

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.68 OF 2002

IN THE MATTER OF: CHIEF MAGISTRATE'S CIVIL SUIT NO. 1024 OF
1995

ASSIZ ABBA ABDALLA..... PLAINTIFF/APPLICANT

AND

PETER K. KAIGOYA DEFENDANT/RESPONDENT

RULING

The matter was brought before court by way of originating summons by the plaintiff. The orders sought are reproduced herein and are brought under the provisions of order 21 rule 18, order 35 rules 3B and 7 of the Civil Procedure Rules and Section 32 and 3A of the Civil Procedure Act and Section 48 of the Trustees Act. The first part of the application was dealt with when the matter came to court Ex-parte and Interim orders of an Injunction were granted. The other substantive prayers are:-

1. That the Defendant his servants and/or agents be forthwith restrained from committing waste on Plot No.613 111/MN by way of erecting permanent constructions, fences or otherwise or in any way alienating or undertaking other dealings in this Plot until the Defendant has delivered title to the plaintiff of a Plot of 120 x 80 feet as per the judgement of the Chief Magistrate's court on 15th November, 2001.
2. That the Court appoint Messers Kiguru Land Surveyors or other suitable land surveyors to cause and effect subdivision of the Plot of 120 x 80 feet of the piece or portion of land known as No.613/111/MN Kilifi to the plaintiff/application one Aziz Abba Abdalla of P.O. Box 99884, Mombasa as the said court judgement.

At the hearing the Defendant and his Counsel were absent but were aware of the date which was given by the court in the presence of J.A. Abuodha representing the Defendant.

Mr. Waiyaki for the plaintiff submitted that the orders sought were necessary as the Defendant had failed to satisfy the court judgement of the 15th November, 2001. Instead the Defendant had proceeded to carry out certain works on the disputed area and for this reason the restraining orders were sought.

Order 21 rule 18 deals with instances in which the court is to issue a Notice to show cause before execution is ordered. Mr. Waiyaki did not address the court on this issue and I am at a loss what purpose it was meant to serve. The only reason I can perhaps think of is that the plaintiff in this case was not required to give any notice before applying for execution but as I said, he choose to ignore the same and, so will I.

Order 35 generally deals with originating Summons and rule 3B provides for a situation in which the applicant is a coveter under Section 116 of the Government Lands Act or Section 57 of the Registration of Titles Act. Save that Mr. Waiyaki mentioned that a caveat put in place by the plaintiff two days after execution of the sale agreement. No more was said on this issue.

Rule 7 on the other hand provides for the Form in which an originating Summons is to commence.

After considering the nature of the orders sought and the submissions by Mr. Waiyaki, it occurs to me that the matter has been wrongly brought to court by originating summons which is one Form of commencing proceedings by a party as long as the claim falls within the ambit of order 35 rule 1. It is a process meant to commence suit which are not complex enough and can be dealt with by way of Affidavits. Any applications for any reliefs are therefore to be filed within the main claim. In the present case, a suit between the parties was filed by the same plaintiff in CMCC 1024 of 1995 for orders of specific performance. The Court found in favour of the plaintiff but on realizing the Defendant was not as yet ready to comply and satisfy the court judgement, the current suit was commenced by way of originating Summons. This is not the proper manner in which the application seeking the orders sought is to be commenced. The plaintiff has filed a fresh suit while he has not exhausted all the avenues open to him as a decree holder. Even assuming this is the correct manner, an application for an injunction cannot issue within the main suit commenced by way of an originating Summons in the absence of a separate application brought within the said originating summons. I further note that in filling the originating Summons, the plaintiff failed to comply with the provisions of the Civil Procedure requiring that he files a verifying Affidavit. In the circumstances, the orders sought cannot issue and the application is dismissed. However since the defendant did not enter any appearance as is required under order 35 rules 7, I will make no order as to costs.

Dated and Delivered at Mombasa this 11th day of June, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE