



1. ATHUMANI M. BUNDO.....1<sup>ST</sup> PLAINTIFF

2. SAIDI R. SHABAN.....2<sup>ND</sup> PLAINTIFF

VERSUS

SHIYATOR HOLDINGS LTD.....DEFENDANT

## RULING

The defendant has by its Notice of Preliminary Objection dated 26<sup>th</sup> November 2008 sought the dismissal of the plaintiff's Originating Summons filed on 27<sup>th</sup> September 2009 on the following grounds:-

- 1) **That the court does not have jurisdiction to entertain the suit.**
- 2) **That the Originating Summons has not been commenced as required by Order XXXVI Rule 3D of the Civil Procedure Rules.**
- 3) **That the suit is an abuse of the process of the court.**

The Preliminary Objection was canvassed before me on 25<sup>th</sup> September 2009 by Mr. Mwenesi, Learned Counsel for the defendant and Mr. Muthama, Learned Counsel for the plaintiff. In his submission before me, Mr. Mwenesi contended that the Originating Summons is incompetent for failure to annex an extract of the title claimed as mandatorily required by Order XXXVI Rule 3D of the Civil Procedure Rules. Counsel further submitted that the suit land had been the subject of previous proceedings being HCCC No. 266 of 2007 and the Originating Summons is therefore *Res Judicata*.

Finally, counsel stated that the defendant had legal occupation of the suit property and the Commissioner of Lands had confirmed that position in documents availed to the court. In the premises, counsel opined that the Originating Summons was defective, incompetent and an abuse of the court process.

Mr. Muthama did not agree. He contended that the Certificate of Postal Search annexed to one of the supporting affidavits is infact an extract of title within the meaning of Order XXXVI Rule 3D (2) of the Civil Procedure Rules. He further submitted that the plaintiffs had done more than merely annex the Certificate of Postal Search; they had infact annexed a copy of the title itself. With regard to the plea of *Res Judicata*, counsel contended that the same was not available to the defendant because the previous suit involved different parties although the dispute was over the same suit land. In the premises, counsel urged the dismissal of the Preliminary Objection.

I have considered the Originating Summons, the affidavits filed and the annexures thereto. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. Order XXXVI Rule 3D (2) reads as follows:-

**“2. The Summons shall be supported by an affidavit to which a certified extract of title to the land in question has been annexed.”**

Extract of title is not defined in the Civil Procedure Rules and the Registration Titles Act. However, in my view, it merely means evidence of the registration of the title. The plaintiffs have annexed a Certificate of Postal Search duly signed by the Registrar of Titles. The Search was carried out on 15<sup>th</sup> August 2006. It contains particulars of the suit title extracted from the register of the suit title. To my mind the Certificate of Postal Search is indeed an extract of title and satisfies the requirements of Order XXXVI Rule 3D (2) of the Civil Procedure Rules. In **Ali – v – Kenya Commercial Bank Limited [Civil Application No. NAI 165 of 1999 KSM 14/99] (UR)**, Akiwumi J, as he then was observed as follows:-

**“Rules are hand maidens of this court but we must be careful that hand maidens do not become mistresses.”**

In this case, the parties are not in doubt as to which title is in dispute. The Postal Search merely confirms what the parties already know. The plaintiffs have exhibited a copy of the title itself. It may not be certified but there is no allegation that it is not indeed a copy of the original title. The requirement of exhibiting an extract of title is intended to safeguard proper adjudication by the court over title because on occasions an Originating Summons may proceed ex parte. Indeed, originally, the procedure of Originating Summons was designed for simple disputes which could be adjudicated upon in a summary manner. In which event the court had to be assured that it was dealing with the correct title. The mischief intended to be prevented by exhibiting an extract of title is absent in this case as all the parties know the title over which they seek a decision of the court. In the premises, I have most unfortunately and with trepidation departed from the view held by my most eminent and lucid brother Njagi J, in **Alfan Rashid Baku – v – Shiyator Holdings Limited [HCCC No. 266 of 2007] (UR)**. In that case the Learned Judge held that a search certificate does not satisfy the requirements of Order XXXVI Rule 3D (2) of the Civil Procedure Rules.

With regard to the plea of *Res Judicata* by reason of the said HCCC No. 266 of 2007, I am afraid the plea is not available as a defence to the defendant. I say so because the said former suit was not determined on merits and the plaintiffs were not joined as parties. It is also not alleged that the plaintiffs herein could have claimed under the plaintiffs in the former suit. The principle of *Res Judicata* as set out in section 7 of the Civil Procedure Act does not therefore apply. The section reads as follows:-

**“7. No court shall try any suit or issue on which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigation under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

It is plain therefore that for the plea of *Res Judicata* to succeed, the former suit must have been between the same parties or parties under or through whom they or any of them claim. The issue in dispute must be the same or substantially the same as in the former suit and the suit must have been heard and finally decided. Those conditions have not been satisfied by the defendant and the principle therefore has no application herein.

Finally, I keep in mind that a preliminary objection raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion (see **Mukisa Biscuit Company – v – Westend Distributors [1969] E.A. 696**).

The defendant herein has not canvassed its preliminary objection on that basis. The facts were not agreed and a determination of the plea of *res judicata* necessarily involved ascertaining of facts which were not admitted.

I am also alive to the fact that striking out a pleading is a drastic remedy and may be invoked only in plain and obvious cases. As stated by Madan J.A., as he then was in **D.T. Dobie – v – Muchina [1982] KLR 1**

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

The upshot is that, the defendant’s Preliminary Objection is overruled.

Costs shall be in the cause.

Order accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF OCTOBER 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Ngigi holding brief for Muthama for the Plaintiff and Abed holding brief for Mwenesi for the Defendant.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> OCTOBER 2009**