 1"---- the court must down tools." [emphasis supplied].*

17. To wrap up his arguments on this important issue of jurisdiction, counsel for the Defendant submitted that a party who feels that the court has no jurisdiction is allowed by to raise it at any point during the proceedings whether such an issue was pleaded or not, and whether or not there was a formal application to amend the original pleadings. In this regard, counsel referred the court to **Said Bin Seif vs Shariff Shatry (1940) 19 KLR** (part 1) in which the question of jurisdiction was raised for the first time on appeal. The Supreme Court (Lucie-Smith J) stated as follows:-

> *"It was held in the case of **Rajlakshm Dasee vs Katyayani Dasee**, 38 Cal. 639, that if a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable; they are void and have no effect either as estoppels or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction. That being so I am of opinion that the point of jurisdiction may properly be taken in this court and must be decided."*

18. The above principles were reiterated by the Court of Appeal in **Kenya Commercial Bank –vs- Oisebe [1982] KLR 296** as well as in **Floriculture International Ltd. –vs- Central Kenya [1995-98]1 EA 61**. The following passage appearing at page 63 of the judgment is relevant.

> *"It is now well established that the originating summons procedure is available only in a limited number of cases specially provided and the procedure is designed to deal with simple matter which may be decided by the court without the expense of bringing an action and was no intended for determination of matters which involved a serious question on contested facts.*
>
> *We, therefore, find that there was no jurisdiction to entertain the originating summons as taken out and it ought to have been struck out.*
>
> *While Miss Martha Karua for the first respondent conceded and, in our opinion properly, that the Superior Court had no jurisdiction she contended that this issue not having been raised in the Superior Court, we do not have the benefit of the decision of the Superior Court. Indeed, she argued that the respondents were content not to take the point. This is true but it does not deprive this court of the power to entertain such a*

point for the first time. It has been held in the case of ***Kenindia Assurance Company Ltd. vs Otiende (1989) 2 KLR 162*** *that the normal rule that a party cannot raise for the first time on appeal a point he had failed to raise in the High Court, does not apply when the issue sought to be raised for the first time on appeal goes to jurisdiction. The court in the Kenindia case (supra) stated at 164: "But neither that admission nor the invitation can confer on the court jurisdiction when none exists."*

19. The thread that runs through the above authorities is that the issue of jurisdiction can be taken at any time during the proceedings, even when it has not been raised at the first instance, and the point must be determined ***in limine*** before any other valid orders can be made by the court. It is on the basis of the above pronouncements by the Court of Appeal that the Defendant herein is saying that the exparte order of 27/04/2009 made in pursuance of the Plaintiff's application dated 21/04/2009 must be set aside and an order made giving the Defendant's Chamber Summons application dated 20/02/2009 priority as to hearing to the Plaintiffs Chamber Summons dated 21/04/2009.

20. Counsel for the Defendant next submitted on prayer (iii) of the Defendant's Chamber Summons dated 12/05/2009 by which the Defendant sought leave of this Honourable Court to amend the Defendant's Chamber Summons dated 20/02/2009 by the addition of a further ground to the effect that this court lacks the jurisdiction to grant any of the prayers sought in the Plaintiff's Originating Summons. Referring to a number of authorities on the principles governing amendment of pleadings and in particular, the case of **British India Insurance Co. Ltd. – vs- Parmar [1966] EA 178,** counsel submitted that leave to amend pleadings ought to be granted unless the court is satisfied that the application for leave to amend is being made mala fides or that the party making the application is "*by his blunder – done some injury to his opponent which could not be compensated for by costs or otherwise*." The further principle is that as long as there is no injustice to the other side the court will not refuse to allow an amendment simply because it introduces a new case –" (see **Eastern Bakery –vs- Casteline [1958] 462).**

21. In **G.L. Baker Ltd. –vs- Midway Building etc Ltd [1958] 3 AII ER at 546,** an authority that was cited with approval in the **Eastern Bakery case,** the court said that

> *"There is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking all such amendments ought to be made "as may be necessary for the purpose of determining the real question in controversy between the parties."*

22. Counsel for the Defendant also submitted that the grounds raised by the Plaintiff in opposition to the Defendant's application dated 12/05/2009 do not hold any water. The Plaintiff has contended that the Chamber Summons dated 12/05/2009 is inter alia, incompetent and fatally defective and secondly that because the Chamber Summons is not a pleading, it is not amenable to amendment under Order 6A rules 3 and 4 of the Civil Procedure Rules. While conceding that the Defendant's Chamber Summons dated 20/02/2009 is not a pleading within the meaning of Order 6A rules 3 and 4, counsel for the Defendants submitted that since the application is also made under S. 100 of the Civil Procedure Act, this court is conferred with primary statutory power to allow the amendment prayed for. Section 100 of the Civil Procedure Act provides thus:-

> *"100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."*

23. Counsel for the Defendant further submitted that section 100 of the Civil Procedure Act is taken from the original RCS Order 28 Rule 12 of England and section 153 of the Civil Procedure Act, Cap 21 Laws of Kenya. Counsel

argued that the effect of RSC Order 28 Rule 12 is that the rule

> *"--- (rule 12) extends to defects or errors in "any proceedings". And under it every Judge and master has full power of his own motion to make any amendment which he deems necessary for the purpose of determining the real question at issue between the parties*". (The 1925 Annual Practice, page 460).

24. It would appear to me that even the amendment to the Civil Procedure Act, Cap 21, which resulted in the new section IA is based on the same principle, namely that what is important as far as the court is concerned is the determination of the real question at issue between the parties.

25. In further submissions on whether or not the Defendant's application dated 20/02/2009 is capable of amendment, counsel for the Defendant submitted that the word "proceedings" has been applied to cover a number of documents such as Answers to Interrogatories, Interrogatories and Notice of Motion which do not fall under the definition "pleading", so that, counsel argued, the invocation of Section 100 of the Civil Procedure Act in the Defendants Chamber Summons dated 12/05/2009 is sufficient to sustain the application to amend made in this case. In this regard, learned counsel relied on **Section 153 of the Code of Civil Procedure of India,** which appears at page 505 of **Starkas The Law of Civil Procedure** Volume I entitled "scope and Application which reads:-

> *"(a) Order 6 Rule 17 (of the Indian Code) is limited to amendment of pleadings but section 153 contains a general power to order any amendment ofany defect or error in any proceeding in a suit for the purposes of determining the real question or issue*, and
>
> *(b) "Proceeding" means "any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damage or for any remedial object."*

26. It is to be noted that our own Civil Procedure Act, Cap 21 does not carry a definition of the term "*proceeding*" although the term appears under Order 6A Rule 5 so that a party, such as the Defendant in this case, would have to look elsewhere for the definition if he intends to rely on the definition for purposes of his argument in support of an application. In this regard, counsel for the Defendant submitted that though the Defendant's invocation of Order 6A Rules 3 and 4 of the Civil Procedure Rules as the basis of the Defendants application to amend the Chamber Summons dated 20/02/2009 was misconceived, section 100 of the Civil Procedure Act should be sufficient to give the Defendant the much needed reprieve. In the alternative, counsel for the Defendant prays that they be allowed to amend the Defendants Chamber Summons dated 12/05/2009 by deleting the reference to Order 6A Rules 3 and 4 and substituting therefore a reference to Order 6A Rule 5 of the Civil Procedure Rules. Order 6A Rule 5 reads:-

> *"5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.*
>
> *(2) This rule shall not have any effect in relation to a judgment or order."*

