



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

**Misc Civ Appli 215 of 2006**

**IN THE MATTER OF HOUSE NO. 4321 COMPRISED IN NAIROBI LAND REFERENCE NO.  
93/431 PLAINSVIEW, NAIROBI**

**AND**

**IN THE MATTER OF SUCCESSION CAUSE NO. 2513 OF 1998**

**BETWEEN**

- 1. RAZIA IQBAL MAJOTHI**
- 2. ROSY MAJOTHI**
- 3. HALIM Y MAJOTHI .....APPLICANTS**

**VERSUS**

- 1. FARIDA KARIM**
- 2. ABID KARIM .....RESPONDENTS**

**RULING**

By Originating Summons filed on 1<sup>st</sup> March, 2006, the plaintiffs/applicants, namely Razia Iqbal Majothi, Rosy Majothi and Halim Majothi, sued the defendants/respondents Farida Karim and her son Abid Karim seeking the following orders:-

**1. That the plaintiffs/applicants are entitled to compensation for the developments made in L.R No. 93/413 South "B" NAIROBI, OR in the alternative, they be allowed to continue staying in the said extensions made".**

Secondly, the applicants prayed

“That the 1<sup>st</sup> defendant/respondent is holding the said property in trust and cannot evict the plaintiffs who have all along stayed as one family for 25 years and thirdly,

**“that in any case the plaintiff/applicant are entitled to a sufficient notice, having stayed in the suit premises for 25 years and have young school going children that require to be re-located to different schools if they have to move from the said premises”**

Grounded on the Originating Summons was a chamber summons application filed on 1<sup>st</sup> March, 2006, but subsequently amended on 2<sup>nd</sup> March, 2006.

The application was lodged in court on 3.3.2006, under a Certificate of Urgency, but was not heard until 9.3.2006, when it was marked stood over generally, as counsel for the applicant was said to be “**unwell**”.

The prayers in the amended application were for **“interim injunction order to issue against the respondents their agents or servants to restrain them from evicting the applicants from L.R No. 93/431 Plainsview, South B, pending the hearing of this application”**

The application was tabled in court on 16.3.2006, ex parte, and temporary interim orders granted.

The application came before me for hearing on 27<sup>th</sup> March, 2006. The court records showed that a preliminary objection to the application was filed and served that same morning. At first, counsel for the applicant sought time for adjournment, but when I indicated to the parties that I would grant the adjournment sought but not extend an ex parte injunction order granted, the advocate, for the applicants Miss Odembo chose to proceed with the hearing of her application.

In her submissions, Miss Odembo relied on the affidavit of her client Rosy Majothi, which supported the original chamber summons to court, before the same was amended. The affidavit states, inter alia, that the 1<sup>st</sup> and 2<sup>nd</sup> applicants, are sisters to their deceased brother Abdul Karim Majothi, who was the husband of the 1<sup>st</sup> defendant, and father to the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> plaintiff/applicant was also a brother of the said deceased.

The lengthy affidavit describes the property as **“family property”** acquired by family members which houses upto about 11 people.

The affidavit then goes on to talk about the death of Abdul Karim Majothi on 13<sup>th</sup> June 1997, and what happened to his wife and children thereafter.

The applicants were apprehensive of being evicted from the suit premises, hence this suit, and application for injunction.

Miss Odembo for the applicants submitted that the applicants herein were not parties to a Succession Cause which was in the matter of the estate of Abdul Karim Nakubali Majothi, deceased. This was their brother and husband to the 1<sup>st</sup> defendant. That the succession cause was between their parents and the 1<sup>st</sup> defendant, who is the widow of the late Abdul Karim. That the applicants therefore opposed the move to evict them from the suit premises.

Mr. Ongicho for the defendants/respondents challenged the pleadings on the file, terming them ‘incompetent’, the Originating Summons having been under Order XXXVI of the Civil Procedure Rules and the applicants do not have a deed or instrument.

He filed grounds of opposition dated 27<sup>th</sup> March, 2006. He submitted that the injunction application was misplaced as it had not been prayed for in the Originating Summons.

On the submissions of Miss Odembo, Mr. Ongicho stated in reply that the suit premises was given to the defendant/widow and her children in the Succession Cause, whilst the parents of the deceased were paid upto 34% of the estate. That it was upon that payment that they (parents of the deceased) gave up this house to the widow, but Miss Odembo maintained that the house was purchased by family members.

The submissions by both advocates touching on the suit premises made me send for and read through H.C Succession Cause No. 2513 of 1998, in the matter of the estate of Abdul Karim Yakubali Majothi, deceased.

The Grant to the estate of the deceased was applied for by his widow Farida Karim and a cousin. However, her father in law Yakubali Sidik Majothi, the deceased's father raised an objection to the making of a grant and the widow then removed the name of her cousin, and thereafter a Grant of Letters of Administration, intestate was then issued to the widow (Farida Karim) who is now the 1<sup>st</sup> defendant in the Originating Summons, and her father in law, Yakub Sadik Majothi on 14<sup>th</sup> November, 2000.

The court records from the Succession Cause show that the assets to the deceased's estate declared by the widow in form P&A 5 were the suit premises, i.e. House No. 93/431, South B Nairobi, and a Saloon car. The widow named her young children and herself as the only beneficiaries to the estate of her husband.

The court records further show that the deceased's widow and father in law were unable to administer the estate together. This resulted in the widow Farida karim, applying to court to revoke the grant issued to them jointly on 14<sup>th</sup> November, 2000.

The application resulted in a consent order recorded in court on **27<sup>th</sup> September 2005** in the following terms which confirmed the grant

1. **“That the widow does pay and hereby pays the parents of the deceased the cheque for Sterling Pounds \$7,000 dated 27<sup>th</sup> July, 2005 on the following terms:-**

**(a) That Yakub Sidik Majothi and Amina Yakub Ali Majothi the parents of the deceased do hand over forthwith to the advocates for the widow all the title documents of the property known as Land Reference Number 93/431, Plainsview Estate, Nairobi.**

**(b) That the duly signed transfer form by the co-administrator be forwarded to the widow's advocates within 21 days from today for further action in terms of the previous consent.**

**(c) That the aforesaid transfer be in favour of the widow in trust for all the children.**

**(d) That in default by the co-administrator to comply with Clause (b) above the Deputy Registrar of the High Court be and is hereby authorized to sign the Transfer form on behalf of the co-administrator.**

**(e) That the parents Yakub Sadik Majothi and Amina Yakub Ali Majothi do vacate the property known as Land Reference Number 93/431 within 21 days from today and in default the Court bailiff be and is hereby authorized to evict them without further notice.**

**(f) That any outstanding matters be sorted out and the cause be mentioned further on 18<sup>th</sup> October, 2005.**

This consent order was annexed to the replying affidavit of Farida Karim in the Originating Summons.

The Succession Cause file also has further consent orders recorded this year on 18.1.2006, before Rawal,

J to the effect that:

- 1. That Farida Karim do pay Yakub Sidik Majothi and Amina Yakub Ali Majothi jointly the total sum of Kenya Shillings Nine Hundred and Ninety Four Thousand Nine Hundred (Kshs. 994,900/-) (receipt of which is hereby acknowledged) for full and final settlement of all claims in regard to the estate of the deceased. The cheque for Kshs. 958,200/= is issued in the name of Messrs N.O Sumba & Co. Advocates.**
- 2. That Yakub Sidik Majothi be and is hereby removed as a Co-administrator of the Estate of the deceased in High Court Succession Cause Number 2513 of 1998.**
- 3. That Abdi Karim, the son of the deceased be and is hereby substituted co-administrator with Farida Karim in place of the said Yakub Sidik Majothi.**
- 4. That Yakub Sidik Majothi undertakes to comply with the consent order dated 27<sup>th</sup> September, 2005 forthwith.**
- 5. That for avoidance of doubt the property known as Land Reference Number 93/431 Plainsview estate, Nairobi be and is hereby to be exclusively possessed by Farida Majothi and the four children of the deceased namely:-**

- (i) Abdi Karim**
- (ii) Azam Karim**
- (iii) Atif Karim**
- (iv) Sadiq Karim**

She also granted orders to evict anybody still in the house.

I must say here that I sent for the Succession Cause file and read through it, in an effort to trace the history of the suit premises, in view of the claims by the applicants in the Originating Summons, that this was family property and that they contributed to it.

Again the replying affidavit of Farida Karim aforesaid had annexed to it a certificate of search and an agreement of sale of the suit premises.

The agreement of sale shows that the suit premises was purchased by Abdul Karim Majothi now deceased and another from Capt. Amir Ahmed. The agreement was entered into on 27<sup>th</sup> September, 1989, and the completion date was 31<sup>st</sup> December 1989.

The Certificate of official search shows the name and address of proprietor as Abdul Karim Majothi (now deceased) of P.O. Box 26394, Nairobi. Certificate of title was issued on 29<sup>th</sup> July, 1991 in the deceased's names.

The plaintiffs/applicants in the Originating Summons aver that they were not parties in the Succession Cause. This is true because it was their parents, who are also parents of the deceased, who raised objection to the making of a grant to the deceased widow Farida and another, and the matter was sorted out by way of consent orders which I have outlined above.

The plaintiffs in the Originating Summons have come to court by way of Originating Summons under Order 36 of the Civil Procedure Act, but the said Originating Summons is still within the matter of Succession Cause No. 2513 of 1998. That is how they have "headed" the Originating Summons, and in view of this, I turned to the Succession Act, Cap. 160 Laws of Kenya, particularly at Rule 41 whose foot

notes read, **“Hearing of application for confirmation”**.

I find the provisions of Rule 41(3) particularly relevant to the situation here. The Rule reads,

**“where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may, prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by ordering appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the act, proceed to confirm the grant”**.

Rule 41(4) gives the procedure of how the parties will appear in such an Originating Summons, if filed as stipulated in Rule (3).

I find first, that the Originating Summons filed herein is covered by the provisions of Rule 41(3) of the Rules of the Law of Succession Act.

Secondly and most important, and in accordance with the Rule, the Originating Summons **SHOULD HAVE BEEN FILED BEFORE THE GRANT OF REPRESENTATION TO THE DECEASED’S ESTATE WAS CONFIRMED**.

The applicants are seeking compensation to the tune of Kshs.2.35 million, **“for the developments made in the extensions and house deposit which were not part of the estate of the deceased.....”**

The applicants are therefore dissatisfied with the mode of distribution of the estate of the deceased which gave the house to the widow Farida and her 4 children as the orders from the Succession Cause show.

As the Originating Summons originates from the orders made in the Succession Cause, and further, as I have found that the Originating Summons should have been filed before the grant was confirmed, I am in agreement with the point raised in the preliminary objection to the effect that the **“Originating Summons is fatally defective”**, and is therefore **“an abuse of the process of the court and the same cannot be sustained”**.

I therefore proceed to dismiss the Originating Summons with costs to the widow, Farida Karim and her son Abid Karim, who were named the defendants/respondents in the Originating Summons.

Further, I also discharge and or vacate the injunction order issued in the amended chambers summons dated 2<sup>nd</sup> March, 2006, as the same does not lie. The said chamber summons is also dismissed with costs to the defendants.

**Dated at Nairobi this 7<sup>th</sup> day of April, 2006.**

**JOYCE ALUOCH**

**JUDGE**