



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Miscellaneous Application 82 of 2007

EUTYCHUS MUTHUI APPLICANT

VERSUS

APOLO NTEERE M'AMBUTU & 2 OTHERS RESPONDENT

RULING

The plaintiff brought this suit as a miscellaneous suit and initiated the suit by filing a chamber summons dated 9th August 2007. That chamber summons was filed by the applicant in person but when it came up for hearing he was represented by learned counsel Mr. Kiambi. It is not clear why learned counsel failed to advise the applicant on the unlikelihood of success of his said application. It was even obvious to the court that Mr. Kiambi was not at all confident of the success of that application because he simply stated that he relied on the application and its grounds. The application which, as stated herein before, initiated this suit prayed for orders that are not at all clear to this court. It is not clear how such orders can be granted on a chamber summons which would essentially bring this action to close since it is not interlocutory. For what it is worth, the application sought the following orders:-

- 1. This Honourable Court be pleased among other things and grant to it to issue an order for the 2nd Respondent to produce records of sub-division of purchased own land Plot No. 518 MAUA effected in the year 1979 between Eliud M'Ambutu now (deceased) and Eutichus Muthui the applicant herein.**
- 2. The 2nd Respondent be ordered herein to produce the records of Plot No. 157 (A) which was registered in the name of Eliud M'Ambutu (deceased) in his life time being a new number after sub-division of Plot No. 518 Meru County Council.**
- 3. The 2nd respondent herein be ordered by this Honourable Court to produce records and approved building plans of Plot No. 158(B) Maua Town Council the same which plot is registered in the name of Eutichus Muthui the applicant herein to prove original ownership of Plot No. 158(B) Maua Municipality.**
- 4. The name of 3rd Respondent, one Joseph Michubu M'Birithia, registered in Plot No. 158(B) of Eutichus Muthui be cancelled and revert to original owner Eutichus Muthui, the applicant herein on the FOUNDATIONS THAT:-`
 - (a) Plot No. 158(B) was transferred by 1st respondent to 3rd respondent and the said transfer was approved fraudulently by 3rd respondent herein knowingly by abuse of office.**
 - (b) The 2nd respondent colluded with 1st and 3rd respondents to approve the transfer of plot No. 158(B) fraudulently which action is motivated by malice and breach of Rules for Natural Justice and contempt of Rule of Law and Order.**
 - (c) The transfer of Plot No. 158(B) Maua Municipality to 3rd respondent was effected secretly and clandestinely by 1st and 2nd respondents herein.****
- 5. The 3rd respondent be ordered to remove all structures and buildings erected or/and constructed on Plot No. 158(B) Maua Municipality and leave the same vacant and O.C.S Maua police station to supervise the removal of**

all structures and building to maintain Rule of /Law and Order accordingly.

The 3rd respondent opposed the application on the basis that he purchased plot No. 158 Maua Municipality from the 1st respondent and that he was the registered owner of that plot with no encumbrances. Further he stated that the applicant had also filed Maua PMCC No. 136 of 2006 against all the respondents in this matter. That case in Maua court had not been fixed for hearing by the applicant since September 2006. The 3rd respondent was of the view that the issues raised in this application ought to have been raised in the Maua case. The 3rd respondent did not attach the pleadings of the main cause. I am unable to determine whether in filing this action the applicant abused the process of the court and whether this action should be stayed as per section 6 of the Civil Procedure Act. But perhaps the greatest fault in the applicant's application is that he initiated an action by way of chamber summons. The Court of Appeal in the case of **Board of Governors, Nairobi School – Vrs. Jackson Ileri Geta** (1999) KLRI stated that:-

***“2. Pleading is defined in section 2 of the Civil Procedure Act to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.*”**

3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.

4. Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder.

5. An application under O. VI Rule 13 (1), of the Civil Procedure Rules must only be confined to plaints or defences, or such modes which are prescribed for instituting suits and the statements in defence or reply thereto.”

Order IV rule 1 prescribes the manner of commencing suits as follows:-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

Chamber summons is not a manner prescribed for instituting suits and cannot be described as pleading within the meaning of term used in Civil Procedure Act. Section 2 of the Civil Procedure Act defines pleading as:-

“.....includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

The term “summons” in that definition must be understood as was held by the Court of Appeal in the case of **Board of Governors Nairobi** (supra) to mean “Originating summons.” On that ground alone, the application must be dismissed. The chamber summons dated 9th August 2007 for the reasons stated herein is incompetent and is dismissed with costs being awarded to all the respondents.

MARY KASANGO

JUDGE

Dated and delivered at Meru this 2nd day of July 2009.

M.J.A. EMUKULE

JUDGE