27. For the proposal to amend under Order 6A Rule 5(1), counsel for the Defendant relied on Kasango J's decision in **Nyanza Spinning & Weaving Mills Ltd. –vs- Credit Bank Ltd, HCCC No. 504 of 2004.** Counsel also relied on Nyamu J's (as he then was) ruling in **Joel K. Yegon & Others –vs- John Rotich & Others, Misc. Application No. 995 of 2003.** In this latter case, objection was taken to an application on the ground that the application was brought under the wrong provisions of the law. Although the Applicant did not apply for leave to invoke the correct provisions of the law, Nyamu J (as he then was) held that a defect such as was visible in

the application before him could be cured by an appropriate application to amend, and that it is only when there is no such application for leave to amend that the defect is fatal. This was the same holding by Bosire J (as he then was) in **John Karuri & Others –vs- Investment Ltd. – HCCC No. 1575 of 1991. The John Karuri** case was cited with approval by Nyamu J (as he then was) in the **Yegon case** where the learned Judge also said that

> *"The discretion of the court cannot be sought where wrong provisions have been invoked and important steps not taken."*

Counsel for the Defendants submitted that since they have made an application to amend, their application should not suffer the fate of the **Yegon case** (above). Counsel has therefore urged the court to allow the application dated 12/05/2009 as prayed.

28. The Plaintiffs filed their written submissions on 10/08/2009 in support of their own Chamber Summons application dated 21/04/2009 and in opposition to the Defendant's Chamber Summons application dated 12/05/2009.

Plaintiffs Submissions on their Chamber Summons dated 21/04/2009

29. The Plaintiffs submitted that since the Defendant has not filed any Replying Affidavit to this application as required by Order L Rule 16(1) of the Civil Procedure Rules, the application should be assumed to be unopposed and heard ex-parte in terms of Order L Rule 16(3) of the Civil Procedure Rules which reads:-

> *"16 (3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard ex parte."*

30. In response to the Defendant's claims that directions cannot be taken because there is a pending application to strike out the suit the Plaintiffs submitted that the Defendants Chamber Summons dated 20/02/2009 does not bar the priority hearing of the Plaintiff's Chamber Summons dated 21/04/2009 as such claims by the Defendants have no legal basis. The Plaintiffs argued that it is settled law that an application to amend will always be heard before an application to strike out and that this court has unfettered power to make such directions concerning the Originating Summons as would meet the ends of justice. Plaintiff's counsel relied on the decision in **Darasa Investments Ltd. –vs- Mark Ngaina & Another (2008)e KLR** and urged the court to give directions as per the Plaintiff's Chamber Summons application dated 21/04/2009.

31. Regarding the procedure adopted by the Plaintiffs in bringing this matter to court counsel for the Plaintiffs submitted that if there is need to convert the Originating Summons into a plaint, the court can proceed to do so at the appropriate time by virtue of Order 36 Rule 10(3) of the Civil Procedure Rules. In this regard, Counsel relied on the decisions in ***Kanyenga –vs- Ombwori [2001] KLR 103, Ndatho –vs- Itumo & 2 Others [2002] 2 KLR 637 and Francis Gichara –vs- Peter Njoroge Mairu (2005)e KLR.*** The Plaintiffs contended that the Defendant have no basis for saying that the Plaintiffs' Originating Summons is incompetent and liable to be struck out. In **Boyes –s- Gathure [1969] EA 385,** it was held, inter alia, that use of the wrong procedure did not invalidate the proceedings unless such use went to jurisdiction. Counsel submitted that the conversion of Originating Summons into a plaint has been done many a time by the courts as was the case in the case of ***Re Deadman (deceased) Smith –vs- Garland & Others [1971] 2 AII ER 101.*** In **Anthony Chinedu Ifedigbo –vs- Joyce Akinyi – NRb HCCC No. 10 of 2008 (OS) (Unreported),** the court refused to strike out an Originating Summons on grounds that it had been brought by way of a wrong procedure.

