



**Eshitemi v Abdiwahab & another (Enviromental and Land Originating Summons
18 of 2020) [2022] KEELC 13723 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 18 OF 2020**

**JO MBOYA, J
OCTOBER 19, 2022**

BETWEEN

SIMON ESHITEMI APPLICANT

AND

ABDULLAHI SHARIF ABDIWAHAB 1ST RESPONDENT

ABDULLAHI ABDILATIF BASHIR 2ND RESPONDENT

JUDGMENT

1. Vide the Originating Summons Application dated the January 28, 2020, the Plaintiff/Applicant herein has approached the Honourable court seeking for the following Reliefs;
 - i. That Simon Eshitemi and Jeremiah Odera EShitem (deceased), having been Defrauded of Parcel of Land LR NO 36/75/1 are entitled to the transfer of the same as Tenants in Common in Equal Shares.
 - ii. That Simon Eshitemi and the Representatives of Jeremiah Odera Eshitemi are entitled to assume Full ownership and the Title to Parcel of Land LR NO 36/75/1.
 - iii. That Costs of this Application be borne by the Respondents;
2. The Originating Summons herein is anchored on the Grounds enumerated in the body thereof and same is further supported by the affidavit of the Applicant sworn on the January 28, 2020 and to which the Applicant has annexed a total of 8 annexures thereto.
3. On the other hand, upon being served with the Originating Summons herein, the Respondent duly entered appearance on the February 14, 2020 and thereafter filed a Replying affidavit sworn by the 1st Respondent on the July 22, 2020. For clarity, the Replying affidavit herein has exhibited and attached a total of 5 documents in support thereof.



4. Despite the averments contained in the Replying affidavit, there is no evidence as to whether the Applicant herein ever filed any Rejoinder/Further affidavit to respond to or to answer allegations contained in the Replying affidavit.
5. Be that as it may, the Pleadings in respect of the subject matter closed and directions were thereafter given pertaining to the manner/mode of disposing of the subject originating summons.

Deposition By The Parfties:

- a. The Plaintiff's/applicant's Case:
 6. The Applicant's case herein revolves around the supporting affidavit sworn on the January 28, 2020 and wherein the deponent has averred that one Jeremiah Eshitemi Odera and himself purchased and acquired LR No 36/75/1 from the vendor, namely, Seva Singh Mandlal in the year 1971.
 7. Further, the deponent has averred that upon entry into and execution of the sale agreement with the named vendor, Jeremiah Eshitemi Odera and himself paid out the agreed consideration and thereafter the suit property was transferred and registered in their name.
 8. Other than the foregoing, the deponent has added that upon the transfer and registration of the suit property in their respective names, same commenced to and indeed paid the requisite land rates over and in respect of the suit property.
 9. At any rate, the deponent has stated that neither Jeremiah Odera Eshitemi nor himself sold the suit property to anyone.
 10. On the other hand, the deponent has stated that Jeremiah Odera Eshitemi who was a co tenant/ Co-owner in respect of the suit property passed on or died on the May 18, 2011 and that upon the death of the said Jeremiah Eshitemi, his Estate has not been succeeded. For clarity, the deponent has added that a succession cause was lodged via Kakamega HCC Succession No 520 of 2011, but no Grant of Letters of administration has since been issued.
 11. Nevertheless, the deponent has further stated that on or about the year 2018, same noticed strange happenings/dealings over and in respect of the suit property. In particular, the deponent has averred that same noted that some Third Parties had commenced construction on the suit property, albeit without his consent, authority and permission.
 12. Pursuant to the foregoing, the deponent has averred that same was constrained to and obliged to carryout investigations pertaining to the circumstances leading to the impugned activities and that during the said investigations, same discovered that the suit property had been transferred to and registered in the names of one, Emily Odera on the November 24, 2015.
 13. On the other hand, the deponent has also averred that in course of his investigations, same also discovered that the said Emily Judith Odera had entered into an agreement and thereafter transferred the suit property to and in favor of the Respondents herein. For clarity, the deponent has stated that the transfer of the suit property in favor of the Respondents is indicated to have transpired in the year 2016.
 14. Be that as it may, the deponent has averred that to his knowledge Jeremiah Odera Eshitemi neither sold nor executed any transfer instrument over and in respect of the suit property.
 15. In the premises, the deponent has therefore averred that the transfer and registration of the Suit Property to and in favor of the Respondents, was carried out and undertaken Fraudulently and without his knowledge.



16. In view of the foregoing, the deponent has thus implored the Honourable court to find and hold that the impugned transaction was illegal, unlawful and thus same ought to be reversed.
- b. Respondents' Case:
17. The Respondents' case is ventilated on the basis of the Replying affidavit sworn on the July 22, 2020. For clarity, the Replying affidavit has been sworn by the 1st Respondent herein.
18. According to the deponent, the 2nd Respondent and himself carried out and undertook due diligence over and in respect of the suit property and thereafter same entered into and executed a sale Agreement with one Emily Judith Odera.
19. The deponent has further added that upon the entry into and execution of the sale agreement, the said Emily Judith Odera, proceeded to and also executed an indenture of conveyance, whereby the suit property was conveyed to and in favor of the Respondents.
20. On the other hand, the deponent has also averred that in the course of the transaction leading to the Sale/Purchase of the suit property, the Applicant herein also executed a Statutory Declaration, wherein same clarified that the suit property lawfully belonged to Emily Judith Odera.
21. Other than the foregoing, the deponent has averred that upon entry into and execution of the sale agreement, the 2nd Respondent and himself paid to and in favor of Emily Judith Odera, the vendor, the entire purchase price amounting to Kshs 40, 000, 000/= Only.
22. Premised on the foregoing, the deponent has averred that the 2nd Respondent and himself therefore lawfully acquired rights over and in respect of the suit property, having bought same from the duly registered Proprietor thereof.
23. At any rate, the deponent has further added that prior to the commencement of the transaction, the 2nd Respondent and himself conducted and carried out an official search which revealed that indeed Emily Judith Odera was truly the registered owner of the suit property.
24. Notwithstanding the foregoing, the deponent has further contended that the 2nd Respondent and himself were therefore Bona fide Purchasers for value without notice of any defect in the title of the vendor.
25. Finally, the deponent has averred that upon the lodgment of the subject suit, his advocates on record proceeded to and submitted the finger prints on the Statutory Declaration allegedly signed by the Applicant to a Document Examiner, with a view to ascertaining and authenticating the veracity of the Finger prints.
26. In this respect, it has been stated that the finger print examiner indeed conducted Forensic investigation/examination and returned conclusion that the impugned finger print truly belong to the Applicant.
27. As a result of the foregoing, the Deponent has thus sought to have the Originating summons herein Dismissed for none disclosure of a Reasonable cause of action, known to Law or at all.

Submissions By The Parties:

- a. Plaintiff's Submissions:
28. The Plaintiff herein filed written submissions dated the June 2, 2022 and in respect of which the Plaintiff has raised four issues for consideration and determination.



