IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Kwach JJ A)

CIVIL APPEAL NO. 132 OF 1993

BETWEEN

1. LALI S. LALI

2. FAQIK K. SKEKUWE

3. KHALID B. MBERE

4. KALUME KATUBU.....APPELLANTS

AND

1. STEPHEN M.WACHIRA.....1ST RESPONDENT

2. OMAR K. BALLETH.....2ND RESPONDENT

3. ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from decree and orders of the High Court of Kenya at Nairobi (Hon Lady Justice Owuor) dated 11th August, 1993

in

HCCC No 5747 of 1991 (OS))

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JUDGMENT

Order XXXVI rule 3D of the Civil Procedure Rules – the Rules provides that:

“3D (1) An application under section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The Court shall direct on whom and in what manner the summons shall be served.”

Rule 3F of the aforesaid order stipulates that:

“3F An application under the Registered Land Act other than under sections 120, 128, 133, 138, 143 and 150 thereof shall be made by Originating Summons unless there is pending a suit involving the same lands when the application may be made by summons in chambers in that suit.”

Section 120 of the Registered Land Act, chapter 300 of the Laws of Kenya – the Act – was repealed by Act No 14 of 1972, Ninth Schedule but that repeal did not take effect until the commencement of the Law of Succession Act, chapter 160 of the Laws of Kenya on 1st July, 1981 *vide* Legal Notice No 93 of 1981: otherwise an application under any of the other sections of the Act referred to in the foregoing rule is excepted from being made by Originating Summons.

On 30th May, 1978, the first respondent, who was the first defendant in the superior court, became the first registered proprietor of land parcel number Chembe/Kibabamushe/427 – the suit land – under the Act and on 15th June, 1978 he was issued with a land certificate in respect of that land. His registration to the suit land was subsequently cancelled on 22nd December, 1986 and the said land was transferred to and registered in the name of the Government of Kenya as its proprietor for the reason that the first registration was erroneous as the Land Adjudication Act, chapter 284 of the Laws of Kenya was wrongly applied to the suit land which was not trust land but Government land. The suit land was, however, to be re-allocated to the first respondent under the Government Lands Act, chapter 280 of the Laws of Kenya if he complied with a circular letter dated 28th May, 1986 and addressed to him by the Commissioner of Lands. It would appear that the first respondent complied with this letter and on 25th

October, 1990 the suit land was re-transferred to him and registered in his name as its proprietor. On 21st January, 1991 the first respondent transferred the suit land to the second respondent, who was the second defendant in the superior court, in consideration of a sum of Kshs 5,000,000/- and on the same day the second respondent was registered as its proprietor and was issued with a title deed in respect thereof. In September, 1991 the appellants who alleged to have been in occupation of the suit land since 1958 had their peaceful and quiet possession of the said land rudely interrupted by the second respondent who had started erecting a fence around that land and had threatened to evict them from the same since he had bought it. Alarmed by this turn of events, the appellants took out an Originating Summons dated 28th October, 1991 which was subsequently amended on 13th February, 1992 and filed in the superior court on the following day and re-amended on 24th March, 1993 annexed to which was the requisite supporting affidavit.

In the re-amended Originating Summons which was taken out under orders XXIV rule 1 and XXXVI rules 3D and 3F of the Rules, section 38 of the Limitation of Actions Act, chapter 22 of the Laws of Kenya, section 30 and 143 of the Act, and all the other enabling provisions of the Laws of Kenya, the appellants sought the following orders from the superior court:

“1. That a temporary injunction be granted restraining the 2nd defendant from selling, transferring or otherwise interfering with the parcel known as Chembe/Kibabamushe/427 pending hearing and determination of this suit.

2. That a temporary injunction be granted restraining the 2nd defendant from evicting or otherwise interfering with the quiet possession and occupation by the plaintiffs of the parcel known as Chembe/Kibabamushe/427.

2a. That the registration of the 1st defendant in May, 1978 as the proprietor of parcel number Chembe/Kibabamushe/427 was validly and lawfully done.

2b. That the surrender by the 1st defendant of plot number Chembe/Kibabamushe/427 to the Government of Kenya in December, 1986 and the re-transfer by the Government of Kenya of plot number Chembe/Kibabamushe/427 in October, 1990 to the 1st defendant

without any consideration was fraudulent and for the purpose of defeating the plaintiffs’ claim.

3. That the cancellation of the 1st defendant on 22nd December, 1986 in the Land Register of parcel number Chembe/Kibabamushe/427 and the registration of the Government of Kenya by the Land Registrar, Kilifi be declared to be null and void.

4. That the 1st defendant be declared to have been the lawful registered proprietor of parcel number Chembe/Kibabamushe/427 from May, 1978 to 21st January, 1991.

5. That the 1st defendant be declared to have ceased to be the lawful registered owner of plot number Chembe/Kibabamushe/427 on or about June, 1990 by effluxion of time.

5a. That the plaintiffs be declared to have been in occupation of parcel number Chembe/Kibabamushe/427 long before the 1st defendant was registered as the 1st proprietor in May, 1978 and they have continued in occupation upto the time of filing and determination of this suit.

5b. That the plaintiffs be declared to have been in occupation of parcel number Chembe/Kibabamushe/427 undisturbed for more than 12 years.

5c. That the 1st and 2nd defendants were registered as proprietors of parcel number Chembe/Kibabamushe/427 subject to the plaintiffs existing rights.

6. That the 1st defendant had no valid title to transfer to the 2nd defendant and the said transfer be declared to be null and void.

7. That the 2nd defendant herein be declared to have been holding (parcel number) Chembe/Kibabamushe/427 as trustee for the plaintiffs and be ordered to transfer the said parcel to the plaintiffs.

7a. That the 1st and 2nd defendants be declared to have been holding (parcel number) Chembe/Kibabamushe/427 as trustees for the plaintiffs and be ordered to transfer the said parcel to the plaintiffs.

7b. That in case the 2nd defendant fails to execute the transfer of parcel number Chembe/Kibabamushe/427 to the plaintiffs the Registrar of the High Court to execute the transfer documents.

8. That costs be provided for.

9. That such further or other orders be granted as this honourable Court deems fit and just in the circumstances."

By a Chamber Summons dated 13th April, 1993 and taken out under order VI rule 13 of the Rules, the second respondent sought orders from the superior court that the appellants' Originating Summons be struck out and that their suit be dismissed with costs together with the costs occasioned by the application. The grounds upon which that application was made were that the appellants' Originating Summons was vexatious; and/or was otherwise an abuse of the process of the court in that their action was not one that was properly within the scope of order XXXVI of the Rules; and/or that an Originating Summons was not the proper mode of obtaining decisions on disputed questions of fact or a contested case.

In a ruling given on 11th August, 1993, Justice Effie Owuor (Mrs) observed that the appellants' Originating Summons was filed *inter alia* under section 143 of the Act. That section provided for the rectification of the register by the Court. She then continued:

"Reliefs Nos 3, 4 and 6 of the Originating Summons seek to achieve this purpose. Such a matter is specifically excluded and is out of the purview of order 36 as can clearly be seen from rule 3F of the said order. An application which falls under sec 143 of the RLA, as the present one is, is expressly excluded by order 36 rule 3F. It follows, in my judgment that the application for that purpose simply does not fall

properly within order 36. The application for the proposed amendment which has not been heard seeks to delete reference to section 143. But prayers 3, 4 and 5 are identical as in the original Originating Summons. Accordingly, there

is no merit in the answer to the applicant's submissions on this point.

If this submission on behalf of the applicant is right, as I find that it is, then he is entitled to succeed regardless of his further submission that the Originating Summons is not the proper mode of obtaining a decision on disputed questions of fact or a contested case."

The learned judge, however, proceeded to hold that the issues in the appellants' Originating Summons were not simple. According to her, they involved serious questions of law and fact which were contested and the decision in respect thereof could not be obtained on Originating Summons. Consequently, the learned judge granted the second respondent's application and struck out the appellants' Originating Summons with costs together with the costs occasioned by the said application.

Against the aforementioned decision, the appellant's appeal to this Court and have put forward seventeen grounds of appeal.

At the hearing of this appeal on 28th and 29th April, 1994, Mr Nowrojee who appeared with Mr Ritho for the appellants without reference to any of the appellants' seventeen grounds of appeal submitted that the learned judge was in error in failing to continue the proceedings in the appellants' Originating Summons as if their action had been begun by filing a plaint. According to him, the provisions of rule 10 of order XXXVI of the Rules had been brought to the attention of the judge and since a claim by adverse possession must only be brought through an Originating Summons, if the issues therein were disputed, the superior court should have dealt with the matter as if the same had been begun by filing a plaint. Unless the entire Originating Summons was bad, it should not have been struck out. In any event, there was before the superior court a pending application which sought directions of the Court and if that Court thought that amendments to the appellants' Originating Summons were necessary to ensure that the same was properly before it, directions in that regard ought to have been given. Mr Nowrojee then concluded by saying that the superior court should have looked at all the issues raised in the appellants' Originating Summons and in doing so, those issues that were irrelevant should have been struck out and thereafter the said summons should have proceeded to hearing on the issues that properly belonged to proceedings commenced by Originating Summons. In failing to do this, that Court was clearly wrong and ought not to have struck out the appellants' Originating Summons.

According to Mr Lakha who appeared for the second respondent, the appellants' Originating Summons was not properly before the superior court as it included prayers for rectification of the register under section 143 of the Act. That was clearly prohibited under rule 3F of order XXXVI of the Rules and a severance of such prayers would have left nothing of the appellants' Originating Summons. At any rate, an Originating Summons is only applicable in appropriate cases. To Mr Lakha therefore, the superior court in exercise of its discretion properly found that the matters raised in the appellants' Originating Summons could not be appropriately dealt with by an *ad hoc* determination. Indeed, the appellants' Originating Summons manifested a multiplicity of suits and the same was quite rightly struck out by the superior court, Mr Lakha concluded.

Mr Kihara Muttu for the first respondent was absent at the resumed hearing of this appeal after tea-break on 29th April, 1994. There was therefore no response by the first respondent to the submissions made on behalf of the appellants. Mr Oyalo for the third respondent, however, associated himself with Mr Lakha's submission on behalf of the second respondent.

Rule 10(1) of order XXXVI of the Rules is in the following terms:

"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."

As is set out at the beginning of this judgment, it is mandatory under rule 3D (1) of the order above mentioned that an application by a person claiming to have become entitled to land by adverse possession under section 38 of the Limitation of Actions Act, chapter 22 of the Laws of Kenya must be made by Originating Summons. There is no discretion in the matter and whether or not the issues involved in such an application are intricate, there is no choice in the matter. Indeed, it is in such latter circumstances that rule 10 of the aforesaid order comes in aid. Under that rule, a trial court has discretion to order the proceedings in an Originating Summons at any stage and for any reasons to be continued as if the cause had been begun by filing a plaint. But before the exercise of this discretion, the Originating Summons must not, in the first instance, be on a matter

that is specifically excepted by order XXXVI of the Rules, otherwise it would not only be improperly under the said order but it would also be in open defiance to that order and therefore illegal.

The appellants' Originating Summons contained prayers for rectification of the register under section 143 of the Act which rectification was a prerequisite to their claim of the suit land by adverse possession. As was set out in their summons, without the rectification of the register, it was plainly obvious that their claim to the suit land by adverse possession was unsustainable since after the cancellation of the first respondent's title to the said land and the latter's transfer to and registration in the name of the Government of Kenya as its proprietor on 22nd December, 1986 no such claim was possible. Indeed, without the rectification of the register under section 143 of the Act, any claim to the suit land by the appellants was maintanable for the reason that if they could not lay any claim to that land against the Government of Kenya, the title to the said land which was conveyed to the first respondent by the Government of Kenya on 25th October, 1990 was free from any claim to that land by the appellants. Subsequent transfer of the said title to the second respondent by the first respondent on 21st January, 1991 was equally unencumbered.

The linchpin to the appellants' Originating Summons was the rectification of the register under section 143 of the Act. An amendment to expunge the prayers for such rectification from the said summons would have left nothing of the appellants' claims in the summons. Since rectification of the register under the above mentioned section is expressly excluded by rule 3F of order XXXVI of the Rules as is set out near the beginning of this judgment, it follows that the appellants' Originating Summons was hopelessly outside the scope of order XXXVI of the Rules.

Fletcher Moulton LJ in *Dyson v Attorney General* [1911] 1 KB 410 at pages 418 and 419, said that the "power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of the legal procedure." He then concluded in this regard by saying that:

'To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

Evidently, from what we have attempted to outline above, the appellants' cause of action in the superior court was clearly incontestably bad and their Originating Summons to that Court was an abuse of the legal procedure of the said Court. That summons was, we think, properly struck out with costs.

In the result, we think that the appellants' appeal to this Court is without merit and the same is dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 20th day of September 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

J.E.GICHERU

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JUDGE OF APPEAL

R.O.KWACH

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR