

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 191 of 2008

JAMES TOROITICH KEITANY.....PLAINTIFF

VERSUS

VIJAY MORJARIA.....DEFENDANT

RULING

The claim in this suit relates to the dispute between the plaintiff and the defendant over the ownership of the piece of land known as **Title No. Nakuru/Kapsita/1089** (the suit land). The defendant claims to have bought it from the plaintiff while the plaintiff claims he only gave it to the defendant as security for a loan made by the defendant to one Moses K. Kabergey.

In pursuit of his alleged claim that he bought the suit land from the plaintiff, the defendant filed an Originating Summons in Nakuru CMCC No. 20 of 2008 (OS) to compel the plaintiff to surrender a copy of his pin certificate to facilitate the transfer. Upon being served with the summons to enter appearance in this case, the defendant has now applied under **Section 18** of the **Civil Procedure Act** and **Order 11 Rule 1** of the **Civil Procedure Rules** for the transfer of that OS to this court and consolidation with this suit as the two suits relate to the same dispute over the suit land. The plaintiff strongly opposes the application on the grounds that the OS having been filed in a court which has no jurisdiction to determine it, this court cannot transfer it to itself. He further contends that the claim could not be litigated in an OS in the first place.

It common ground that the suit land is registered under the **Registered Land Act Cap 300** of the **Laws of Kenya**. **Section 159** of that Act provides that:-

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease, or charge being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds by the Resident Magistrate’s court or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act in accordance with that Act.”

I know that the pecuniary jurisdiction of the subordinate courts has been increased from time to time. If my recollection is right the maximum pecuniary jurisdiction of the subordinate court is Kshs.3 million. I do not know if the Nakuru Chief Magistrate has jurisdiction upto that amount but the value of the friendly loan as is clear from the defendant’s own lawyer’s letter dated 14th December, 2005 is Kshs. 5,650,000/= . It is therefore clear from the above provision that the Chief Magistrate’s Court before in which the OS is filed has no jurisdiction to try this dispute. A suit which is filed in a court without jurisdiction is a nullity- **Charles Wainaina Njehia Vs Barclays Bank of Kenya Ltd [2006] eKLR** and there is no jurisdiction to transfer it to another court-**Nyandundo Primary School & Another Vs Stephen Waweru, Civil Appeal No. 179 of 1999** and **Adero Anuthen & Another Vs Ulinzi Sacco Society Ltd [2000] 1 KLR 577**.

Besides the OS being a nullity for lack of jurisdiction of the court in which it is filed, in view of the disputed facts in this case, an OS is not the right forum to try the matter. This is because the scope and general purpose of the procedure by way of originating summons is limited. As Spry, J.A. stated in **Bhari**

Vs Khan [1965] EA 94 at page 101 that: “the whole object of Order 36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit.”

Sir Ralph Windham, CJ had, in **Mohamed Vs Saldanha, Kenya Supreme Court (Mombasa) Civil Case No. 253 of 1953 (unreported)** stated the limited scope of the procedure of originating summons in the following terms:-

“Such procedure is primarily designed for the summary and ‘ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the courts’ own executive officers. That dispatch is an object of the proceedings is shown by Order 36 which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court.”

As was stated by the Court of Appeal in **Kenya Commercial Bank Ltd Vs Osebe [1982-88] 1 KAR 48 at p. 51** “...the originating summons procedure is not for the purpose of obtaining decisions on disputed questions of fact.” “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.”—**James Njoro Kibutiri Vs Elius Njau Kibutiri [1982-88] 1 KAR 60 at p. 61.**

For these reasons I find no merit in this application and I accordingly dismiss it with costs.

DATED and delivered this 18th day of November, 2009.

D. K. MARAGA

JUDGE.