



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 401 of 2009

FRANCIS KIRUNGIE NGATIA.....PLAINTIFF

VERSUS

1. BISHOP DR. JUSTUS WANJALA,

2. HEZRON ARUNGA

3. JOSIAH SYANDA

(TRUSTEE OF GOSPEL LIGHTHOUSE).....DEFENDANT

R U L I N G

1. The Defendant has raised a preliminary objection to the Plaintiff's suit by notice in that regard dated 3rd August 2009. The point taken is that the court lacks jurisdiction to grant the reliefs sought under the provisions of **Order XXXVI, rule 3** of the **Civil Procedure Rules** (the **Rules**) then in place. The further point taken is that the suit, which seeks orders of eviction, should have been commenced by way of plaint and not originating summons.

2. I have considered the submissions of the learned counsels appearing, including the cases cited.

3. The Plaintiff filed his suit by way of originating summons dated 22nd July 2009. He sought the following main relief-

“3. That there be an order of eviction against the Defendant from the property called Nairobi/Block 107/1/1122 forthwith.”

The Plaintiff's case as set out in the grounds for the originating summons given on the face thereof, and also in the supporting affidavit, is that on or about 20th December 2006 he sold the suit property to the Defendants for KShs 8 million and a sale agreement in that regard was executed; that despite numerous extensions of the completion date to accommodate them the Defendants failed to pay the balance of the purchase price in the sum of KShs 4.5 million; that it was an express term of the sale agreement that in the event that the Defendants failed to complete the sale, the Plaintiff was at liberty to evict them from the suit property without having to resort to court action; that the Plaintiff therefore duly instructed an auctioneer to evict the Defendants from the suit property; that the auctioneer sought assistance of the police for that purpose but was advised that he ought first to obtain an order from court, and that therefore he filed the present suit.

4. A copy of the sale agreement and other documents are annexed to the supporting affidavit.

5. The Defendants filed a replying affidavit on 5th August 2009. It is sworn by one of the Defendants. The Defendants countered the Plaintiffs claim by the assertion that the Plaintiff himself was in breach of special condition 8 of the sale agreement in that it turned out that he may not have a clear and valid title to the property sold as there was a restraining order registered against the title issued in Nairobi HCCC No. 1303 of 2003, and further, that a third party had laid claim to the same property. The Defendants further pleaded that the Plaintiff was unable to resolve these issues involving his title to the property, and the Defendants were thus unable to complete the sale.

6. The pleadings as they now stand raise various complex issues of fact and possibly law that are not amenable to resolution by the summary procedure of originating summons. Courts have variously held that where there are contested issues of fact, originating summons is not an appropriate mode of inquiry, and a normal suit by way of plaint ought to be filed.

7. Rules of procedure themselves make it possible to convert a suit filed by originating summons to a suit as filed by plaint. In this regard see **Order XXXVI, rule 10(1)** of the then **Civil Procedure Rules** (now **Order 37, rule 19(1)** of the **Civil Procedure Rules**) which provided -

“10. (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.”

8. I hold that the justice of the present case demands that the proceedings herein do continue as if the cause had begun by filing a plaint, and I so order. The affidavits filed by the parties shall stand as their pleadings. Further directions may be obtained.

9. In the circumstances the preliminary objection by notice dated 3rd August 2009 is overruled with costs in the cause. It is so ordered.

10. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2012