



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 81 of 2005

RUGANO NTHIGA.....PLAINTIFF

VERSUS

FAUSTINO NJERU NJOKA & 74 OTHERS..... DEFENDANT

JUDGMENT

The Plaintiff has filed this Originating Summons against 75 persons described as Respondents. The Plaintiff claims to be rightful proprietor of all the parcels of land captured at the heading of the Originating Summons numbering 14. The respondents by their Advocate filed an application dated 31/1/2006 seeking orders to strike out the Originating Summons with costs on the ground that the 13 questions raised in the Originating Summons are in violation of principles of the Originating Summons which is to determine simple matters which a court can settle without the expense of bringing an action and that the 13 questions raise complex and contentious issues of fact and law which are above the scope of Originating Summons and that the Originating Summons is incompetent. To this application the Respondents filed grounds of opposition the main one of which (d) refers to Order 36 3F C.P.C which directs that such issues be brought to court under Originating Summons only. In supporting of the application the applicant relied on the authority of ***Kibutiri Vs Kibutiri [1983] KLR 62*** where it was held:-

1. that procedure by way of Originating Summons is intended to enable simple matters to be settled by court without the expenses of bringing an action in the usual way. The procedure is however not meant to determine matters which involve serious questions of law and fact.
2. in cases where complex issues and contentious matters the Judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit because the scope of inquiry under Originating Summons is limited.

Mr. Njagi also referred to the ***Case of Kenya Commercial Bank Ltd Vs Osebe*** where the court held that the procedure of Originating Summons was intended for simple matters. **“The procedure should not be used for the purpose of determining disputed questions of facts”**. A perusal of this record shows that the number of defendants is large and each has different interests in the lands in dispute. There raised complex issues of law under Cap. 300, adverse possession issues under Limitation of Actions Act Cap 22 effects of Judicial Review decision, Land Adjudication Act and others like issues of resjudicata. The facts are also complex and serious and disputed seeing the nor of the affidavit filed.

It is my finding therefore the defendants application dated 31/1/2006 must succeed. The Originating Summons is dismissed with costs to the Applicant in the suit and in this Chamber Summons.

It is so ordered.

Dated this 1st November, 2007.

J. N. KHAMINWA

JUDGE

1/11/2007

Khaminwa – Judge

Njue – Clerk

Parties present in person.

Read in open court.

J. N. KHAMINWA

JUDGE