



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KAJIADO

ELC APPEAL NO. 23 OF 2019

FLORENCE AKOTH ODUK.....APPELLANT

-VERSUS-

ROBERT MAINA KAMANJA.....RESPONDENT

JUDGMENT

1. The appellant filed a memorandum of appeal on 25th October, 2019 after being aggrieved by a ruling dated 2nd October, 2019 which dismissed her case which was Miscellaneous ELC No. 3 of 2018 at Ngong Magistrate's Court.

2. In the appeal, there are three prayers namely,

- a. The ruling and the order of the Trial Magistrate dated 2nd November, 2019 (sic) dismissing the summons be set aside.
- b. The court do determine the originating summons and give appropriate orders on the issues raised therein.
- c. The costs of the originating summons and of this appeal be borne by the Respondents.

3. In dismissing the appellants suit this is what the Trial Magistrate said in summary;

“ A glance at the above provisions of the law indicate that, for a matter to be resolved through an originating summons, it must be simple and specific in nature. In my view the issues raised in the summons can only be ascertained at the hearing of the main suit and not through summons filed herein.....for a Court to determine whether or not there was a breach of contract, the aggrieved party must prove first and foremost that, the contract in question was valid. If therefore its validity is a question for the court to determine, order 37 rule 3 Civil Procedure Rules excludes such an issue from being brought through an originating summons.

In the result, I dismiss the originating summons with costs to the defendants. The plaintiff is at liberty to file a suit by way of a plaint (if she so wishes)”

4. There are four grounds of Appeal namely;

a. The Trial Magistrate erred in Law and in fact in construing the originating summons as seeking a determination of the existence of or the validity of the contract between the parties, whereas the issue was for the breach of the concluded contract dated 7th December, 2017, through various acts.

b. The Trial Magistrate erred in Law and in fact in delivering (sic) the grounds that it ought to have proceeded by way of plaint when she no longer had jurisdiction to do so, directions having been taken under **Order 37 Rule 18 of the Civil Procedure Rules**, that the issues raised in the Originating Summons to be heard on evidence of the documents filed, by way of affidavit evidence and without having called for any amendments to the summons.

In the alternative, the Trial Magistrate erred in Law in dismissing the summons without determining the issues raised and without ordering for the Originating Summons to proceed as if began by way of plaint.

c. The Learned Trial Magistrate erred in law and in fact in dismissing the Originating Summons outright and without having recourse to the provisions of **Order 37 Rule 1a Civil Procedure Rules** and thereby arrived at a decision which was unjust, unfair

and prejudicial to the appellant in the circumstances.

d. The Learned Trial Magistrate erred in failing to evaluate the evidence and documents produced in support of or in opposition to the summons.

5. Counsel for the Appellant filed a record of Appeal which contains written submissions. The Respondent's Counsel did the same. This was on 11th December, 2019 and 28th October, 2020 respectively.

6. According to the Counsel for the Respondent, there are two (2) issues for determination namely;

a. Did the Trial Court have jurisdiction to determine the suit brought under **Order 37 Rule 3 Civil Procedure Rules?** And

b. Could the summons be saved by **Order 37 Rule 19(1) Civil Procedure Rules, Section 1A and 1B** of the **Civil Procedure Act** and **Article 159** of the Constitution.

It is the submission by counsel for the Respondent that those provisions of law cannot save the suit as presented because Originating Summons only apply to cases which are simple in nature but not to serious and complex matters such as the suit before the court.

As for, **Article 159 (2) (d)** of the Constitution, Counsel said it is not meant to negate the orderly scheme of litigation provided for in the Civil Procedure Rules. In so submitting Counsel relied on five authorities.

7. On the other hand, the Appellant's Counsel urges that Trial Magistrate relied on repealed law to dismiss the suit yet the law has been amended to empower the court to convert an Originating Summons into a plaint.

Secondly, Counsel urges that the Magistrate should not have ignored the evidence adduced in form of the affidavits and exhibits and should have offered some relief instead of dismissing the entire suit.

8. I have considered the appeal in its entirety including the memorandum of appeal, the record, the submissions by both sides and I find that there are only two issues to be decided in this Appeal namely;

a. Was the suit properly commenced?

b. If not properly commenced, should the suit have been dismissed?

9. On the first issue, I find that the suit was not properly commenced.

The Supporting Affidavit has thirty (30) paragraphs and the annexures run into forty one (41) pages. The Replying Affidavit and annexures are almost as voluminous.

As correctly submitted by the Respondent's Counsel and as held in the case of **Kibutiri –Vs- Kibutiri (1982) KLR** “**The procedure by way of Originating Summons was intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual manner. The procedure is, however, not meant to determine matters which involve serious and complex questions of law and fact**”

The affidavits by the Appellant and the Respondent in the Lower Court contain deposition that is controverted almost verbatim. From that material, it is clear that the character of the agreement changed in content and context from time to time. Affidavit evidence was not good enough to resolve the dispute.

The Trial Magistrate was therefore right to find that the suit was improperly commenced.

10. On the second issue of whether the suit should have been dismissed, I have two things to say.

Firstly, it is trite law that an Appellate Court will not interfere with the findings of a Trial Court unless it is satisfied that the decision was clearly wrong and due to misdirection and acting on matters which it should not have, or failed to take into account matters which it should have and is so doing arrived at a wrong conclusion. See **Mbogo –vs- Shah 1968 EA 95**.

Secondly, under **Section 1A (1) Civil Procedure Act**, the overriding objective of the Civil Procedure Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed by the Act.

This overriding objective is repeated in **Section 3 of the Environment and Land Court Act (Act No. 19 of 2011)**.

Finally, **Order 37 Rule 19(1) Civil Procedure Rules** provides in part “**Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits**”

11. Armed with all these provisions of Law, the Learned Trial Magistrate should not have dismissed the suit but instead converted it into a suit commenced by a plaint in order to conclude it expeditiously as required by the law cited above.

12. In conclusion I therefore make the following orders;

- a. The ruling and the order of the Trial Magistrate dated 2nd October, 2019 dismissing the summons is set aside.
- b. The case to proceed before a different Magistrate who is to proceed from where it had reached before dismissal.
- c. The issue of costs in this case and in the Lower Court to be decided at the conclusion of the Lower Court suit.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 3RD DAY OF NOVEMBER, 2021

M.N. GICHERU

JUDGE