



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT 15 OF 2011**

**IN THE MATTER OF SECTIONS 7 AND 38 OF THE LIMITATION OF ACTIONS ACT AND  
ORDER XXXVI RULE 3D OF THE**

**CIVIL PROCEDURE RULES, AND IN THE MATTER OF LAND PARCEL NUMBERS SIAYA /  
KOCHIENG 'B'/257**

**IN THE MATTER OF LAND PARCEL NO. SIAYA / KOCHIENG 'B'/257**

**AND**

**IN THE MATTER OF AN APPLICATION BY: EVANS OMONDI OCHIEL(SUING THROUGH  
HIS NEXT FRIEND AND UNCLE FRANCIS KIZITO RAGALO)**

**RULING**

The Preliminary Objection dated 24<sup>th</sup> February 2011 by **Joseph Ogola Okelo** raises three (3) points namely:-

- 1. The originating summons offends both substantive and procedural law and is incurably defective.**
- 2. There is no defendant named in the originating summons and the same is thus incompetent.**
- 3. The originating summons is res judicata**

**Mr. Omolo** in support of the Preliminary Objection argued that as it stands the applicant did file the originating summons in respect to the estate of a deceased person. He contended that his client responded by virtue of being served with the summons and other pleadings.

He contended that the applicant ought to have served the administrator of the deceased estate. He also argued that the applicant did not file the summons in line with the provisions of Order 37 Rule 7 and 14 of the Civil Procedure Rules namely that there is no defendant in the suit.

Further he raised an argument that the applicant filed suit on behalf of a minor without the consent of the next friend being obtained.

Equally his objection was that the applicant came via complete wrong provisions of the law.

**Mr. Okero** on the other hand argued that if there was any deficiencies to the originating summons then the same could be cured by amendments. He stated that under the prevailing amendments of the Civil

Procedure and the new constitution such prevailing technicalities could be sorted out. In a nutshell his argument is that the applicant should not be sent away from the justice altar because of procedural technicalities.

Having heard both able counsels, the issue to be determined first is the competency of this suit. Originating summons is always a special kind of procedure in which parties pursue in filing their claims. The same was intended as it were to fast track the hearing and disposal of matters. The issues that are raised therein ought to be very clear and not technical in nature, otherwise they ordinarily ought to be brought by way of a plaint.

The issue to be determined therefore is if indeed the applicant complied with the said requirements.

Order 37 Rule 14 thereof demands that the forms filled should be those under Numbers 26 or 27 of the Appendix A. The said form demands that there ought to be a defendant or respondent. I do agree therefore with Mr. Omolo that the said originating summons does not have a defendant or a respondent.

Further the format does not comply with form 26 and 27 as envisaged by the Rules. Although it would have been possible ordinarily to carry out any such amendment with or without leave, the originating summons procedure is mandatory in its nature. The strict adherence to the format is key to any party choosing to come via it. As earlier alluded it was meant to facilitate expeditious disposal of matters.

Worse still the applicant did not name any defendant. From the pleadings it is clear that the land belonged to one Charles Okelo Muyere deceased. Who is the legal administrator of the deceased?. How does the applicant intends to execute the orders if successful in his claim?.

My findings is that the applicant ought to have sought out the administration of the estate first prior to filing this claim. The law of Succession Act Chapter 160 laws of Kenya prohibits any party from intermeddling with the deceased property or estate unless with the full legal blessings which are obtained through obtaining a grant or leave of the court.

**Joseph Ogola Okelo** is perhaps the correct person to take out letters of administration. The applicant would in any case have taken out citation proceedings against the deceased estate.

Order 32 Rule 1 of the Civil Procedures Rules states that:-

**“Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate such person shall sign a written authority to the advocate for that purpose and the authority shall be filed”.**

No such authority was filed in this suit. This equally renders this suit defective incurably.

**Mr. Okero** persuaded me that under the spirit of the new constitution such defects could be amended. I do fully agree with that proposition that section 159 of our current constitution grants the courts the liberty to overlook certain procedural technicalities by allowing necessary amendments so as to see the ends of justice met.

However, in the instant case the issues not addressed and or complied with are so weighty that the defects cannot just be cured by allowing amendments thereof. If the amendments are allowed then the substratum of the pleadings shall be greatly compromised to the extent that the suit shall have been mutilated.

Consequently, I am inclined to allow the preliminary objection. The originating summons is struck out with costs to Joseph Ogola Okelo.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> day of July 2012**

**H. K. CHEMITEI**

**JUDGE**

*HKC/aao*