



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

**Civil Suit 702 of 2003**

**NG'ANG'A KAHUHA..... PLAINTIFF**

**VERSUS**

**MUNYI KAHUHA.....DEFENDANT**

**RULING**

This Ruling relates to a preliminary objection dated 15.03.04 and filed on 16.03.04 by the defendant contending that the suit brought by the plaintiff:

**'...does not lie, is misconceived, incompetent and fatally defective'**

and that it should be struck out with costs.

At the hearing of the preliminary objection on 29.01.08, the defendant, who is the applicant by virtue of his preliminary objection, was represented by learned counsel, Mr A.O. Wandago.

Defendant's/applicant's counsel raised the following two issues:-

a) Adverse possession

Under this sub-head, defendant's/applicant's counsel submitted that in so far as the suit is based on adverse possession as the cause of action, the said suit is fatally defective by virtue of the provisions of Order XXXVI rule 3D of the Civil Procedure Rules providing for a mandatory procedure by way of originating summons supported by an affidavit to which a certified extract of the title to the land in question has been annexed. It was the defendant's/applicant's case that as no extract of title to the suit land was annexed to the instrument bringing the suit filed by way of plaint, the suit is fatally defective for breaching the mandatory provisions of Order XXXVI rule 3D aforesaid. Defendant's/applicant's counsel cited Ngethe –vs- Gitau & Another [1999] 1E.A. 225 where the Kenya Court of Appeal comprising 3 Judges held that it was a mandatory requirement of Order XXXVI rule 3 D that a claim based on adverse possession under the Limitation of Actions Act (Cap.22) be commenced by way of an originating summons. Defendant's/applicant's counsel also relied on Kenyenga –vs- Ombwori [2001] KLR 103 in which the Kenya Court of Appeal in a 3 – Judge Bench, differently composed, drew a similar conclusion in the following terms:

**'Held:**

**(2) By virtue of Order 36 rule 3D of the Civil Procedure Rules, claims for adverse possession are brought by way of originating summons. Failure to comply with this mandatory provision makes a suit incontestably bad in law.'**

b) Trust

Under this head, defendant's/applicant's counsel submitted that in so far as the cause of action is also based on trust, the suit is likewise incurably bad and that the court lacks jurisdiction to entertain it. He relied for this proposition on Order XXXVI rule 5A to the effect that an application for an order under the Trustee Act (Cap.167) shall be made by originating summons. Defendant's/applicant's counsel also cited Loise Wanja Kibutiri –vs- James Njoro Kibutiri & Eliud Njau Kibutiri, HCCC No.3610 of 1983 to make the point that since the suit is stated, vide paragraph 15 of the plaint, to be also based on trust, it ought equally to have been commenced by way of originating summons.

Defendant's/applicant's counsel urged the court to strike out the present suit as being incurably defective.

On the other hand, plaintiff's/respondent's counsel countered the preliminary objection as follows:-

a) Jurisdiction

Under this sub-head, plaintiff's/respondent's counsel submitted that the objection to the court's jurisdiction was brought late in the day. In counsel's view, the defendant had conceded to the court's jurisdiction by filing chamber summons application dated 27.09.04 on 28.09.04 under Order XXXIX for temporary injunction. Plaintiff's/respondent's counsel pointed out that the notice of preliminary objection dated 15.03.04 was filed on 16.03.04, i.e. 6 months before the defendant's application of 27.09.04 for injunction, and that by filing the application for injunction before his preliminary objection filed earlier had been heard and determined, the defendant had conceded the court's jurisdiction.

b) Adverse possession

Under this sub-head, plaintiff's/respondent's counsel submitted that the suit is not based merely on a claim for adverse possession. Counsel said the plaintiff seeks a declaratory order that his interest in the suit land be recognized. Counsel pointed out that under Order II rule 7, no objection can be raised to a suit for a declaration. He contended that the claim on adverse possession is prayer 2 which is alternative to prayer 1 for a declaration that the defendant holds half share of the suit land in trust and for the benefit of the plaintiff. Counsel contended that the declaration sought is based on Kikuyu customary land rights, which can be brought by way of plaint. Plaintiff's/respondent's counsel cited Gathiba –vs- Gathiba KLR [E & L] 1 in which the High Court, *inter alia*, held that Kikuyu customary law contains the concept of a trust or a resulting trust within its jurisprudence as demanded by sections 48 and 51 of the Evidence Act (Cap. 80).

c) Trust

Under this sub-head, plaintiff's/respondent's counsel contended that Order XXXVI rule 3 D specifies the types of claims based on trust that must be brought by way of originating summons and that such claims do not include Kikuyu customary interest in land based on trust. With regard to Order XXXVI rule 5A, plaintiff's/respondent's counsel submitted that it applies only to applications under the Trustee Act and that the present action was not brought under the Trustee Act.

d) General

Under this sub-head, plaintiff's/applicant's counsel faulted the preliminary objection on the basis that it gave no particulars and that it is, therefore, defective. In support of that proposition he cited Kashbhai –vs- Sempagawa [1967] E.A. 16. The case was decided by the High Court of Uganda. In that case the defendant had pleaded that the plaint was bad in law and did not disclose any cause of action and that the action was brought out of time. The court held that the plaintiff was entitled to know particulars of what the defendant's objection was. Accordingly, the court ordered the defendant to furnish the plaintiff with further and better particulars of the written statement of defence. In the present case, plaintiff's/respondent's counsel also pointed out that a preliminary objection cannot be raised if any fact is to be ascertained. He pointed out that in this case there is an issue to be ascertained, i.e. whether the

plaintiff has an interest in the land based on Kikuyu customary law, which is an issue of fact. Plaintiff's/respondent's counsel pointed out that striking out a suit is a drastic action and should be invoked only in plain and obvious cases, which in his view is not the case here. He asked that the preliminary objection be dismissed with costs to the plaintiff.

In reply, defendant's/applicant's counsel pointed out that a preliminary objection can be raised at any time of the proceedings and that the fact of a party having argued an application in a suit does not bar that party from raising a preliminary objection on a pure point of law. He noted that a pure point of law can be raised even by the court itself and that in Kenyenga's case (*supra*) the point of law was raised in the Court of Appeal and was entertained. With regard to particulars of the preliminary objection, defendant's/applicant's counsel said that the issue previously arose when this matter went before Rawal, J on 15.01.07 and he, defendant's/applicant's counsel, explained the nature and details of the preliminary objection in the presence of plaintiff's/respondent's counsel's assistant, Mrs Kawere. Defendant's/applicant's counsel added that he had also verbally explained details of the preliminary objection to plaintiff's/respondent's counsel outside this court before the hearing before started before me on 29.01.08. In defendant's/applicant's view, plaintiff's/respondent's counsel was estopped from raising the issue of particulars of the preliminary objection. With regard to Order XXXVI rule 5A, defendant's/applicant's counsel submitted that it does not expressly exclude customary law trust cases and that in any case the trust disclosed by the plaint is a resulting trust based on contribution towards the purchase price of the suit property. In counsel's view, Order XXXVI rule 5A applies to the present case and that, therefore, the suit ought to have been commenced by way of originating summons.

On the issue of declaratory suit, defendant's/applicant's counsel submitted that Order II rule 7 does not apply to the present suit as the said suit is for declaration of trust and that it also seeks specific order for transfer of the plaintiff's share of the suit land to him. In counsel's view, the present suit is not the type envisaged by Order II rule 7 but a suit envisaged by Order XXXVI rule 3D.

Regarding plaintiff's/respondent's submission that striking out of a suit is a drastic remedy, defendant's/applicant's counsel agreed that it is indeed a drastic remedy but submitted that it applies where the court is to exercise discretion. He submitted that in the present case, if the court finds it has no jurisdiction, it will have no discretion to exercise on whether to proceed with the suit, i.e. the court will have no option but to strike out the suit.

With regard to Gathiba's case (*supra*) defendant's/applicant's counsel submitted, firstly, that it was a decision of the High Court and, therefore, not binding on this court. Secondly, that the issue of jurisdiction did not arise in Gathiba's case. He said the trust in issue in Gathiba's case was a customary trust while the trust in the present case is a resulting trust. In his view, Gathiba's case is distinguishable from the present case.

Defendant's/applicant's counsel asked this court to be persuaded by Loise Wanja Kibutiri's case (*supra*) and reiterated that the court should uphold the preliminary objection.

I have given due consideration to the rival submissions of the parties.

It was contended by plaintiff's/respondent's counsel that the objection to the court's jurisdiction came late in the day, that the defendant/applicant filed his notice of preliminary objection on 16.03.04 but some 6 months later, i.e. on 28.09.04, he filed a chamber summons application seeking interim restraining orders from the same court whose jurisdiction he had purported to challenge vide his notice of preliminary objection filed on 16.03.04, and apparently before the challenge to jurisdiction had been adjudicated upon. Plaintiff's/respondent's counsel urged this court to deem the defendant/applicant as having, by filing the chamber summons on 28.09.04, conceded the jurisdiction of the court. In this connection, I note from paragraph 18 of the plaint filed on 10.07.03 that the plaintiff acknowledged the court's jurisdiction and the defendant, *inter alia*, admitted the jurisdiction pleaded vide paragraph 2 of his defence and counter-claim filed on 02.09.03! Interestingly, the notice of preliminary objection is silent on the defendant's/applicant's earlier admission of the court's jurisdiction. Had he forgotten about the admission when filing the notice of preliminary objection? If the defendant/applicant was serious in his

challenge of the court's jurisdiction as per the notice of preliminary objection filed on 16.03.04 and if it were to turn out that the court had no jurisdiction but the court nevertheless granted the interim restraining orders sought vide the chamber summons filed on 28.09.04, where would such restraining orders get their validity from? For the record, the defendant's/applicant's chamber summons application filed on 28.09.04 for interim restraining orders was dismissed by Mugo, J on 18.02.05 for lacking merit.

Be that as it may, the crucial question here is whether the defendant's/applicant's earlier express admission of the court's jurisdiction would confer jurisdiction on the court if under the law the court lacked jurisdiction? I answer the question in the negative as I hold that jurisdiction is conferred by operation of law.

Did the defendant/applicant raise the issue of jurisdiction too late? I also answer this question in the negative. Jurisdiction is everything and if it turns out to be an issue in court proceedings, it has to be addressed regardless of the stage of the proceedings. Nevertheless, jurisdiction ought to be raised at the earliest possible opportunity: see Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1. In the present case, the issue of jurisdiction has been pursued belatedly but I must consider it all the same. Note should be taken that even the court can raise the issue of jurisdiction *suo motu*.

The main suit herein is yet to be heard, so no concrete evidence on the substantive issues in contention has been tendered before court. According to the plaint and verifying affidavit in support thereof, the plaintiff and defendant are brothers. The plaintiff claims that he came from detention in 1959 and moved to his 1½ - acre plot in Ndenderu New Town and began building a house on ¼ acre of that plot and that one Mbugua Wangai asked for the 1½ - acre plot together with the house in exchange for a 3.8 acres of the said Mbugua Wangai's 3.8 acre land known as Kiambaa/Ruaka/104. Under the deal, the plaintiff was also to pay Mbugua Wangai Kshs.2,600/= for his 3.8 - acre plot. The plaintiff further claims that since he could not be registered as proprietor of Kiambaa/Ruaka/104 because he had been a Mau Mau freedom fighter, it was agreed by the parties' entire family that the defendant be registered as proprietor of Kiambaa/Ruaka/104 in trust for the plaintiff and his mother who (i.e. the mother) also could not be registered as proprietor. Plaintiff adds that he, defendant and their mother lived peacefully on Kiambaa/Ruaka/104 until 1962 when the mother died. Then problems arose between plaintiff and defendant. Arising from the aforesaid problems, the plaintiff averred vide paragraph 15 of his plaint as under.

**'15. The plaintiff's claim is therefore for orders that the Defendant holds ½ share of the land in trust for the Plaintiff, and/or that the Plaintiff has acquired title to the land by prescription thus the Defendant ought to be ordered to transfer ½ of the land to the Plaintiff, the register be rectified and the Plaintiff be issued with a title deed.'**

The plaintiff prayed for the following orders:-

- a) A declaration that the defendant holds a half share of the land parcel known as Kiambaa/Ruaka/104 in trust and for the benefit of the plaintiff.
- b) A declaration that the plaintiff has acquired ½ share of the land known as Kiambaa/Ruaka/104.
- c) An order directing the defendant to execute a transfer of ½ share of the land known as Kiambaa/Ruaka/104 in favour of the plaintiff.
- d) Costs of the suit.

In response to a submission to the effect that the prayer based on adverse possession brings the present action within the ambit of Order XXXVI rule 3D requiring mandatorily for the action to be brought by way of originating summons, plaintiff/respondent countered that the prayer based on adverse possession is prayer 2, i.e. prayer (b), which is alternative to prayer 1, i.e. prayer (a), based on trust. Plaintiff respondent elaborated that prayer (a) is based on Kikuyu customary land rights but I can tell him that he

jumped the gun since at this stage no evidence has been tendered before court relating to Kikuyu customary land rights. At this moment in time, the principal substantive prayer seems to be prayer (a) which is based on trust. Defendant's/applicant's counsel contended that the plaintiff's claim based on trust cannot lie because it contravenes Order XXXVI rule 5A which he said mandatorily requires such claim to be brought by way of originating summons. The said rule 5A is in the following terms:

**'5A. An application for an order under the Trustee Act shall be made by originating summons returnable before the judge sitting in chambers: and the settlor and any other person who provided property for the purposes of the trusts in question shall, if still alive and not an applicant and unless a judge summons in addition to any other persons who are necessary and proper respondents thereto.'**

In the present case, there is no application for an order under the Trustee Act. I do not, therefore, see how the Trustee Act comes in. The principal aspect of the action seems to be based on the general or common law of trusts and not tied to the Trustee Act. I find Order XXXVI rule 5A inapplicable to the case before me and hold that the mandatory requirement in rule 5A for an application under the Trustee Act to be brought by way of originating summons is alien to the present proceedings, i.e. the plaintiff's claim based on trust did not have to be mandatorily brought by way of originating summons.

Prayer (b) based on adverse possession seems in the circumstances of this case as disclosed so far is alternative to prayer (a) based on trust. Prayer (a) seems to be the principal substantive prayer and it should in my respectful view be the one to determine the ruling procedure under which the present action ought to be brought. The defendant has, in his defence and counter-claim filed on 02.09.03, denied holding the suit land in trust for the plaintiff. A determination on the issue will depend on evidence to be tendered relating thereto. The court will upon hearing evidence on the matter have to make a finding of fact as to whether or not the defendant holds half share of the suit land in trust and for the benefit of the plaintiff. In the latter regard, attention is drawn to the following observations of Law, J.A. in Mukisa Biscuit Manufacturing Co. Ltd. – vs – West End Distributors Ltd [1969] E.A. 696 (at page 701):

**' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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.'**

I respectfully associate myself with Law, JA's above observations.

The matters raised by the present action revolving around trust are complex. As I understand it, the procedure by way of originating summons is intended for comparatively simple and straight forward cases. The present case is not one of such cases. I note that Order XXXVI rule 10 empowers the court to allow proceedings started by way of originating summons to be continued as if the cause had been begun by filing a plaint. I am not, however, aware of a provision for the reverse procedure. This seems to reinforce the view that if a matter is complex and requires to be adjudicated upon via the filing of a plaint, it would be inappropriate for it to be adjudicated upon under the comparatively simpler procedure by way of originating summons.

The upshot is that I find the preliminary objection to be without merit and the same is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 27<sup>th</sup> day of February, 2008.**

**B.P. KUBO**

**JUDGE**