



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 100 of 2005**

**JAMES KOROPAN (On behalf and legal representative of OREU OLE KIPRIKEN).....
PLAINTIFF**

VERSUS

**KIMITEE OLE SETEK.....
.....DEFENDANT**

RULING

The plaintiff filed an originating summons under an undisclosed rule of **Cap 284** of the **Laws of Kenya** seeking a declaration that he is entitled to the entire parcel of land comprising of **TRANSMARA/OSINONI/22** and **75** which previously fell under the Osinoni adjudication area. He also sought a declaration that the allocation of **TRANSMARA/OSINONI/22** falling on the side of the stream occupied by the plaintiff was unlawful, illegal and actuated by bias. He also sought for an order directing the Transmara District Land Registrar to rectify the boundary and accommodate all that land falling on the side of the stream in the applicant's title number **TRANSMARA/OSINONI/22**.

The originating summons was supported by an affidavit sworn by the plaintiff on 14th April 2005.

The defendant made an application by way of Chamber Summons bought under **order VI rule 13 (1), (c)** and **(d)** of the **Civil Procedure Rules, Section 29** of the **Land adjudication Act** and **Section 21(4)** of the **Registered Land Act** urging the court to strike out the aforesaid originating summons and thereby dismiss the plaintiff's suit with costs.

The application was made on the grounds that the provisions of **order XXXVI** of the **Civil Procedure Rules** do not envisage the prayers in the instant originating summons and that the prayers contained in the originating summons could only be adjudicated upon, if at all, vide a plaint in terms of **order IV rule 1** of the **Civil Procedure Rules**.

It was also stated that the originating summons was premature, mischievous and misconceived and that the claims contained therein were barred by the provisions of **Section 29** of The **Land Adjudication Act Cap 284** of the **Laws of Kenya**. It was further stated that this court did not have jurisdiction to adjudicate on the question and/or issues raised in the originating summons, the same having been dealt with conclusively by the Minister in charge of Lands and Settlement and further that the court did not have jurisdiction to direct the District Land Registrar to carry out his statutory mandate under the provisions of **Section 21(4)** of the **Registered Land Act**.

The application was supported by an affidavit sworn by Joseph Mboya Oguttu the defendant's advocate who deposed that **L.R. NOS. TRANSMARA/OSINONI/22** and **75** were created pursuant to the Adjudication and Demarcation Process at Osinoni adjudication area. He further stated that pursuant to the adjudication process the plaintiff was aggrieved by the same and he filed objection proceedings.

Subsequently the plaintiff also lodged an appeal to the Minister and the appeal was heard and disposed of on the 12th November 2003. The Minister having heard and determined the said appeal, this court was devoid of jurisdiction to entertain the instant suit, counsel stated. He added that if any party was aggrieved by the decision of the Minister he could only apply by way of a Judicial Review to quash the Minister's decision. Counsel further submitted that if there was any bias on the part of the Minister he should have been made a party and cited **MELICA VS MBUVI** [2001] 1 EA 124. In that case the appellant had filed a suit before the High Court seeking a declaration that the judgment in Kitui **SRMCC No.83 of 1998** awarding the suit property to the respondent was a nullity. He averred that the decision in that case had been reached after the **Land Disputes Tribunals Act** had come into force and removed jurisdiction to hear land cases from magistrates' courts. The respondent submitted *inter alia* that the matter was *res judicata* and that the issue regarding the magistrates' courts' jurisdiction should have been made the subject of an appeal. He went on to argue that the appellant having failed to file any such appeal the suit was an abuse of the court process. The respondent accordingly applied for the plaint to be struck out under **order VI rule 13** of the **Civil Procedure Rules** on the grounds that the matter was *res judicata* and the Minister had awarded the suit property to him under the provisions of **Section 29** of the **Land Adjudication Act**. He further claimed that the appellant had made an application in High Court **Misc. Case No. 5 of 1993** seeking to quash the Minister's decision which he later withdrew and the application to strike out the suit was granted. The appellant appealed against the High Court decision. The Court of Appeal held that by withdrawing his High Court suit against the Minister the appellant had denied himself the only means permitted by the **Land Adjudication Act** of challenging the decision. He could not do so when the Minister was not a party to the proceedings.

Mr. Oguttu further deposed that the prayers contained in the originating summons could only be brought to court by way of a plaint as opposed to originating summons. He argued that an originating summons can only be used to adjudicate upon simple and undisputed issues of law or other matters as provided for by **order XXXVI** of the **Civil Procedure Rules**. He sought to rely on a Court of Appeal decision in **KENYA COMMERCIAL BANK LTD. VS JAMES OSEBE** [1982-88] 1 KAR 48.

Regarding the objection that the court had no jurisdiction to direct the Land Registrar to do a statutory duty unless it was specifically provided for or under Judicial Review Proceedings, counsel cited **WAMUTU VS KIARIE** [1982] KLR 481 where it was held that **Section 21(4)** of the **Registered Lands Act** provides that the court has no jurisdiction to hear a matter relating to boundary disputes of registered land unless the boundaries have first been determined by the Land Registrar.

It was further submitted that the originating summons was intended to defeat a first registration unprocedurally whereas the defendant's title to the property could not be defeated.

In opposing the chamber summons, the plaintiff filed grounds of opposition and stated *inter alia* that the application was incompetent, bad in law and offended the provisions of **order VI rule 13** of the **Civil Procedure Rules**.

Mr. Kiplenge submitted that the originating summons was properly instituted and there was no provision of law barring the same.

I have carefully considered all the affidavits on record and the submissions made by counsel and I agree with the defendant that the plaintiff's claims cannot be adjudicated by way of an originating summons. The plaintiff should have commenced his suit in any other suitable manner either by way of a plaint or judicial review.

The Court of Appeal decision in **KENYA COMMERCIAL BANK LTD. VS JAMES OSEBE** (supra) clearly stated that originating summons are supposed to be used for determination of particular questions or facts which are largely undisputed except as provided under **order XXXVI** of the **Civil Procedure Rules**. The plaintiff's originating summons is therefore non suited for the prayers raised therein. That alone is sufficient to dispose of this application.

If at all that was not sufficient, the plaintiff did not file judicial review proceedings to quash the decision

of the Minister if he was dissatisfied with his decision and this court has no jurisdiction to entertain the instant suit, the Minister having heard and determined the plaintiff's appeal in terms of the provisions of the **Land Adjudication Act. Section 29(1)(b)** of the said **Act** clearly states that the Minister's decision is final.

Where a court has no jurisdiction to entertain a matter it is superfluous for it to proceed to make determination on issues therein and having held that this court lacks the appropriate jurisdiction, it would be pointless to say much about the other issues which have been raised by the defendant. I strike out the plaintiff's originating summons dated 14th April 2005 and award costs of the suit to the defendant.

DATED, SIGNED AND DELIVERED At Nakuru this 20th day of February, 2006.

D. MUSINGA

JUDGE

20/2/2006

Ruling delivered in open court in the presence of Mr. Kagucia and Mr. Olola holding brief for Mr. Oguttu for the appellant and Mr. Kisila holding brief for Mr. Ogola for the respondent.

D. MUSINGA

JUDGE

20/2/2006