29. First and foremost, Learned Counsel for the Plaintiff herein has submitted that the purported sale agreement allegedly entered into between Jeremiah Eshitemi and Simon Eshitemi, on one hand and Emily Judith Odera on the other hand, was Fraudulent and a Forgery.
30. For clarity, Counsel has pointed out that one page of the purported Agreement seems to indicate that same was entered into and executed in 2011, whereas another page indicates that the Indenture was executed on the November 24, 2015.
31. Secondly, Learned Counsel for the Plaintiff has submitted that the transfer documents/indenture transferring the suit property to Emily Odera was a Forgery. In this regard, counsel has put emphasis on the first paragraph of the indenture.
32. Thirdly, the counsel for the Plaintiff has also submitted that Jeremiah Odera Eshitemi passed on in the year 2011 and by the time same died, same had not entered into or executed any Indenture of conveyance. In this regard, counsel has reiterated that the impugned transaction which affects the ownership status of the suit property was/is a fraud.
33. Fourthly, counsel for the Plaintiff has submitted that upon the death of Jeremiah Odera Eshitemi, now Deceased, the heirs/beneficiaries of the estate lodged a succession cause at Kakamega, but the succession cause has not been heard or determined.
34. In this regard, Learned Counsel for the Plaintiff has therefore contended that the suit property, a portion of which similarly forms part of the Estate of the said deceased could therefore not be dealt with by Emily Judith Odera, who had not been constituted as the administratrix of the Estate of the deceased.
35. Other than the foregoing, counsel for the Plaintiff has submitted that the entire transaction touching on and/or concerning the suit property was therefore replete and wrought with Fraud and Forgery.
36. Premised on the foregoing, Learned counsel for the Plaintiff has therefore contended that the Respondents herein cannot invoke and rely on the Doctrine of Bona fide Purchase for value without notice.
37. In short, Learned Counsel for the Plaintiff has implored the Honourable court to find and hold that the Plaintiff has proved his case to the required of standard, being balance of probabilities and hence, same ought to be allowed.
 - b. The Respondents' Submissions:
 38. The Defendants' filed written submissions dated the September 23, 2022 and same have itemized, highlighted and amplified three issues for determination.
 39. Firstly, the Defendants have submitted that the Plaintiff's claim herein is premised on fraud, forgery and fraudulent intent, touching on and concerning the sale, transfer and conveyance of the suit property.
 40. To the extent that the Plaintiff's suit is premised on fraud and forgery, the Learned counsel for the Defendant has submitted that the Burden of proof was on the Plaintiff to established and prove that indeed the transaction was fraudulent and borne out of forgery.
 41. However, Learned counsel for the Defendants has submitted that despite the requirement to plead and prove fraud, no credible and believable evidence was placed before the Honourable court by and on behalf of the Plaintiff.



42. Premised on the foregoing, Learned counsel for the Defendants has therefore submitted that the Plaintiff has failed to discharged the burden of proof that laid at his doorsteps, either in the manner provided under the Law, or at all.
43. In respect of the requirement to specifically plead, particularize and thereafter prove fraud, counsel for the Defendants has cited and relied on various decisions, inter-alia *Rosemary Wanjiku Muriithi versus George Maina Ndinwa, Court of Appeal Civil Appeal No 9 of 2014 (unreported)*, *Kinyanjui Kamau versus George Kamau (2015)eKLR*, *Kuria Kiarie & 2 Others versus Sammy Magera (2018)eKLR* and *Mutiria Karumbai Macau versus James Njagi Makembo & 3 Others (2018)eKLR*.
44. Secondly, Learned Counsel for the Defendants has submitted that the issues that belie the subject dispute, namely, fraud, forgery, fraudulent intention and the illegality pertaining to the impugned transaction, are complex and convoluted, hence same cannot be ventilated or addressed on the basis of Originating Summons.
45. According to counsel for the Defendants, the issue before hand could only be commenced and dealt with in the Ordinary manner of proceedings, whereby the Plaintiff would plead and particularize fraud and thereafter call evidence to prove his case.
46. In support of the contention that Originating Summons was/is not the appropriate method for ventilating the complex issues, Learned Counsel for the Defendants has cited and relied on various decisions, inter-alia, *Mukesh Manchand Shah and Another versus Priyat Shah & Another Mombasa Civil Appeal No 39 of 2019 (unreported)*, *Kibutiri versus Kibutiri (1983)eKLR*, *Bhari versus Khan (1965) EA* and *John W Wepukulu versus Secretary Board of Governors Buruburu Secondary School (2005)eKLR*.
47. The third issue raised and ventilated by the Defendants relates to the Doctrine of Bona fide Purchase for value without notice of any defect in the title of the vendor, namely, the Title of one, Emily Judith Odera.
48. According to counsel for the Defendants, the Defendants herein were desirous to buy and purchase the suit property and that prior to entry into and execution of the sale agreement, same carried out and conducted an official search to ascertain the ownership status.
49. Further, counsel for the Defendants has submitted that after carrying out and conducting the official search, same confirmed and authenticated that indeed one, Emily Judith Odera was the registered owner/proprietor of the suit property.
50. Thereafter, counsel has submitted that the Defendants proceeded to and entered into a land sale agreement relating to and concerning the suit property, culminating into the transfer thereof in favor of the Defendants.
51. In view of the foregoing, counsel for the Defendants has therefore submitted that the Defendants herein are lawful and Bona fide Purchaser for value without notice of any defect, in the Title of their predecessor.
52. In support of the foregoing submissions, counsel for the Defendants has cited and relied on the decisions in the case of *Lawrence P Mukiri versus Attorney General & 4 Others (2013)eKLR*, *Ardhi Highway Developers Ltd versus Westend Buturey Ltd & 6 Others (2016)eKLR*, *Joyce Wairimu Karanja versus James Mburu Mbuti & 3 Others (2018)eKLR* and *Elizabeth Wambui Githinji & 29 Others versus Kenya Urban Roads Authority & 4 Others (2019)eKLR*.



53. Based on the foregoing submissions, Learned Counsel for the Defendants has therefore contended that the Plaintiff herein has failed to meet the requisite threshold and hence the subject suit ought to be dismissed with cost.

Issues For Determination:

54. Having reviewed the Originating Summons, the Supporting Affidavit thereto and the Replying affidavit filed in Opposition thereto; and having similarly considered the written submissions filed by the Parties, the following issues do arise and are thus pertinent for Determination;
- i. Whether the Plaintiff herein has the requisite capacity to Originate, Prosecute and maintain a claim premised on the Estate of one Jeremiah Odera Eshitemi, now deceased.
 - ii. Whether the Issues at the foot of the Originating Summons herein and essentially Fraud, Forgery and Fraudulent activities can be pleaded/prosecuted on the basis of Originating summons.
 - iii. Whether the Plaintiff proved and established his claim.

Analysis And Determination:

Issue Number 1:

Whether the Plaintiff herein has the requisite capacity to originate, prosecute and maintain a claim premised on the Estate of one Jeremiah Odera Eshitemi, now deceased.

55. The Plaintiff herein has acknowledged and confirmed that the suit property was bought and purchased by Jeremiah Eshitemi Odera and himself, on or about the year 1971.
56. Besides, the Plaintiff has further contended that upon the purchase, the suit property was transferred and registered in their names as tenants in common.
57. Other than the foregoing, there is evidence that Jeremiah Odera Eshitemi passed on/died on the May 18, 2021. In any event, it has also been contended that despite his death, the Estate of Jeremiah Odera Eshitemi, now deceased has not been succeeded to date.
58. For coherence, the Plaintiff has indicated that what has since happened is that succession proceedings have been lodged but no Grant of Letters of administration has been issued to anyone. Essentially, no administrator has since been constituted or appointed.
59. Further, the Plaintiff has stated that owing to the fact that no Grant of Letters of administration has been issued in respect of the estate of Jeremiah Odera Eshitemi, it then means that the transaction, if any, that were executed by Emily Judith Odera, over and in respect of the suit property was therefore a nullity.
60. The foregoing facts, which have been brought to the fore by the Plaintiff himself, are material and relevant, insofar as same underscore that the co-owner in respect of the suit property, is since Deceased. Besides, same also underscore that the Estate of the said Deceased has not been succeeded.
61. Despite the foregoing, the Plaintiff herein has filed the subject suit and same seeks Declaratory orders as follows;
- a. Simon Eshitemi and Jeremiah Odera Eshitemi (deceased) having been defrauded of LR No 36/75/1 are entitled to the transfer of the same as Tenants in Common in equal shares.



- b. Simon Eshitemi and the Representative of Jeremiah Odera Eshitemi are entitled to assume full ownership and the title to parcel of land LR No 36/75/1.
62. From the nature of the reliefs, which have been alluded to in the preceding paragraph, what becomes apparent is that the suit herein is being propagated both on account of the Plaintiff, but also on behalf of the estate of Jeremiah Odera Eshitemi, now deceased.
63. The question that arises is whether the Plaintiff herein can agitate any cause of action for and on behalf of Jeremiah Odera Eshitemi, now deceased and whose estate has not been succeeded.
64. Before answering the question, it is appropriate to take cognizance of the provisions of Section 82 of the *Law of Succession Act*, Chapter 160, Laws of Kenya. For completeness, the said provisions are reproduced as hereunder;
82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
- (a) To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
 - (b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
 - i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - ii. No immovable property shall be sold before confirmation of the grant;
 - (c) To assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
 - (d) To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—
 - (i) No appropriation shall be made so as to affect adversely any specific legacy;
 - (ii) No appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal



representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

65. Other than the foregoing provisions, which have been alluded to in the preceding paragraph, the capacity to commence and maintain civil proceedings on behalf of the Estate of a Deceased was also addressed, deliberated upon and underscored vide the decision in the case of *Edith Virginia Wamboi Otieno versus Joash Ochieng Ougo (1987)eKLR*, where the Court of Appeal held as hereunder;

' But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq).

But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent'.

66. It is established and trite that as pertains to the Estate of a Deceased person, the only person who is authorized and mandated to commence, maintain and prosecute a civil claim on behalf of the estate, is the duly constituted executor or legal administrator and not otherwise.
67. To the extent that the Plaintiff herein does not purport to be the legal administrator of the estate of Jeremiah Odera Eshitemi, it is therefore common knowledge that same cannot agitate and propagate a claim, whose import and tenor is meant to benefit or affect the Estate of a deceased, which has not been succeeded.
68. In the premises, it is my considered view that the orders sought on the face of the originating summons and whose import and tenor is to affect part of the Estate of the deceased, namely, Jeremiah Eshitemi Odera, are not only misconceived but legally untenable.
69. Respectfully, the Plaintiff herein cannot agitate a claim for and on behalf of the Estate of the Deceased, not until same is duly constituted and appointed as the administrator thereof.

Issue Number 2

Whether the Issues at the foot of the Originating Summons herein and essentially Fraud, Forgery and Fraudulent activities can be pleaded/prosecuted on the basis of Originating Summons.



70. It is common ground that originating summons is a process and mechanism which is meant to address and deal with simple and less complex issues, which require to be addressed and determined quickly and without going through the cumbersome procedure for hearing of complex, nay, convoluted matters.
71. In any event, the nature of dispute that can be addressed and dealt with vide originating summons and the reliefs that can be issued thereunder, are statutorily circumscribed and prescribed. Consequently, only such issues that are prescribed can be commenced and addressed by way of originating summons.
72. To be able to understand the nature of reliefs that can be addressed and ventilated vide the originating summons, one needs to take cognizance of the provisions of Order 37 Rule 1 of the [Civil Procedure Rules 2010](#).
73. For convenience the said provisions provides as hereunder;
1. Who may take out originating summons and in respect of what matters [Order 37, rule 1.]

The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

 - (a) Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
 - (b) The ascertainment of any class of creditors, devisees, legatees, heirs, or others;
 - (c) The furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
 - (d) The payment into court of any money in the hands of the executors, administrators or trustees;
 - (e) Directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
 - (f) The approval of a sale, purchase, compromise or other transaction;
 - (g) The determination of any question arising directly out of the administration of the estate or trust.
- (a) Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;



- (b) The ascertainment of any class of creditors, devisees, legatees, heirs, or others;
 - (c) The furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
 - (d) The payment into court of any money in the hands of the executors, administrators or trustees;
 - (e) Directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
 - (f) The approval of a sale, purchase, compromise or other transaction;
 - (g) The determination of any question arising directly out of the administration of the estate or trust.
74. Given the nature of reliefs that can be pursued or ventilated by way of originating summons, the question beforehand is whether a dispute pertaining to fraud, forgery and fraudulent activities, can by their nature be commenced and prosecuted by way of Originating summons.
75. It is imperative to note and underscore that a claim founded on fraud, forgery and fraudulent intention, would require the claimant to not only plead the cause of action but also to supply the requisite particulars upon which the cause of action is predicated/premised. See Order 2 Rule 10 of the Civil Procedure Rules.
76. Subsequent to pleading and particularizing the claim relating to fraud, forgery and fraudulent intention, the claimant shall thereafter be called upon to tender and adduce sufficient and credible evidence to prove the charge of fraud or forgery.
77. At any rate, it is not lost on the Honourable court that where the claimant raises a charge of fraud, forgery and fraudulent intention, the burden of proof is certainly above the usual standard, which obtains in civil proceedings. For clarity, the standard of proof is on the Intermediate standard.
78. Based on the foregoing, I must now return to address the issue as to whether a claim for fraud, fraudulent intention and forgery can be addressed by way of Originating summons.
79. However, before venturing to address the issue, it is appropriate to lay a basis by referring to the obtaining corpus of case law, wherein the issue has hitherto been dealt with and deliberated upon.
80. Firstly, I am aware of the decision of the Court of Appeal in the case of *Kenya commercial Bank Ltd versus Osebe (1982)eKLR*. For clarity, the Court of Appeal observed as hereunder;
- ‘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 execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.’



81. Secondly, there is also the elaborate decision in the case of *Kibutiri v Kibutiri (1983)eKLR*, where the Court of Appeal stated and held as hereunder;

' In cases where complex issues and contentions questions of fact and law are raised the Tudge should dismiss the summons and leave parties to pursue their claim by ordinary suit because the scope of inquiry which is made and dealt with in an originating summons is limited. The Procedure by way of originating summons is intended to enable simple matters to be settled by the court without the experts of bringing an action in the usual way not to enable the court to determine matters which involve a serious question. This was said in the case of *Re Giles (2) [1890] 43 CH D 391a* decision cited with approval by this Court's predecessor in *Kulsumbhai-vs-Abdullussein [1957] EA 699*. See also *Bhari-vs - Khan [1965] EA 94* in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. 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.'

Law JIA in *Obiter* further stated 'I would like to advice judges who have to deal with originating summons to consider the Judgement of this Court (Court of Appeal) in *Kenya Commercial Bank Ltd -vs-James Osebe Civil Appeal No 60 of 1982* in which the law relating to and the scope of originating summonses were extensively reviewed. That case referred to *Official Receiver-vs- Sukhdev [1970] EA 243* which was also cited to *Bhandari I* in which Madan I as he then was refused to deal with that which he referred to as a mass of facts in dispute by way of originating summons.'

82. The third case of relevance and significance is the decision in [*John W Wepukulu versus Secretary Board of Governors Buruburu Secondary School \(2005\)eKLR*](#), where the court similarly held as hereunder;

' The procedure of Originating Summons is designed for the summary of ad hoc determination of points of law construction of certain specific facts obtaining of specific directions of the court such as trustees, administrators or the courts execution officers. The procedure should not be used for the determination of matters that involve a serious question of determination of disputed questions of fact. What happened in the trial court is that the issues of fact were fully determined by way of trial by production of oral evidence. Though no objection was raised as to the appropriateness of the originating summons before the trial commenced or at the instance, the fact remains that the dispute

Before the learned judge was outside the ambit of the originating summons and the procedure was wron8. There was no point therefore, for the learned judge allows the parties to waste their time and canvass their dispute through a faulty procedure he disapproved of. However, we agree with the learned judge that the dispute the dispute between the parties herein could not appropriately be determined by way of an Originating Summons.'

83. Without seeking to exhaust all the decisions, where the issue of competence of originating summons has been addressed, it is appropriate to also refer to and reiterate the decision



in the case of *Muchanga Investment Ltd vs Safaris Unlimited (Africa) Limited & 2 others [2009]eKLR*, where the court observed as hereunder;

This Court, in the case of *Mucheru V Mucheru*[2002] 2 EA 455 held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved Sir Ralph Windham CJ's holding in *Saleh Mohammed Mohamed V Ph Saldanha* 3 Kenya Supreme Court (mombasa) Civil Case Number 243 of 1953 (UR) where his Lordship said:-

'Such procedure is primarily designed for the summary and 'ad hoc' determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible

84. The totality of the foregoing decisions, underscore one salient and important fact. For clarity, it is explicit that originating summons is not the best suited mechanism for addressing complex factual issues, including inter-alia, issues of fraud, forgery and fraudulent intention
85. To my mind and with due respect, had the Plaintiff's counsel considered the magnitude and gravity of the issues alluded to, same would no doubt, have chosen the appropriate mechanism other than Originating summons.
86. Be that as it may, I come to the conclusion that the originating summons herein is inappropriate and thus invalid, to the extent that same seeks to anchor issues that are well beyond the scope provided for pursuant to and by the Law.

Issue Number 3

Whether the Plaintiff proved and established his claim.

87. The Plaintiff's claim revolves around on a number of documents which are alleged to be forged and thus culminating into the Fraudulent transaction giving rise to the transfer and registration of the suit property in favor of the Respondent.
88. Taking into account that fraud, forgery and fraudulent conduct must not only be pleaded and particularized, but must also be proven by production of cogent evidence to the requisite standard, which is certainly, higher than the ordinary standard of proof of a Balance of probabilities.
89. To this extent, it was incumbent upon the Plaintiff herein to actually call and tender viva voce evidence. However, such evidence could only be called for and follow after appropriate pleadings have been filed and placed before the court.
90. Nevertheless, in respect of the subject matter, there were no proper or appropriate proceedings with the requisite pleadings and particulars, whatsoever.
91. Notwithstanding the foregoing, when the Originating summons came up for mention, counsel for the Plaintiff, whose client bore the Burden of proof, proposed to have the originating summons canvased on the basis of affidavit evidence.



92. With respect, where there are allegation of fraud, forgery and fraudulent conduct, one cannot meet and satisfy the requisite threshold on the basis of affidavit evidence. In this regard, the Boat was missed from the onset.
93. Be that as it may, cases belong to the Parties and ones the owners of the case, in this one, the Plaintiff, choose a particular mechanism for purposes of addressing their issues, the Honourable court must oblige.
94. Given the foregoing position, the critical issue to determine is whether the Plaintiff herein was able to tender, produce and adduce cogent evidence to meet and satisfy the standard of proof envisaged in matters pertaining to fraud, forgery and fraudulent conduct.
95. Being alive to the requisite Standard of proof, I am afraid that the Plaintiff was unable to meet the threshold required. Indeed, the allegation of fraud, forgery and fraudulent conduct remained as they were in the affidavit.
96. Sadly, no light was shed on the allegations and the cold letter writing, contained in the Supporting Affidavit of the Plaintiff, remained staring at the court without any meaning and explanation.
97. Put differently, the allegations of Fraud, Forgery and Fraudulent conduct that were alluded to, were merely thrown unto the face of the Honourable Judge, who was then called upon to give life to same without more. Surely, it not the Duty of the Judge to help Parties to prove their cases.
98. Having made the foregoing observation, it is now appropriate to look at the case law which have hitherto addressed and determined the manner of pleadings, particularization and thereafter proof of fraud.
99. To this end, it is appropriate to state that case law abound. However, two decisions stand out and are thus worthy of mention.
100. First and foremost, is the decision in [Kinyanju Kamau versus George Kamau \(20150eKLR\)](#), where the Court of Appeal stated and held as hereunder;

