REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 764 OF 2003 (O.S)

ESTHER WAMBUI KODIRE (suing on her own behalf & on behalf

of the Children and dependants of Mohammed Kodire)…PLAINTIFF

VERSUS

IDDI HASSAN……..…….…….….1ST DEFENDANT

MARIAM KASSIM (sued in her capacity as the Administrator and

representative of the Estate of

KASSIM HASSAN (deceased))……..2ND DEFENDANT

RULING

The Chamber Summons application by the first and second Defendants, dated 29th September, 2004 and filed on 30th September, was brought under Order VI, rules 13(1) (a), (d) and 16 of the Civil Procedure Rules. The prayers in the application were as follows:

(a) That, the suit herein against the first and second Respondents be struck out for being an abuse of the process of the Court;

(b) that, in the alternative, the Originating Summons be struck out for being incompetent;

(c) that the costs of the application be provided for.

The grounds in support of the application were as follows:

(i) that, the Plaintiff has no locus standi in bringing the suit proceedings;

(ii) that, the Plaintiff has not sought leave to continue with the suit;

(iii) that, obtaining of letters of administration after filing suit does not validate the Plaintiff's claim;

(iv) that, there is no principle of retrospective effect which applies to the Plaintiff's claim;

(v) that, a challenge is being levelled against the limited grant issued by the High Court to the Plaintiff since the primary documents relied on by the Plaintiff included forged ones.

The evidentiary basis of the application is in the supporting affidavit of ***Hassan Iddi***, the first Respondent, dated 29th September, 2004.

The deponent avers that the Plaintiff has taken out the Originating Summons on her own behalf and for the benefit of the dependants of the estate of the deceased brother of the deponent. The deponent believes the advice received from his advocates on record, that at the time of taking out the Originating Summons, no letters of administration, either ***ad coligenda bona*** or final, were produced by the Plaintiff or shown to the Court. The deponent also believes information from his counsel on record that the Court of its own motion did recognise that the Plaintiff lacked locus standi to file suit, and so the matter was stood over generally as the Court was not inclined to dismiss the same. It is averred that in the ensuing period the Plaintiff filed a petition and obtained a limited grant on 23rd February, 2004. Other than these factual depositions, the deponent has fallen into the error of urging points of law which are much better left to counsel to articulate professionally in his submissions before the Court. This error is commonplace in current affidavits; I think responsibility for it falls squarely upon counsel who not only fail to own up to their special task to address the Court on matters of law, but also miss out on the crucial importance of untainted, straightforward factual information from the deponent, as a building block for correct and valid rulings of the Court.

The response of the Plaintiff was to file grounds of opposition, dated 18th October, 2004. The specific items listed in those grounds are as follows:

(a) that the Chamber Summons application is defective, vexatious and an abuse of Court process;

(b) that the orders sought are so harsh and draconian, that they should not be granted.

On the occasion of hearing, on 1st November, 2004 ***Mr. Kingara*** and ***Mr. Goi*** appeared for the Plaintiff, while ***Mr. Wara*** appeared for the Defendant/Applicant. ***Mr. Kingara*** submitted that the Defendants' Chamber Summons application offended the provision under which it had been brought – i.e. Order VI(1) (a) and (d) – because for an application under the said paragraph (a) *no evidence is admissible*. I have taken the time to check the provision of the said paragraph (a):

"13(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that -

(a) it discloses no reasonable cause of action or defence."

To appreciate the point made by counsel, one has to consider the content of Order VI, rule 13(2). It states:

"No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made."

This provision has been interpreted in a decision of this Court, ***General (Rtd.) J.K. Mulinge v. Lakestar Insurance Co. Ltd***., Civil Case No. 1275 of 2001, in which the Honourable ***Mr. Justice Ringera*** (as he then was) remarked:

"On whether or not the application could lie under paragraph (a) it is plainly expressed in subrule (2) of rule 13 of Order VI that affidavit evidence is inadmissible on an application under subrule 1(a). What is required is a concise statement of the grounds on which it is made. The Applicant advocate has not done the latter. On the contrary it has been loudly proclaimed that the application is based on the grounds contained in the annexed affidavit and on such other grounds as may be adduced at the hearing of the application."

Mr. Kingara submitted that while the suit was being challenged for want of letters of administration, there was no need for such letters where a party was claiming adverse possession. The principal prayer in the amended Originating Summons of 3rd June, 2004 thus reads:

> **"That the registration of IDDI HASSAN and/or the estate of KASSIM HASSAN [as] the administrator thereof as the proprietor of L.R. NGONG/NGONG/3224 be cancelled and the Plaintiff be registered as proprietor thereof on her own behalf and on behalf of her children, under Section 38 of the Limitation of Actions Act."**

Counsel submitted that the Plaintiff in her own right was entitled to adverse possession; and that the instant application had not addressed itself to the effect of s.38 of the Limitation of Actions Act.

Mr. Wara submitted that any difficulty which the application may face on account of interpretations of Order VI, rule 13(1) (a) of the Civil Procedure Rules, should not lead to a striking out of the application – because the application also fell under rule 13(1) (d), which did allow the admission of affidavit evidence.

Counsel submitted that since the Plaintiff was bringing action on her own behalf and on behalf of the children of the deceased, there had to be letters of administration, to give ***locus standi;*** and hence the claim is incompetent.

Mr. Wara further contended, I think quite meritoriously, that questions involving *adverse possession*, owing to the factual information involved, must be canvassed *during full trials.*

Mr. Kingara relied on a Court of Appeal decision, ***D.T. Dobie & Co. (Kenya) Ltd. v. Joseph Mbaria Muchina & Another***, Civil Appeal No. 57 of 1978, to urge that the Plaintiff's Originating Summons suit be not dismissed. The following passages in the judgement of ***Madan, JA*** were sought to be relied upon:

> **(i) "At this [preliminary] stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way'…" (p.9).**
>
> **(ii) "If an action is explainable as a likely happening which is not plainly and obviously impossible the Court ought not to [overreact] by considering itself in a bind summarily to dismiss the action…" (p.9)**
>
> **(iii) "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a Court of justice ought not to act in darkness without the full facts of a case before it" pp.9 – 10**).

In the light of such authority, of the submissions of counsel, and of the evidence tendered through the depositions, I see no basis for terminating ***in limine*** the Plaintiff's suit, which is originated by the amended Originating Summons of 3rd June, 2004. *The Court if it errs, should do so in favour of a normal hearing, rather than of shutting out evidence and determining the vital questions summarily*.

On the basis of the foregoing principle I will make the following Orders:

(A) The prayer that the Originating Summons suit be struck out, is refused.

(B) The prayer that, in the alternative, the Originating Summons be struck out for incompetence, is refused.

(C) The Plaintiff shall move expeditiously, and in any event within 30 days from the date hereof, to

obtain a date for hearing the main suit; failing which the Defendants shall be at liberty to make any appropriate application, or to fix a date for the hearing of the main suit.

(D) The costs of this application shall be in the cause.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 4th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendants/Applicants: Mr. Wara, instructed by M/s. Ngumbau Mutua & Co. Advocates

For the Plaintiffs/Respondents: Mr. Kingara, instructed by M/s. Gichuki Kingara & Co. Advocates.