REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 4 of 2007

PHILIP MUGO MUCHIRI…….……..……APPELLANT

Versus

MBEU KITHAKWA……..…….…….…….…….....…...RESPONDENT

(Being appeal against the ruling of M. R. Gitonga Principal Magistrate Nyeri made on 29th day of August 2006 in Misc. Application No. 39 of 2006)

JUDGMENT

The Respondent in this appeal instituted a suit in the lower court by way of a Miscellaneous Application brought under a Notice of Motion dated 30th May 2006. By that application the Respondent sought to restrain the Appellant from burying his deceased relative on **INOI/KERUGOYA/769**. The lower court granted interim orders and on hearing the matter interpartes the learned magistrate by her ruling dated 29th August 2006 granted an injunction to the Respondent and stated as follows:

"***I note this application is clearly stated that it is just so an application I will not consider it to be seeking permanent injunctive order since there was indeed an award which settled the issue(sic). The Respondent do admit there was indeed such an award. The respondent talked of there being separate title deeds; however the same were not annexed to clarify the position. Nothing has been brought up to show the deceased is the registered absolute proprietor of INOI/KERUGOYA/759. All this has to be highlighted by way of annextures".***

I am satisfied the applicant's application is merited on the strength of the annextures MKI and I allow the application as prayed. Orders accordingly."

The Appellant was aggrieved by the ruling of the lower court and has presented the present appeal. The grounds of appeal are as follows:

1. ***That the learned Magistrate erred in law and in fact in not holding that the suit was improperly instituted by way of a Notice of Motion which is not permissible in law.***

2. ***That the learned Magistrate erred in law and in fact in giving absolute orders in an interlocutory application which application was not supported by a plaint.***

3. ***That the learned Magistrate erred in law and in fact in giving injunctive orders whereas the***

application seeking the orders was not based on a plaint as is required by law.

4. ***That the learned Magistrate erred in law and in fact in failing to set out the issues of determination in her ruling.***

5. ***That the learned Magistrate erred in law and in fact by holding that there was no evidence tendered to show that the deceased was the registered proprietor of INOI/KERUGOYA/769 whereas a copy of the register tendered in evidence clearly proved that the land is registered in the names of the deceased.***

6. ***That the learned Magistrate erred in law and in fact in failing to consider that the Respondent had no locus standi to file a suit as the deceased was to be buried in his land INOI/KERUGOYA/769.***

7. ***that the learned Magistrate erred in law and in fact in disregarding the fact that the application for injunction was brought under the wrong provisions of the law and in the wrong form and ought therefore to have been dismissed.***

8. ***That the learned Magistrate erred in law and in fact is arriving at the wrong conclusion.***

Grounds No. 1, 2, 3 and 7 can be collapsed into one. They attack the manner in which the Respondent approached the court and obtained essentially permanent orders in a miscellaneous application. I find that there is merit in those grounds. *Order VII* and *XXXVI* of the Civil Procedure Rules show that a civil action is instituted either by a plaint or originating summons. Pleadings is defined under *Section 2* of the Civil Procedure Act. That definition is as follows:

"*Pleadings*" ***includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."***

Considering those provisions it becomes very clear that the Respondent in instituting this suit approached the court in a manner not recognized under the law. This indeed was the holding in the **Court of Appeal case No. CIVIL APPL. NO. 61 OF 1999 BETWEEN BOARD OF GOVERNORS, NAIROBI SCHOOL AND JACKSON IRERI GETA**. The Court of Appeal had the following to say:

"***However, before we conclude this judgment, we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. "Pleadings" is defined in section 2 of the Civil Procedure Act as follows:-***

"…includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant:"

Mr Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggests that the term "pleadings" may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that:

"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of 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."

In respect of the 4th 5th and 6th grounds the same do not find favour with this Court. I find that they are not merited. I have perused the learned magistrate's ruling and I find that I cannot fault it on these grounds. In the end therefore the judgment of this Court is that the Appellant does hereby succeed and the appeal is allowed in that the ruling of the Principal Magistrate M. R. Gitonga of 29th August 2006 and all the consequential orders thereof are hereby set aside. The Appellant is awarded the costs of this appeal.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 13th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE