



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Civil Case 174 of 2005**

**TIFAS WANGUBO**

**MABINA .....PLAINTIFF**

**VS**

**LUKHOBABIKETI.....DEFENDANT**

**RULING**

The originating summons, is dated 28<sup>th</sup> October 2003. It is made under Order XXXVI Rule 3 and 7 of the Civil Procedure Rules.

It seeks orders:

- 1 That the applicant be declared the owner of a parcel of land measuring fourteen (14) acres to be curved out of parcel no.E.BUKUSU/S.NALONDO/279 which he is in adverse possession of having occupied the same for over 32 years.
- 2 An order that the applicant has become entitled and should be registered as the owner of parcel of land measuring fourteen (14) acres to be curved out of land parcel no.E.BUKUSU/S.NALONDO/279 by operation of law viz Section 7, 17, 36 and 38 of the Limitation of Actions (cap 22 of the Laws of Kenya) in the place of the respondent Lukhoba Biketi.
- 3 That the respondent's name to the said parcel of land be removed and cancelled on the part curved out and comprising by measurement fourteen (14) acres out of the said parcel of land known as E.BUKUSU/S.NALONDO/279.
- 4 In the alternative and without prejudice to the averments 1,2 and 3 aver (questions to be determined). A declaration that the respondent holds title to a portion measuring 14 acres in the parcel of land known as E.BUKUSU/S.NALONDO/279 in Trust for the benefit of the applicant.
- 5 That costs of this application be paid by the respondent.
- 6 That this Court do grant any other relief that it may deem proper and fit to grant.

It is based on the grounds:

- a) That the applicant has lived on, occupied and has been in quiet enjoyment of the part measuring

14 acres out of land parcel NO.E.BUKUSU/S.NALONDO/279 for over thirty two (32) years and so he is in adverse possession of the said portion of land.

- b) That the original number bought by the applicant was no.E.BUKUSU/S.NALONDO/279 has never been changed, it is left in the hands of the applicant thus recognizing the rights of the occupier who has never been disturbed but has never been given separate numbers.
- c) That the applicant has lived on the part he occupy for a long time quietly and so the title of the respondent to that part on which he has put up buildings is extinguished by law.
- d) That the respondent signed written agreements dated 14/3/1971 and 15/9/1976 to sell a portion of land measuring 14 acres to the applicant and then allowed the applicant and his family to take occupation which he has done since that todate.
- e) That the respondent has sat on the transfer of the part sold to the applicant for too long in order to try and deprive the applicant of his rights and so this court's intervention has now become necessary.
- f) Other and further grounds to be adduced at the hearing.

It is supported by the affidavit of Tifas Wangubo Mabina sworn on 28<sup>th</sup> October 2003.

By a chamber application dated 24<sup>th</sup> May, 2005, under Order V Rule 7 and Order XXXVI Rule 7 of the Civil Procedure Rules, the applicant sought orders that the said originating summons to be dismissed for being a non-starter. The application is based on the grounds that no summons to enter appearance was ever issued by the Deputy Registrar. It therefore follows that none was served. This, the applicant contended, is fatal.

At the hearing of the aforesaid chamber summons, Mr. Waswa for the applicant pointed out that the suit was filed on 6<sup>th</sup> May 2003. Todate no summons have been taken out or served on the respondent and hence the suit is non-starter and should be dismissed.

Mr. Were, for the applicant (in the originating summons) and the respondent (in the chamber application) failed to file grounds of opposition or replying affidavit in opposition to the application as required by Order L Rule 16(1). Nevertheless, on oral application, I allowed him to oppose the application purely on points of law.

The gravamen of Mr Were's submission is that by entering appearance by Notice thereof dated 21<sup>st</sup> June 2004, the respondent waived its rights. In the alternative, he urged me to strike out the originating summons instead of dismissing it.

I have carefully read and considered all the arguments of both counsel and addressed my mind to the law on the issue at hand.

Order XXXVI Rule 7 provides:

*"7. An originating summons shall be in Form No.13 or No.13A of Appendix B with such variations as circumstances may require, and shall be prepared by the applicant or his advocate and shall be filed in court; service where necessary shall be effected in accordance with Order V."*

Form NO.13 of Appendix B provides for the entering of appearance to the originating summons.

To my mind, the originating summons excluded by the said mandatory requirement are those under Order XXXVI Rule 1 of the Civil Procedure Rules or under statutes like the Advocates Act or the Chattels Transfer Act etc. See *CHRISTINE NYAGITHA MILLER -VS- G. S. SAGOO & 3 OTHERS H.C. MISC. CIVIL CASE NO.695 OF 1989 (unreported)*.

Non-compliance with the mandatory provisions of Order XXXVI Rule 7 renders the application a nullity. *See RE PRITCHARD (DECEASED) (1963) ALL E.R PAGE 873 AT PAGE 883 WHERE LORD RUSELL OF KILLOWEN* held that where an originating summons has not been issued out of the central office as required by R.S.C 54, Rule 4 B, which is in mandatory terms, the originating summons is a nullity. That omission is not a mere irregularity but a fundamental defect, which the defendant could not waive.

Halsbury's Laws of England, Volume 30 at paragraph 685 has this to say on appearance in originating summons:

*"685: Appearance to originating summons: Except where appearance is not required, the parties served with originating summons must enter appearance and give notice thereby."*

At foot note K. of paragraph 685 of the Halsbury's Laws of England (supra):

*"Appearance is not required to the originating summons specified in R.S.C Ordinance, 54 Rule 4F."*

I take the position that the originating summons referred to in the said footnote, is in pari-materia with Order XXXVI Rule 1 of the Civil Procedure Rules which specifies where and/or when appearance is not required in proceedings initiated by originating summons.

The subject originating summons is taken out under the provisions of Order XXXVI Rule 3 and 7 of the Civil Procedure Rules (see Appendix B, Form No.13A) Summons must be taken out. Appearance must follow upon service of the summons. This is because Order XXXVI Rule 7 is couched in mandatory terms. That mandatory rules of procedure goes to jurisdiction cannot be gainsaid. I take the lead from *MAWJI -VS- ARUSHA GENERAL STORE (1970) E.A 137 AT PAGE 138 WHERE SIR CHARLES NEWBOLD, P* had this to say:

*"..... I should like to make it quiet clear that this does not mean that the rules of procedure should not be complied with- indeed they should be. But non-compliance with the rules of Procedure of the Court, which are directory and not mandatory rules would not normally result in the proceedings being vitiated, if in fact, no injustice has been done to the parties."*

Jurisdiction cannot be conferred by consent or waiver. The mere fact of entering appearance or filling of affidavits by the respondent in this matter cannot therefore waive the mandatory provisions of Order XXXVI Rule 7 of the Civil Procedure Rules.

In the result, I find and hold that failure to take out and serve summons to an originating summons in this case is fatal. Accordingly, the originating summons herein is hereby struck out with costs.

Dated and delivered at Bungoma this 6<sup>th</sup> day of March 2006.

N.R.O. OMBIJA

JUDGE

Mr. Waswa for the Defendant

Mr. Were for the Plaintiff.