32. Counsel for the Plaintiff contested the Defendant's allegations that an Originating Summon is not the procedure to be followed when a party is pursuing questions of fact. Plaintifft's counsel argued that Order 36 rule 10 of the Civil Procedure Rule clearly provides for the conversion of an Originating summon to a plaint in circumstances where the facts of the case are not disputed and that more importantly, the Court of Appeal has now clarified the position that an action on adverse possession and breach of trust must be commenced by way of an Originating

Summon and not by plant. In ***Kanyenga –vs- Ombwori*** (supra) it was held, inter alia, that

> *"By virtue of Order 36 rule 3D of the Civil Procedure Rule, claims for adverse possession are brought by way originating summons. Failure to comply with this mandatory provision makes a suit contestably bad in law."*

and that an order for adverse possession can only be made to a party who complies with Order 36 rule 3D of the Civil Procedure Rules. (Also see ***Ndatho –vs- It case*** (above).

33. On the power to strike out, counsel for the Plaintiffs submitted that the court must act cautiously when exercising such power, and only then in circumstances where the action is so hopeless that it cannot be cured by amendment. This was the position held by the Court of Appeal in the case of ***D.T. Dobie and (Company (Kenya) Ltd –vs- Muchina [1982] KLR I.*** Counsel submitted that if the Plaintiff's application were allowed, the court would be allowing the Plaintiff to convert the Originating Summons into a plaint as provided by the rules and that eventually, no prejudice would accrue to the Defendant if the Plaintiff's application was allowed, with possibilities presenting themselves to the Defendant to make whatever applications the Defendant would wish to make to strike out the suit. In summary the Plaintiff's counsel submitted that the Defendant contention that the Plaintiff's suit does not or has not established a reasonable cause of action is a matter that can only be canvassed at a full hearing and further that the Defendant's application to strike out the Plaintiff's suit is not based on want of jurisdiction. The Plaintiff's believe that the Defendant's application is an afterthought and have asked the court to dismiss the Defendant's said application. The Plaintiffs also submitted that the Defendant's application dated 20/02/2009 is premature and an abuse of the court process because directions on the Originating Summons are yet to be taken under order 36 rules 8A. 9, 10 & 12 and Order I rule 8(1) (2) and (3) of the Civil Procedure Rules. In this regard counsel for the Plaintiffs cited the case of ***Teresia Njoki V Trufosa Njeru [2005] e KLR*** in which the court (Lenaola J) held that an appeal from the subordinate court could only be dismissed after directions in the appeal had been taken. Counsel for the Plaintiff urged the court to draw a parallel between the procedure for an Originating Summons and that of appeals from the subordinate courts to the High court on the issue of taking of directions and to find that the Defendant's application cannot stand.

34. From the above, the Plaintiff's main arguments on their chamber summons application dated 21/04/2009 are that the application should succeed for reasons that

    (a) There is no replying affidavit in opposition to the application;

    (b) Directions in the matter are yet to be taken and that until such directions are taken, any application to strike out is premature.

    *(c) The Plaintiffs have adopted the correct procedure in bringing their claim for adverse possession before this court as held in **Kanyenga –vs- Ombwori** (above)*

    (d) The power to strike out, though discretionary must be exercised with caution and that only then in the clearest of cases, and that this is not one such clear case lending itself to being struck out.

Plaintiff's Submissions on the Defendant's Chamber Summons dated 12/05/2009

35. The Plaintiff's main contention against this application is that since the application is not a pleading under the provisions of section 2 of the Civil Procedure Act Cap 21 Laws of Kenya, it cannot be amended under Order 6A rules 3 and 4 of the Civil procedure Rule or at all. Counsel for the Plaintiffs relied on ***Kanti & Co. Ltd –vs- South British Insurance Co. Ltd [1981] e KLR.*** In the case, the Defendant who had entered an appearance to

the suit attempted to arrogate or annul the memorandum of appearance by entering an amended appearance under protest, and without an order of the court releasing him from his admission and acceptance of the court's jurisdiction. The Court of Appeal held, inter alia, that the statutory definition of a pleading under the Civil Procedure Act does not include appearance as a pleading. Plaintiffs counsel has argued that a chamber summon, which the Defendants have sought to amend falls in the same category of not being a pleading and as such the Defendant's application should be refused. In ***Board of Governors, Nairobi School –vs- Getah (***1999) LLR 4130 (CAK), the Court of Appeal specifically stated at page 2 of the judgment that a chamber summon is not a pleading within the meaning of the term in the Civil Procedure Act and the Rules made thereunder. The reason given by the court in making these remarks was that "*Chamber Summons is not a manner prescribed for instituting suits"*. The court also said that 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." Counsel for the Plaintiffs submitted further and said that in

England the term "*pleading*" does not include "summons".

36. Plaintiff's counsel also argued that Order 6A rules 3 and 4 of the Civil Procedure Rules makes provision for amendment of pleadings and not applications, and that the Defendant admits as much. That in the circumstances, the Defendant's application for amendment of the chamber summons is incompetent and fatally defective and cannot be cured by section 3A or 100 of the Civil Procedure Act. These 2 sections deal with the inherent power of the Honourable Court to make such orders as would meet the ends of justice (see **Joel K. Yegon & 4 Others case** (above) in which Nyamu J (as he then was) held that where wrong provisions of the law are invoked, Order 50 rule 12 of the Civil Procedure Rules cannot cure the defect "*as there is a world of difference between failing to cite the provisions under which an application is brought and citing wrong provisions*". The learned Judge went a head to find the application incompetent, and to strike it out.

37. Plaintiff's counsel further argued that the Defendant attempt to rely upon the RSC Order 28 Rule 12 is futile exercise for the reasons that Section 100 of the Civil Procedure Act does not include amendment of applications, and that if applications were intended to be included both the legislature and the Rules Committee would have made a specific provision to that effect. Plaintiff's counsel buttressed his arguments by pointing out that neither the Civil Procedure Act nor the Interpretation of General Provisions Act, Cap 2 of the Laws of Kenya, has a definition of the term "*proceeding*". In **Mohamed vs. K & A Self Selection Stores Ltd & 3 Others (2004) e KLR** the Court defined the word "*proceedings*" thus:-

> *"Proceedings I would define to be the business done or carried out before a court. Proceedings can also be the re cord of all attendance and steps taken in an action or suit."*

Counsel urged the court to find that whichever way the defendants may choose to look, they cannot succeed on their application.

38. Counsel for the Plaintiff also argued that based on the courts holding in **Pemcloth Enterprises Limited vs. Peter [1976-80] I KLR 95**, reliance upon foreign decisions by the Defendant in this case should be frowned upon. Counsel for the Plaintiff also took objection to the Defendant's attempts to further amend its application during submissions by seeking to take cover under the provisions of Order 6 Rules 6 of the Civil Procedure Rule which provides:-

> *"6 (1) No party may in any pleadings make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.*

2. Subrule (1) shall not prejudice the right of a party to amend or apply for leave to amend his previous pleadings so as to plead the allegation or claims in the alternative.

39. Counsel for the Plaintiff contended that one point regarding the Defendant's application is clear – that the Chamber summons cannot be amended, and that what the Defendant needs to do is to humbly withdraw the said application and file a fresh application. Such a step would, in the view of counsel for the Plaintiffs pave the way for the taking of directions in the matter. Counsel also argued that if the Defendant was aggrieved by the court's order of 27th April, 2009 directing that the Plaintiff's chamber summons application dated 21/4/2009 be heard in priority to the defendant's application he should have filed an application for review under section 80 of the Civil Procedure Act or appealed against the ruling. It was submitted that in the absence of such steps taken by the defendant, the Defendant's instant application should fail. Taking the argument further on a possible application for review by the Defendant counsel for the Plaintiff's submitted that there is infact no error in the proceedings of 27th April, 2009 that would warrant the grant of an order or review. Counsel argued that whether or not the order of 27th April, 2009 ought to have been made cannot possibly be a ground for review or setting aside. The principle that is applicable in applications for review was stated in **John Francis Muyodi vs. ICDC & Another (2006) e KLR** at page 5 hereof as follows:-

> *"In **NYAMOGO AND MYAMOGO vs. KOGO [2001] EA 174** this court said that an error appearing on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness, inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two points of opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal."*

40. There is no doubt in my mind that the above principle of law, so well stated is applicable in this case. Plaintiff's counsel submitted that the Defendant has not made any claim throughout its submissions that the direction for priority hearing of the application is an error on a substantial point of law that stares one in the face, and therefore counsel prays for the dismissal of the Defendant's application.

41. I have carefully considered the Plaintiff's submissions and all the authorities cited in support of the Plaintiff's application dated 21st April, 2009. I have also carefully considered the Defendant's submissions and all the authorities cited in support of the Defendant's application dated 12th May, 2009. I have also considered all the submissions in opposition to the respective applications. At the outset I want to commend counsel for their detailed research and spirited fight that was so evident from the written submissions filed in court in support of their respective clients' position.

42. Applying the principles which I have gleaned from all the authorities cited and set the same out earlier in this ruling, I am persuaded that the Plaintiff's chamber Summons application dated 21/04/2009 has merit. The Plaintiff's have demonstrated to the court that there is need to substitute the 2nd and 3rd Plaintiffs. A need to amend has therefore arisen. If the Originating Summons were to be struck out before the said amendment is done, the whole of the Plaintiffs case would be prejudiced based as it on a claim for adverse possession. And until and unless directions on the Originating Summons are taken, it would be premature to allow the said

Originating Summons to be struck out.

43. Secondly, it is trite law that the court's power to strike out must be exercised only in the most plain cases, but from the circumstances of this case, I do not think that either the Defendant or anybody else can say that this is a very plain case in which the court can exercise its discretion to strike out the Plaintiffs' Originating Summons. There is a possibility that with some amendment the Plaintiff's pleadings could be salvaged. In any event, it is the policy of the court and a rule of natural justice that courts should hear the cases that come before them on their merits and not adopt summary procedure for dealing with litigation. For these reasons I would accordingly allow the Plaintiff's chamber summons application dated 21/04/2009 in terms of prayers 2, 3, 4, 5 and 6 thereof. The costs of the said application shall be in the cause.

44. As regards the Defendant's application dated 12/05/2009, and in light of the decision I have reached regarding the Plaintiff's application dated 21/04/2009, I would dismiss the Defendant's said application. The Plaintiff put forth many convincing arguments why the Defendant's application should fail. I am persuaded by these arguments. The Defendant has not proved that there is an error on the face of the record of 27/04/2009 that stares one in the face and though the Defendant also put up many counter arguments, I find that the tide in this case is moving strongly against the Defendant's application, which application in my view was filed prematurely. The defendant argued that because a point of law has been raised by their application, they should be heard first but as noted above, to hear the defendant's application before the preliminary steps have been taken with regard to the plaintiffs application dated 21/04/2009 would be draconian and an affront to the rules of natural justice. At the opportune moment the Defendant can still move the court to have the Plaintiff's Originating Summons, after it is duly amended struck out. As for the Defendant's plea to amend the Chamber Summons dated 20/02/2009 the court finds that the law does not allow such amendment. Accordingly and for the above reasons, the Defendant's application dated 12/05/2009 is dismissed with no order as to order.

Orders accordingly.

DATED and delivered at Nairobi this 19th day February, 2010

R. SITATI

JUDGE

Delivered in the presence of:-

Mr. Anzala (present) for the Plaintiff

Mr. Amoko (present) For the Defendant

Weche – court clerk