' It is trite law that any allegations of fraud must be pleaded and strictly proved. In *Ndolo -vs- Ndolo* [2008] 1KLR (G&F) 742 wherein the Court stated 'we start by saying that it was the Respondent who was alleging that the will was a forgery and that the burden to prove that allegation lay squarely on him since the respondent was making a serious charge of forgery or fraud the standard of proof required of him was obviously higher than that of probabilities but the burden of proof on the Respondent was certainly not beyond one of reasonable doubt as in criminal cases. In cases where fraud is alleged it is not enough to simply infer fraud from the facts.'

101. The second critical decision is the case of [Kuria Kiarie & 2 Others -vs-Sammy Mayera \[2018\] eKLR](#), where it was held as hereunder;

' It is trite law that any allegations of fraud must be pleaded and strictly proved. [See *Ndolo -vs- Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that 'we start by saying that it was the Respondent we start by saying that it was the Respondent who was alleging that the will was a forgery and that the burden to prove that allegation lay squarely on him since the respondent was making a serious charge of forgery or fraud the standard of proof required of him was obviously higher than that of probabilities but the burden of proof on



the Respondent was certainly not beyond one of reasonable doubt as in criminal cases. In cases where fraud is alleged it is not enough to simply infer fraud from the facts.'

102. Duly guided by the dicta underscored in the decisions alluded to, there is no gainsaying that the Plaintiff herein has not been able to establish and prove the allegations that color the Originating summons and the supporting affidavit.
103. It must also be underscored that the Burden of Proof was on the Plaintiff to prove his case, irrespective of whether the Defendants, responded thereto or otherwise.
104. As concerns the incidence of burden of proof and on whom same lies, it is appropriate to recall, adopt and reiterate the holding in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR*. For coherence, the Court of Appeal stated and held as hereunder;

' In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the *Evidence Act*, as follows;

'107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person.'

In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1st respondent, the three provisions reproduced above require that the 1st respondent who laid the claim that certain facts existed had the burden to prove existence of those facts.

It is no matter that the appellant did not refute the claim by way of a replying affidavit. The 1st respondent was still bound to lay evidence on a balance of probability of the alleged facts before the learned judge. The 1st respondent claimed that there were three companies in which he, the appellant and others held shares. Each of those companies owned the properties stated in the petition. That the appellant sold off those properties and had them accordingly transferred and as a result the 1st respondent suffered loss and damage.

In our view we think that the facts to be proved required documentary evidence. The 1st respondent ought to have produced the certificates of incorporation of the three companies together with their respective Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who, at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1st respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it.



105. My answer to the third issue is that the Plaintiff has failed to prove and establish his claim founded on fraud, forgery and fraudulent conduct as against the Defendants, either in the manner alluded to or at all.

Final Disposition:

106. This Honourable court has endeavored to and analyzed the various perspectives relevant to and in respect of the issues that were in Dispute.

107. Having evaluated and analyzed the itemized and underlined issues, it is evident and apparent that the Plaintiff has not been able, to inter-alia, properly address and prove the claims at the foot of the Originating summons.

108. Consequently and in the premises, I come to the conclusion that the Plaintiff's suit is devoid and bereft of merits.

109. In a nutshell, the Plaintiff's claim vide Originating summons dated the January 28, 2020, be and is hereby Dismissed with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Onindo for the Plaintiff

Ms Mohamed Osman h/b for Hassan Lakicha for the Defendants

