IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO.196 OF 2017

BETWEEN

AHAD.....APPELLANT

AND

CJE.....RESPONDENT

(Being an appeal against the Ruling and Order of the High Court of Kenya at

Nairobi (Musyoka, J.) delivered on 18th December 2015 In H.C.C.C. No. 1 of 2011 (OS))

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JUDGMENT OF THE COURT

1. AHAD, the appellant, and CJE, the respondent, solemnized their marriage under the then Marriage Act, Cap 150 at the Registrar's Office in Nairobi on 23rd September 1997. At the time of marriage, the appellant was resident in Nairobi while the respondent was resident in the USA. Approximately nine years thereafter the respondent filed divorce proceedings before the Superior Court of the District of Columbia, USA, which, after hearing the parties, dissolved the marriage on 12th June 2009. At the same time, that court decreed that the respondent was entitled to 80% interest of the value of the marital home located in Washington D.C while the appellant's interest in the same was placed at 20%. The court also ordered that each party shall have 50% interest in a 1997 Ford Explorer automobile. Subsequently, litigation moved to Kenya where the parties own a property in their joint names.

2. On 12th January 2011, the respondent instituted suit by originating summons before the High Court at Nairobi (Civil Suit No. 1 of 2011(O.S)) seeking orders: that the joint ownership in respect of a property known as L.R. No. xxx/xx-Maisonette No. x situated off Riverside Drive, Nairobi be severed; that the property be held by the parties as tenants in common; and that the said property be sold and the proceeds be shared equally between the parties. In her affidavits in support of that suit, the respondent deposed that although the property was registered in their joint names, the same was being used exclusively by the appellant since June 2005; that unless the orders she sought were granted, the appellant would continue to fully control and utilize the income from the property to her exclusion.

3. In opposition to the originating summons, the appellant deposed in his replying affidavit that the respondent had not contributed to the acquisition of the property; that she had failed to disclose that despite the court in the USA ordering that the appellant was entitled to 20% share in the Washington D.C property, she continued to reside and occupy the same without accounting to the appellant for his share. He intimated in that affidavit that he intended to counterclaim against the respondent for his 20% share in the Washington D.C property as well as the matrimonial car.

4. On 6th June 2011, the respondent applied to the court, by chamber summons, for directions in respect of the suit and in particular sought directions *"whether the trial shall* [be] *by affidavits and or by viva voce evidence"*. That application was heard before ***G.B.M. Kariuki, J.*** (as he then was) on 25th June 2012 who directed that the originating summons *"will be determined on the basis of affidavit evidence and submissions"* and provided a timetable for filing and service of written submissions. The final direction by the Judge was that there was liberty to apply (indicated in the order as liberty to *"appeal").*

5. On 28th November 2012, the appellant presented an application seeking an order that the cause be continued as if it had been begun by filing a plaint. That application was based on the grounds that the appellant desired to file a counterclaim against the respondent in respect of the ownership of the property and other matrimonial properties and that he desired too that the matter should be conducted through *viva voce* evidence so that he could have an opportunity to cross examine the respondent.

6. Counsel for the respondent opposed that application on grounds of opposition dated 14th December 2012 in which it was contended that the application was an abuse of the process of the court, frivolous and vexatious; that both parties had already filed their respective pleadings; that directions had already been taken; that the respondent resides and works in Germany and could not therefore attend the hearing; and that the matter was at the conclusion stage pending filing and serving of parties respective submissions. In an amended application dated 22nd May 2014, the appellant included the alternative prayer for the court to order the attendance of the respondent for cross-examination.

7. That application fell for determination before ***Musyoka, J.*** who, on 27th March 2014 directed that the same should be *"dispensed of by way of written submissions"*. It took the parties considerable time to file the written submissions after which the learned Judge delivered the impugned ruling on 12th May 2017 dismissing the application. In doing so, the Judge expressed that directions had been given on 26th July 2012 *"in the presence of counsel for both sides"*. The Judge held that those directions *"were comprehensive with regard to the manner of the disposal of this suit"* and that the appellant *"had not advanced any substantive reason for departure from the said directions."* The Judge concluded that *"all issues relating to the property can quite properly be dealt within the cause as commenced by originating summons."*

8. That ruling gave rise to the present appeal in which the appellant faults the Judge for finding that directions had been given in the presence of counsel for both parties. He asserts that he had advanced substantive reasons for seeking an oral hearing; that contrary to the finding of the Judge, the issues raised in relation to the property could not be dealt with in the manner suggested by the Judge; and that the Judge failed to take into account all matters he had raised.

9. During the hearing of the appeal, ***Mr. A. Osodo***, learned counsel for the appellant, stressed that the appellant's counsel who was then on record was absent when directions to dispose of the originating summons through affidavits and submissions were given; that it was only counsel for the respondent who was present on that occasion; that the appellant should not suffer prejudice on account of his advocate having been absent when the directions were taken; that a mistake of counsel should not be visited on a litigant; that directions are procedural matters that should not override considerations of a fair trial, which, in the present case require that the appellant should have an opportunity to cross-examine the respondent.

10. It was submitted that based on the affidavits filed in support and in opposition to the originating summons, there are disputed facts which render *viva voce* evidence necessary. In support, reference was made to the case of ***Wakf Commissioners vs. Mohamed Bin Umeya Bin Abdulmaji Bin Mwijabu, Civil Appeal No. 83 of 1983*** as well as ***Kenya Commercial Bank Ltd vs. Osebe, Civil Appeal No. 60 of 1982*** for the proposition resolution of complex issues. It was submitted that the court had the option of converting the originating summons into a suit or ordering the attendance of the respondent for the purpose of cross-examination.

11. Opposing the appeal, learned counsel for respondent ***Ms. Lynn Nganga*** holding brief for ***Mrs. Thongori*** submitted that when directions were given on 25th June 2012 for the matter to be determined on the basis of affidavit evidence and submissions, the appellant had duly been served with notice of hearing but failed to attend; that rather than make a fresh application seeking an order that the cause be continued as if it had been begun by filing a plaint, the appellant ought to have applied for review of the directions that were given on 25th June 2012; that the replying affidavit filed by the appellant in response to the originating summons constituted the appellant's defence and the originating summons was the appropriate and correct process for resolving the matter. It was submitted that there is no complexity in the matter as the originating summons deals with only one property in the joint names of the parties.

12. In his brief rejoinder, ***Mr. Osodo*** submitted that it is not in contention that the dispute was instituted in the right manner by way by originating summons. Rather, the contention is that on account of the disputed facts as brought out in the affidavits, the suit should be continued as if commenced by way of plaint.

13. We have considered the appeal and the submissions by counsel. The only issue for determination is whether the learned Judge erred in declining to allow the conversion of the suit commenced by way of originating summons into an ordinary suit or by declining the alternative prayer for the attendance of the respondent for purposes of cross examination.

14. In declining the application, the Judge was exercising his judicial discretion. The circumstances in which we can interfere with exercise of discretion by a judge are limited. As stated by Sir Charles Newbold P. in ***Mbogo & Another vs. Shah [1968] E.A.93*** at page 96, stated:

> ***"…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."***

15. Order 37 Rule 11 of the Civil Procedure Rules on which the respondent's originating summons was based provides that:

> ***"Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."***

[Emphasis added]

16. In light of that provision, there can be no basis for complaining that the respondent did not invoke the correct process by instituting her action by way of originating summons. It is however established that the procedure of originating summons is not intended for complex matters or matters where facts are contested. As stated by the Court in ***Kenya Commercial Bank Ltd vs. Osebe*** (above):

> "***The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense***

of bringing an action. The procedure is not intended for determination of matters that involve serious questions. <u>The procedure should not be used for the purpose of determining disputed questions of fact</u>.

The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers". [Emphasis added].

17. Where serious questions arise in a suit or where there are disputed facts relevant to the resolution of the dispute, an originating summons may not be the appropriate process. In that regard, Order 37 Rule 19(1) of the Civil Procedure Rules provides leeway. It provides that:

"(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."

18. In the present case, the respondent was effectively seeking a declaration of her rights over the suit property that is jointly registered in her name and that of the appellant. In his affidavit in reply, the appellant contested the respondent's claim to half the property asserting that she made no contribution towards its purchase and that there are other properties that should be considered alongside her claim. The respondent in turn filed a further affidavit asserting, among other things, that property would not have been registered in the joint names if she had *"not substantially contributed to the same."* In addition, the respondent claimed that the appellant should be held to account to her for *"all the rental proceeds that he has exclusively collected from the said property."* Given the rival positions taken by the parties in their respective affidavits, it is manifest that there are disputed questions of fact.

19. Although the statement by the Judge that both parties were present when directions were given was not entirely correct, he was right that the directions had in fact been given by the court for the disposal of the matter by affidavits and written submissions. That did not however tie his hands for the life of the case, for if "*it appears to the court <u>at any stage of the proceedings</u> 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…*". Notwithstanding that directions had been given, it remained within the power of the court, at any stage of the proceedings, to proceed with the action as if it had been commenced by way of a plaint.

20. Furthermore, the Judge does not appear to have taken into account that the directions given by the court on 25th June 2012 did in fact provide *"liberty to apply"*. Where, as here, facts appear to be contested, we see no reason why an opportunity should not have been availed for testing the conflicting facts as set out in the rival affidavits through cross examination. It would appear that the main reason the respondent objected to the appellant's application is that she is based in Germany and her attendance in court would be inconvenient. However, we see no reason why arrangements cannot be made, if she is unable to attend court, for her testimony to be taken through video conference or such other medium as the trial court might direct.

21. We think, therefore, that the matters we have alluded to are relevant matters that the learned Judge ought to have considered. To the extent that he did not do so, we have reason to interfere with his exercise of discretion. We accordingly allow the appeal and set aside the ruling given on 18th December 2015. We substitute therefor an order allowing the appellant's application dated 27th November 2012 as amended on 22nd May 2014. We direct that the matter be mentioned before the High Court within 30 days from the date of delivery of this judgment for purposes of directions as to the hearing and disposal of the suit by *viva voce* evidence.

We make an order is as the costs of the appeal.

Dated and delivered at Nairobi this 8th day of November, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S.GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR