



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 66 OF 2018 (OS)

GAUDENCIA MANYASIA OUMA

(Suing as the Administrator of the

Estate of OUMA OREMAKE).....APPLICANT

VERSUS

ISAYA WABWIRE MARIDADI.....RESPONDENT

RULING

1. This is a ruling on a preliminary objection raised via a Notice of Preliminary Objection dated 27th October, 2018 and filed on 21st November, 2018. In order that clarity is not lost or obscured by paraphrasing, I shall set out the substance of the preliminary objection *Ipsissima Verba*.

Here it is:

“The respondent shall raise a preliminary point of law to the effect that the suit herein that has been instituted through the originating summons on complaints of fraud and which seeks prayers for cancellation of titles is entirely and incurably incompetent and contravenes express provisions of the law.”

The respondent’s desires that the applicant’s originating summons dated 17th July, 2018 and filed on the same date be struck out for the reason expressed in the notice of objection.

2. The respondent is clearly saying that the suit should not have been brought by way of an originating summons. It should have been in another form. And the reason for that is that the suit is founded on fraud, which is not one of the wrongs or torts that can sufficiently and/or effectively be urged through an originating summons.

3. A look at the originating summons as filed shows that the applicant – **GAUDENCIA MANYASA OUMA** – is suing as the administrator of the estate of the late **OUMA OREMAKE**. She impleads the respondent – **ISAYA WAMBWIRE MARIDADI** – because of an alleged fraudulent subdivision and transfer of land parcel **No. L.R No. BUKHAYO/EBUSIBWABO/257**. According to the applicant, the land was fraudulently subdivided into parcels **NOS. BUKHAYO/EBUSIBWABO/4772** and **BUKHAYO/EBUSIBWABO/4773**. She wants everything reversed so that the land could revert its original status.

4. The objection was canvassed by way of written submissions. The respondent’s submissions were filed on 10th June, 2019. A snapshot of the pleadings is given and it is then submitted, inter alia, that *“originating summons is basically an application that is reserved for straight forward matters that would not require an elaborate process of proof. Allegations of fraud would entail a higher standard of proof beyond a balance of probabilities.”* The respondent went on to submit further that *“The summons as drawn is therefore incompetent owing to express provisions of Order 37 rule 8.”*

5. The applicant’s submissions were filed on 8th May, 2019. The court was urged to dismiss the objection as *“it is founded on a procedural issue subservient to the likely justice to be meted out to the parties herein if the suit and the claim is heard and determined on merit.”*

6. The objection raised was also said to have failed to meet the threshold for a proper preliminary objection. The reason for this is that the law upon which it is raised is not stated. It was further submitted that under Order 37 of the Civil Procedure Rules, 2010, the applicant was right to file the originating summons as heir or legal representative of a deceased person.

7. I have looked at the suit as filed and I have considered the objection and rival submissions. This is a simple and straight forward matter. I

don't think that both counsel on record appreciated the law properly. I will go straight to the law and then make my decision.

8. Order 2 rule 14 of the Civil Procedure Rules states as follows:

“No technical objection may be raised to any pleading on the ground of any want of form.”

9. There is also another applicable law – Interpretation and General Provisions Act (cap 2) – which always comes in handy in the interpretation of all statute law. Section 72 of that law states as follows:

“save as otherwise expressly provided, whenever a form is prescribed by written law, an instrument or document which purports to be in that form shall not be void by reason of deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”

Simply put, it is not the formalism of the law that matters; what matters is its functionalism and the philosophy that informs its application.

10. If the respondent's counsel had applied his mind to these provisions, he would have appreciated that it is the substance, not form, that matters in any pleading or proceedings. He would not have insisted that the suit is incompetent. It is clear that the objection as raised lacks legal succor. It is therefore unmeritorious and I hereby dismiss it with costs.

Dated and signed at Kericho this 20th day of May, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 27th day of May, 2020.

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A. OMOLLO

JUDGE