



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. E.O11 OF 2021

IN THE MATTER OF TITLE NO. EMBU MUNICIPALITY 1112/1571

**ALLY MOHAMED HASSAN AND GICHUNGE ABUBAKAR GITONGA (as Administrators
of the estate of Mohamed Hassan Gichunge also known as Mohamed Gichunge Hassan also
known as M. Kishungi H. Kitonga (Deceased) APPLICANTS**

VERSUS

ISMAEL MSAMBA HASSAN 1ST RESPONDENT

THE LAND REGISTRAR EMBU COUNTY 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. What is for determination before me is a Preliminary Objection dated 22.3.2021 and filed on 23.3.2021. The objection targets both the suit as filed and the motion on notice contemporaneously filed with it. It is a multi-pronged objection and is premised on seven (7) points as follows:-

1. The court lacks jurisdiction to entertain the Originating Summons taken out as it is contra-statute, incompetent, and a nullity ab-initio for offending the Civil Procedure Rules, order 37 rule 8 which explicitly stipulates that an application under the Registered Land Act other than under Sections 120, 128, 133, 138, 143 and 150 shall be made by Originating Summons unless there is pending a suit involving the same lands when the application may be made in that suit.
2. The Originating Summons pleads a complex issue "ie" fraud without enlisting the particulars thereof hence the matter is incapable of being justly determined by the court in its present form.
3. The Originating Summons as filed is an undated one paper, unsupported by an affidavit, incurable and fatally defective.
4. That there is no suit properly before court for determination as order 51 presuppose the existence of a suit upon which an application may be field.
5. That Pursuant to Section 2 of Civil Procedure Act, a notice of motion is not a pleading as per the Law and is therefore not capable of forming the basis for determination of any question or issue.
6. The suit is a sham, frivolous, scandalous, vexatious, bad in Law and an abuse of the court process.
7. The notice of motion and Originating Summons as taken out ought to be struck out with cost to the first respondent.

2. The parties in the Originating Summons are shown to be Ally Mohamed Hassan and Gichunge Abubakar, as applicants, while Ismael Msamba Hassan, the Land Registrar, Embu County and Hon. Attorney General, are the respondents. The parties appear in the same order in the notice of motion that came with Originating Summons. The prayers sought in the Originating Summons are clearly challenging the title of land Parcel No. Embu Municipality/1112/1571 owned by the 1st respondent, Ismael Msamba Hassan, with the applicants alleging that the

land is a subdivision from the larger parcel No.1112/117. That land is part of the estate of the late Mohamed Gichunge Hassan, who also goes by the name M. Kishungi H. Kitonga.

3. The applicants are the administrators of the estate of the late Mohamed Gichunge Hassan. According to them, the 1st respondent became owner of the disputed land through fraudulent means. They would wish the 1st respondent's title cancelled so that the land reverts to the estate of the late Mohamed Gichunge Hassan.

4. The Notice of Motion is meant to preserve the disputed land before the suit is determined. In that regard, the applicants pray for an order of injunction and inhibition, both of which are meant to last during the duration of the matter in court.

5. According to the 1st respondent both the Originating Summons and the Notice of Motion filed together with it are not feasible court processes, hence the need to ensure that they do not proceed.

6. The objection was canvassed by way of written summons. The 1st respondent's submissions were filed on 29.3.2021. The 1st respondent began by pointing out what a Preliminary Objection is as articulated in the case of **MUKISA BISQUIT CO. LTD. Vs WEST DISTRIBUTORS LTD [1969] E.A 96**. He went further and proffered the grounds upon which the objection can be based as illustrated in the case of **JOHN MUNIDA NJOROGE and 9 others vs CECILIA MUTHONI NJOROGE and another [2016] eKLR**.

7. On the issue of jurisdiction, the 1st respondent faulted the applicants for filing an Originating Summons instead of a plaint. He submitted, inter alia, that the applicants "*flagrantly violated the Civil Procedure Act, particularly, the Civil Procedure Rules order 37, rule 8 ..*" The position taken by the respondent is that the rectification of register sought by the applicants would come under Section 143 of the Registered Land Act (cap 300) which, under order 37 rule 8 of Civil Procedure Rules, would require a suit to be filed in a manner other than by way of Originating Summons. To drive the point home, the respondent cited and quoted the case of **MALINDI MUSKETEERS LIMITED vs ATTORNEY GENERAL & 2 others (2014) eKLR** where the court reiterated its position as earlier stated in the case of **NGOMENI SWIMMERS LIMITED vs THE COMMISSIONER OF LANDS & 25 OTHERS, MALINDI HCC NO.18 OF 2013 (OS)**. For further weight and effect, the case of **DANIEL MOMAGUL KANDEI & 2 OTHERS VS. KAMANGA HOLDINGS LIMITED & 44 OTHERS 2017 eKLR** was also cited quoted.

8. Perhaps anticipating or suspecting that the applicants may seek to rely on the oxygen principle as expressed in Sections 1A and 1B of Civil Procedure Act (Cap21) and/or article 159 of the Constitution of Kenya, 2010 or that the court itself may invoke them, the respondent cited and quoted several cases including **THE SPEAKER OF THE NATIONAL ASSEMBLY Vs. KARUME (2008) IKLR EP 425, HUNKER TRADING COMPANY LIMITED Vs. ELF OIL KENYA LIMITED: C.A NO. 6 OF 2010, MRABURA SURESH KENTERIA Vs. SURESH NANALAL KENTEVIAI C.A. No. 277 of 2005 and MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (2013) eKLR** to make and reinforce the point that the oxygen principle or even article 159 of the Constitution cannot be used to circumvent, defeat, or depart from the laid down procedure.

9. The respondent further noted that the applicant allege fraud in their matter and for that reason, the Law requires them to give particulars of the alleged fraud. The respondent faulted the applicants for not appreciating that an Originating Summons would not afford them the opportunity and space to give such particulars. Besides, fraud was said to be a complex issue which an Originating Summons cannot adequately enable the court to address. An Originating Summons was said to be meant for simple and straight forward issues and fraud is not one such issue. To buttress the argument, the respondent cited and quoted the case of **FREDERICK KIURA NYAGA & 24 OTHERS (2020) e KLR, VIJAY MORJARIA Vs. NANCING M. DARBAR & Another (2000) e KLR, WAKF COMMISIONER Vs. MOHAMED bin UMEYA bin ABDULAMAJI BIN Mwijabu (1984) KLR 346, KIBUTIRI Vs. KIBUTIRI (1983) KLR and 122 MWANGA JUMA Vs. LWAMBA NZAKA MUNGA (2019) eKLR**.

10. The Originating Summons was said to be one for striking out and it would leave the notice of motion without a substratum. The Notice of Motion should therefore suffer the same fate.

11. The applicant's submissions were filed on 20.4.2021. An overview of both the Originating Summons and the Notice of Motion was given. The focus then shifted to the Preliminary Objection. There was a blow-by-blow response to the points raised in the notice of preliminary objection. On the issue of jurisdiction, the applicants faulted the 1st respondent for basing the issue on the repealed Registered Land Act (Cap 300) instead of the current Land Registration Act No. 3 of 2021. Reference to repealed Law was said to make that aspect of the objection fatally defective.

12. On the issue that the alleged fraud is a complex issue and/or that particulars are not given, the applicants questioned whether it is indeed true that no particulars are given. They then wondered whether it is a pure point of Law. And to these two concerns, the applicants answer was in the negative, meaning that particulars are given and the point raised are not pure legal points.

13. The Originating Summons filed was said by the 1st respondent to be "*one -pager*". The applicant submitted that they e-mailed the whole application to the 1st respondent and the allegation that it was a "*one pager*" was therefore untrue. There was also physical service on the 1st respondent and in both instances what was served was not a "*one-pager*" document. In this regard, the 1st respondent was said to be mischievous. This issue was also said to be one requiring evidence and therefore not suitable to be raised as a Preliminary Objection.

14. The other points of objection, namely, that the Notice of Motion is not a pleading in law; that the suit and the application that came with it are a sham, frivolous, vexatious bad in law, and an abuse of court process, were all addressed together. According to the applicants these are not proper issues for raising as points of Preliminary Objection. They were said to be issues of facts which therefore require to be proved or disproved.

15. Ultimately, it was submitted that the Preliminary Objection "*cannot be sustained as it is going against the basic principles governing*

Preliminary Objection”.

16. The applicants also submitted on the issue of withdrawal of the suit. They intended to withdraw the suit but the 1st respondent opposed mainly for the reason that there was no suit to withdraw. According to the court records this court declined at that stage to allow the withdrawal and directed that submissions on the Preliminary Objection be filed. It is not clear to the court why the applicants have submitted on the issue of withdrawal. Even now, the court refuses to entertain it. It is not the one coming for consideration. It is an issue for another time and that time itself depends on the outcome of this objection.

17. I have considered the objection as raised and the rival submissions filed by both sides. I have had a look into both the Originating Summons and the Notice of Motion filed together with it. As pointed out by the 1st respondent, the governing principles are to be found in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO. LTD Vs. WEST END DISTRIBUTORS [1969] EA 696**. In the case, Law JA expressed himself as follows:-

“So far as I am aware, a preliminary Objection consists of a pure point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

And Sir Charles Newbold P also had this to say;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”.

18. The position expressed in Mukhisa’s case (supra) has been consistently followed in cases that came later (see for instance *MUIRURI Vs. KIMEMIA [2000] 2 KLR 677* and *SIRMA Vs. KIPRONO [2005] 1 KLR 197*).

19. Given the position expressed in Mukhisa’s case, it seems to be clear that only grounds 1,4 and 5 in the notice of objection filed herein are points of law. The rest, that is to say 2,3,6 and 7, are questions of fact which require to be ascertained through evidence. They do not therefore qualify as points of preliminary objection. This observation impels the court to take a position concerning what is to be determined. And the position is that only grounds 1,4 and 5 will be determined. The others can be regarded as rejected. They do not qualify for consideration as points of preliminary objection.

20. The first point relates to the manner in which the suit is brought. The 1st respondent points out that it should not be by way of Originating Summons. He cites Order 37 Rule 8 of Civil Procedures Rules, 2010, as the basis of his position. The applicant’s on the other hand fault him mainly on the ground that he seeks to rely on repealed law – the Registered Land Act (cap 300). According to the applicants, this reliance on repealed Law “*is fatally incurable and the ground of objection fails*”. No decided case is made available for the applicant’s position.

21. I do not understand the 1st respondent as seeking to rely on the stated repealed Law. A careful reading of the point as formulated in the Preliminary Objection shows that the 1st respondent is stating the position as spelt out in order 37 rule 8 of the Civil Procedure Rules. What the 1st respondent failed or omitted to state is that the position stated in order 37 rule 8 of Civil Procedure Rules, 2010, can still be found in part VII and part VIII of the Land Registration Act, 2012. More appropriately, Order 37, Rule 8 of the current amended version of Civil Procedure Rules states as follows:

“An application under the Land Registration Act, 2012 other than under part VII and VIII thereof shall be made by Originating Summons unless there is pending a suit involving the same land when the application may be made in that suit”.

22. The point here is that the position that obtained in the repealed law still exists in the current applicable law. If the court accepts the applicants argument to the effect that the objection is unsustainable for invoking the repealed Law, it would in effect be allowing them to continue with the suit in violation of the same position as it obtains in the current applicable Law. In otherwords, the court would wittingly or unwittingly have allowed the applicant’s to continue with their matter in violation of the current applicable law.

23. The 1st respondent reinforced his position by making available and even quoting Judicial pronouncements on the issue. In this regard, the decided cases of *MALINDI Musketeers Limited (Supra)* and *Daniel Momagul Kandie(Supra)*, were cited and quoted. And the position that emerges in both is that where the manner of filing a suit is stated or prescribed by a statute, departure or deviation from the prescribed manner will not be accepted by the court. The party filing must strictly adhere to the manner prescribed or risk the suit being struck out for incompetence.

24. The correct legal position therefore is that espoused by the 1st respondent and I therefore uphold his objection on this issue. My finding is that the suit as filed is a non-starter.

25. The 1st respondent submitted extensively on the applicability of the oxygen principle as found in Civil Procedure Rules and article 159 of the Constitution. This, as I pointed out earlier, was done in anticipation or expectation that the applicants or even the court itself would seek reliance on them. The applicant did not rely on them. The court has not invoked them. The 1st respondent articulated the law well but the court does not see the need of dwelling at length on the issue. The issue should be left to rest as neither the applicants nor the court itself has sought reliance on that Law.

26. Then there is a ground 4, which is to the effect that there is no application properly before the court as order 51 of Civil Procedure Rules,

2010, presupposes the existence of a suit upon which an application may be based. It seems apparent to me that this is targeted at the notice of Motion that came with the Originating Summons. Ground 5, which faults the application for not being a pleading is actually related to ground 4. The point made here is that since the suit cannot stand, the notice of Motion cannot also stand as its anchor is for demolition. I have already held that the Originating Summons cannot stand. I agree with the 1st respondent that the Notice of Motion cannot stand. It is an inseparable part of the suit and when the suit collapses, it collapses with it.

27. As regard whether the Notice of Motion is a pleading, the 1st respondent seeks to rely on the definition of pleading found in Section 2 of the Civil Procedure Act (Cap 21). It's as follows:

“Pleading” includes a petition or summons, and the statement in writing of the claim or demand of any plaintiff, and of defence of any defendant thereto, and of the reply of the plaintiff to any defence or the counter-claim of the defendant”.

28. On my part, I find this aspect of the objection simplistic misconceived, and somewhat lacking in depth. The definition referred to only refers to a few court processes that can be said to be pleadings. If one were to limit one's understanding of the word “pleading” to what is expressly mentioned in the definition, one would run into problems. For instance, third party proceedings, which are a common feature in court proceedings, are not mentioned. What would the 1st respondent say about them? Are they not pleadings? Of course they are. What would the 1st respondent also say about Order 2 of the Civil Procedure Rules 2010, which deals with pleadings generally, and where interlocutory applications of the kind filed by the applicant herein are anticipated as part of court processes?.

29. One would even pose more questions: Does it matter really whether the Notice of Motion filed by the applicant is a pleading or not? Is it not enough that it is a process known and accepted by law in court processes? Can anyone doubt that applications of this kind are generally the accepted mode of interventions deemed necessary in the pre-determination stage of a suit? The fact of the matter is that the definition in Section 2 is not exhaustive. The fact of the matter also is that a Notice of Motion is an accepted useful tool for the litigants to use in their proceedings particularly in the interlocutory stages. I therefore don't agree with the 1st respondent on this issue.

30. Overall, the 1st respondent succeeds on the first point of the objection. He also succeeds on the 4th point. He fails on the 5th. The more crucial aspect of the objection is the first point which leads to the rejection of the suit as filed. The 4th point is secondary to the first point.

31. The objection raised by the 1st respondent is upheld therefore only to the extent of 1st and 4th points. In light of this, both the Originating Summons and the Notice of Motion that came with it are both struck out with costs to the 1st respondent.

A.K. KANIARU

JUDGE

RULING ON PRELIMINARY OBJECTION DATED 22.3.2021 READ AND DELIVERED IN OPEN COURT ON THIS 26TH DAY OF MAY 2021.

In the presence of:-

Applicant – absent

Respondent – absent

Hussein for 1st respondent

Muthoni for Ali for applicant

Court Assistant – Leadys

Right of Appeal 30 days.

A.K. KANIARU

JUDGE