



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**CIVIL APPEAL NO.127 OF 1997**

**BETWEEN**

**1. MARY  
MOHAMED**

**2. MOME  
HARUSI**

**3. SAID  
MOHAMED**

**4. ALIBHAI  
ESSA &  
COMPANY**

**5. FAMIYA  
MOHAMED**

**6. ZUBEDA  
MOHAMED**

**7 SULEIMAN  
HASSAN .....**  
**.....**  
**APPELLANTS**

**VERSUS**

**NYALI AIR  
CONDITIONIN  
G &**

**REFRIGERATI  
ON SERVICES  
LTD. ....**  
**RESPONDENT**

**(Appeal from the Ruling of the High Court of Kenya at  
Mombasa (Mr. Justice S.O. Oguk) dated 14th July,**

**1995,**  
**in**  
**H.C.C.C. NO.216 OF 1995)**  
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**JUDGMENT OF THE COURT**

The facts which are not in dispute are that Nyali Air Conditioning & Refrigeration Services Limited, the respondent, is the owner of the premises known as Mombasa/Block XIX/220, the suit premises, which it purchased from the previous owner, one Charles Jally Kitsao on October, 21, 1994. Before the sale and transfer the seven appellants were sitting tenants in the suit premises.

Upon being registered as the proprietor of the suit premises, the respondent on December 30, 1994, instructed its lawyers to serve upon all the appellants with notices, giving them one month to quit and vacate the suit premises by January 31, 1995. The notices read:

"RE: NOTICE OF CHANGE OF OWNERSHIP OF PROPERTY MOMBASA/BLOCK XIX/220

We act for Nyali Air Conditioning & Refrigeration Services Ltd. the owners of the above property.

We hereby notify you that our clients are the new owners of the property with effect from 21st of October, 1994.

Please note that our clients do not intend to keep you as tenants. Consequently, we hereby issue you with Notice to vacate and hand over vacant possession on or before the 31st of January, 1995, with effect from the date hereof.

If you fail to do so, we shall apply to court for orders to forcibly evict you."

As the appellants failed to comply with the quit notices, the respondent on March 20, 1995, instituted proceedings by way of originating summons expressly brought under Order XXXVI rules 3 and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The questions for determination on the Originating Summons are:-

1. That they, defendants are illegal tenants and/or trespassers at the said Mombasa/Block XIX/220.
2. That the court issue an order declaring the said defendants as being trespassers without authority and or permission of the plaintiff herein.
3. That the court do issue an order for eviction of the said defendants and order delivery of vacant possession to the plaintiff herein.

The only matter for determination by us in this appeal is whether Oguk, J. was correct in ruling against the preliminary objection taken by Mr. Sereje for the appellants which was to the effect that the issues raised by the originating summons were not suitable to be tried by this form of procedure and should be the subject of a suit in the normal way or by institution of appropriate proceedings under the Civil Procedure Act or the Landlord and Tenant (Shops, Hotel and Catering Establishment) Act Cap 301 of the Laws of Kenya (the Act).

Section 19 of the Civil Procedure Act states that every suit shall be instituted in such manner as

may be prescribed by the rules while Order IV rule 1 of the Civil Procedure Act provides that every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed. The respondent did not commence suit by means of plaint nor did it refer the action to the Tribunal established under the Act. However, we are doubtful whether the nature of the action could justify institution of the suit by means of plaint. It would appear that what was in issue was tenancy and its proper province was the Tribunal.

But the respondent chose Originating Summons. It is plainly clear from the notice of intention to raise preliminary objection on points of law filed by counsel for the appellants; and his submissions before the learned Judge, that a number of issues raised are neither simple or clear-cut one, nor can they be determined with that expedition which the procedure by originating summons was designed to achieve. It was pointed out in *re Giles*(2) (1890), 43 Ch. D.391, that such procedure

"was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way not to enable the court to determine matters which involve a serious question."

The last part of this passage was cited with approval by Sir Eric Law JA in *James Njoro Kibutiri v. Eliud Njau Kibutiri* (1983) KAR 60 in which he said (at 61):

"When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit. The instant summons is very much in point".

In the matter before us the learned judge gravely erred when he delved into determination, in an action brought by Originating Summons, as to whether there existed tenancies or not and by making a finding on the alleged non-payment of rents by the appellants. Moreover, it was clear that affidavit evidence was not sufficient. The parties and their witnesses required to be heard.

It is trite that the general purpose of procedure by way of originating summons is primarily designed for the summary and 'ad hoc' determination of points of law or construction or of certain questions of fact, or of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators, or the court's own execution officers. That despatch is an object of the proceedings is shown by O. XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge in a court. That being so, we have no hesitation in finding that an originating summons is not the appropriate procedure for determining a tenancy dispute between the parties as herein. Simply, the action is not one which properly falls within the scope of Order 36 of the Civil Procedure Rules and the summons on that account ought to have been struck out.

In the result we allow the appeal and set aside the order of the learned judge. We order that the Originating Summons dated March, 17, 1995, be dismissed with costs. The appellants shall have the costs of this appeal.

Dated and delivered at Mombasa this 25th day of July, 1997.

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR