



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC NO. 65 OF 2017

RICHARD KUNGU MANYARA.....PLAINTIFF

VERSUS

JOHN KIHAGURU NDITU.....DEFENDANT

RULING

1. The plaintiff herein moved the court through Originating Summons dated 22nd February 2017 seeking the following orders:

- 1. That a declaration that the continued occupation of the respondent/ defendant herein on L.R No. 464/15 Ndundori is unlawful and that the same constitutes illegal trespass.**
- 2. That the defendant be evicted from the said parcel of land L.R No. 464/15 Ndundori.**
- 3. That the Officer Commanding Police Station (O.C.S.) Ndundori police station do supervise the exercise and or provide security.**
- 4. That the defendant be compelled to pay mesne profits equivalent to rent chargeable for continued occupation of the property from February 2017 until the final determination of the Summons.**
- 5. That the defendant do bear the costs of this application.**

2. The Originating Summons is stated on its face as being brought “under Order 36 Rules 3A and 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law”. It is supported by an affidavit sworn by the plaintiffs. It is deposed in the affidavit that the plaintiff is the registered proprietor of a parcel of land known as **LR 464/15 Ndundori** (the suit property). Pursuant to a lease dated 22nd February 2006 and a renewal dated 2nd May 2015, the plaintiff leased to the defendant three acres of the suit property as well as a farm house built thereon on agreed monthly rent of Kshs.2, 000/= for the farm house and the Kshs.10, 000/= per annum for the land. The renewed lease has an expiry date of 31st December 2018. Owing to the defendant’s alleged failure to pay the rent and other alleged breaches of the lease such as constructing permanent structures, the plaintiff issued to the defendant notice of termination of the lease with a requirement that the defendant hands vacant possession “by January 2017”. The defendant has ignored the notice of termination and has continued to occupy the premises.

3. The defendant responded to the Originating Summons by filing Notice of Preliminary Objection dated 27th March 2017. The grounds of the objection are:

1. That the Originating Summons dated 22nd February 2017 is incompetent and based on the incorrect Law:

- i. Order 36 of the Civil Procedure Rules is not available to the plaintiff. This order is for parties willing to apply for Summary Judgment.**
- ii. Order 36 does not have Rule 3A.**
- iii. Rule 7 of Order 36 states “Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise as the court thinks fit.”**

This rule is not applicable in Originating Summons.

- iv. Section 3A is only applicable where there are no other legal or procedural provisions for a party desiring to move**

the court one way or other.

2. That where the incorrect procedural or legal provisions are invoked in judicial proceedings where they are not applicable, the court lacks jurisdiction to hear such proceedings and they should be struck out in “limine”.

4. The preliminary objection was heard by way of written submissions. The defendant’s submissions were filed on 6th March 2018 while the plaintiff’s submissions were filed on 9th March 2018. It was argued on behalf of the defendant that the Originating Summons has been brought under wrong provisions of the law and that the procedure of Originating Summons is intended for determination of simple matters but not complex questions of law and facts. Citing the cases of Njagi Kanyunguti Alias Karingi Kanyunguti & 4 others –vs- David Njeru Njogu [1997] eKLR and Kibutiri –vs- Kibutiri [1983] KLR 62, counsel for the defendant urged the court to uphold the preliminary objection and strike out the Originating Summons with costs.

5. In response, counsel for the plaintiff argued that the matter is straight forward and not complex since it seeks the direction of the court on whether the defendant should refuse to vacate when the lease has been terminated and whether the defendant should construct permanent buildings on the suit property. Additionally, the plaintiff argued that the preliminary objection is contrary to the “Oxygen Principle”.

6. The plaintiff also purported to introduce evidence in the form of photographs annexed to the submissions. Obviously, that is unacceptable. Evidence can only be introduced on oath either through oral testimony or by affidavit.

7. I have considered the preliminary objection, the submissions thereon and the authorities cited. A valid preliminary objection must be on a pure point of law. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

9. Both parties herein agree that the procedure of Originating Summons is for determination of simple matters which do not involve complex questions of law and fact. That indeed is the correct position. The Court of Appeal stated in Beatrice Nyambura Mucheru v Joyce Wanjiru Mucheru [2000] eKLR –as follows:

...But can the same be said about the first question set out in the originating summons, that is, whether Teresia Mucheru was entitled to bury her dead husband? We would say, no! What is more, the issues involved in the originating summons were ... of a complex nature and which should not have been dealt with by way of the originating summons

... in Kibutiri v Kibutiri (1982-88) 1 KAR 60 Law J.A. had this to say: "The procedure by way of originating summons is intended - 'to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.'

10. A perusal of the Originating Summons herein shows that the plaintiff seeks judgment in the nature of a declaration that the defendant’s continued occupation of the suit property is unlawful and amounts to trespass. Additionally, the plaintiff seek eviction of the defendant as well as judgment for mesne profits. Though no replying affidavit has so far been filed in response to the Originating Summons, the prayers sought by the plaintiff cannot by any stretch of imagination be said to constitute simple matters that can be dealt with summarily. I accordingly agree with the defendant that the procedure adopted herein is not the appropriate procedure.

11. Should the procedural breach attract an order of striking out as is sought by the defendant? From the onset, I remind myself of **Article 159 (2) (d)** of the **Constitution of Kenya** which provides:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a)

(d) justice shall be administered without undue regard to procedural technicalities;

12. I further remind myself of the overriding objective of the **Civil Procedure Act** and the rules thereunder as stated at **Section 1A** of the said Act which provides:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

13. Pursuant to Section 1B of the Act, the court is required to handle all matters presented before it with a view to attaining just determination of the disputes, efficiency in disposal of the business of the court, efficiency in the use of both judicial and administrative resources and timely disposal of proceedings at a cost that is affordable by the parties.

14. The upshot of the foregoing provisions of the Constitution and the Civil Procedure Act is that while observing procedural requirements, the court should not lose sight of the bigger picture; substantive justice. Indeed, the Court of Appeal has recently addressed the issue in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others**[2018] eKLR as follows:

We draw from the judgment of this Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013) where Ouko, JA. in the majority stated that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness... it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...

15. The defendant herein has not cited any injustice that has been occasioned or will be occasioned to him by the procedure the plaintiff has adopted. All he has done, and commendably so in my view, is to point out the procedural shortcoming in the Originating Summons. These shortcomings need not attract the extreme sanction of striking out as is sought. The court must ask itself whether there is a way in which the plaintiff can be assisted to have his case heard on the merits. Indeed, **Order 37 rule 19** of the **Civil Procedure Rules** offers a ready relieve. The rule provides:

19(1) 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.

(2) Where the court makes an order under sub rule (1), Order 11 shall apply.

(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.

(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under sub rule (1).

16. In view of the foregoing discussion and in the totality of the circumstances of this case, an approach that enables the court to rise to its higher calling of rendering substantive justice commends itself to me. Consequently, I dismiss the preliminary objection dated 27th March 2017. I further Order that:

a. The proceedings herein shall continue as if this cause had been commenced by filing a plaint.

b. The Originating Summons dated 22nd February 2017 and the affidavit in support thereof shall be collectively deemed to be the plaint.

c. The plaintiff to file and serve the documents referred to in Order 3 rule 2 (b) (c) and (d) of the Civil Procedure Rules within 14 (fourteen) days from the date of delivery of this ruling.

d. The defendant to file and serve defence and all compliance documents within 14 (fourteen) days of service of the documents referred to in (c) above.

e. Costs of the preliminary objection shall be in the cause.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 6th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

Mr Karanja for the defendant

Court Assistants: Gichaba & Lotkomoi