REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kneller, Hancox, JJ.A. and Nyarangi, Ag. J.A.)

CIVIL APPEAL NO. 83 OF 1983

BETWEEN

WAKF COMMISSIONNERS…….....APPELLANT

AND

1. MOHAMED BIN UMEYA BIN ABDULMANJI BIN MWIJABU

2. ALI MOHAMED ALI BASHIR…….....RESPONDENTS

(Appeal from an order of the High Court of Kenya at Mombasa

(Bhandari, J.) dated 24th May, 1983

in
Civil Case No. 455 (O.S) of 1977)

JUDGMENT OF HANCOX, J.A.

The only matter for determination by us on this appeal is whether Bhandari, J., was correct in ruling against the preliminary objection taken by Mr. Magan (who appears for the Appellant), which was to be the effect that the issues raised by the Originating Summons, dated 19th July, 1977, its supporting Affidavit sworn by both the Respondents respectively on the 9th and 7th April, 1977, the Affidavit sworn on behalf of the WAKF COMMISSIONERS by their Secretary on 11th October, 1977, and by the Affidavits of the 1st respondent dated 23rd December, 1977 and 31st May, 1982, respectively, were not suitable to be tried by this form of procedure and should be the subject of a suit in the normal way. The application was made under **Order 36 Rule 10** which empowered the Judge hearing an Originating Summons to dismiss it for this purpose. Unfortunately we don not have a rule in Kenya corresponding to the one mentioned in **ATKIN'S COURT FORMS 2nd Edition Volume 29** referred to by Mr Malik, on behalf of the Respondents to this appeal, which is now **Rule 8(1) of Order 28** of the **English Rules of the Supreme Court,** enabling a court to continue as if the cause or matter had been begun by writ, even

though the cause or matter could not have been so begun in the first place (R.S.C. Order 28 Rule 8(3). The result is that if a judge does so decide in the course of the hearing of an Originating Summons, then the whole matter has to be recommenced de novo with all the expense and delay, in this case inordinate delay, which has been thereby entailed.

The proceedings were begun, as I said, by an originating summons filed in July 1977 by these two respondents, who are stated to be descendants of the original deceased person, Mkisi Binti Muidani who owned property at Changamwe. From the documents exhibited as MU4 to the 1st defendant's last mentioned Affidavit it seems that the slave of Mkisi Binti Muidani, died on the 17th July, 19o5 (corresponding to the 13th Jamad Avval 1323 in th Mohamedan calendaer) and surrendered his masters" (or mistress's) property to the Mosque of Mwijabi. There was then an application to the High Court of East Africa dated 1st December, 1905, that it be vested in the then WAKF Commissioners. For some reason that I am unable presently to understand the vesting order appears in the record as part of the proceedings of the court over two years earlier, namely the 26th September, 1903.

The present WAKF Commissioners are appointed pursuant to the WAKF Commissioners Act, Cap. 109, which was enacted in 1951, and are a body corporate. Every Wakf (meaning, by statutory definition, a religious, charitable or benevolent endowment or dedication of property in accordance with Muslim Law) made previously thereto, became valid under section 4 of the act if the conditions therein were satisfied, with the result that the Commissioners became seised of certain powers and duties in relation to Walkf property. In particular they were enjoined to keep a register thereof, to produce evidence of their administration, and to keep (though the Act does not say render) proper accounts of all property and money which came into their hands.

The full details of the ancestry of the family of Mujabu bin Juma bin Mujabu, which presumably has some connexion with the Mosque of Mwijabu, are set out in an annexure to the Chamber Summons dated 14th July, 1903, seeking the appointment of the WAKF commissioners as trustees of the Wakfs executed by the deceased, which is itself annexed to the respondents' supporting affidavit. There is in addition that which appears to be an extract from the relevant family tree shown in the record of the court proceedings culminating in the vesting orders of the 26th September, 1903, to which I have already referred. Furthermore, details of the plots comprising that which is described as the Mwinabu WAKF, and the tenants or holders of those plots, are set out in Exhibits MU6 and MU7 to the 1st respondent's Affidavit of 31st May 1982.

The appellants, through their secretary, initially denied any maladmistration, or that they were obliged to publish accounts, resisted their removal and replacement as trustees (as was sought by the second prayer in the Originating Summons), and, moreover, alleged that they had been unable to trace in their records any Wakf properties in which the respondents might be interested, which, they said, the respondents had in any event failed to identify.

The respondents rejoined by exhibiting correspondence in which certain allegations against the Commissioners were made (included in which was one that hey were a closely knit clicue of administrative officers who were not getting in the income of the properties concerned, as they should), and by obtaining the services of a qualified accountant, Mr. Mathias B Keah. His report, dated 11th November, 1980, which is extremely detailed, makes further comments regarding the Commissioners' conduct, such as the inequitable charging of management commission, the low and unrealistic rents obtained from the properties they were administering, the failure to distribute or allocate the proceeds of certain investments sold in 1978, and the purchase of certain other property out of Mwijabu and other Eakf funds. It concludes by saying that the entire management of the Wakf properties

"leaves, to be polite, much to be desired."

There can be no doubt that these matters are being and will be strenuously contested by the commissioners, and certain steps more appropriate to a full scale action, such as the entering of an Appearance and the service of the Notice to produce taken out by the respondents on 6th October, 1979 have already been taken. This being the case, the position is, in my judgment, amply covered by decided

authority. The first of the East African authorities which appears in the appellant's list, and towhich reference was made by Bhandari, J., is formally cited a Kulsumvhai v Abdulhussein, (1957 E.A. 699 a decision of Windham, C.J. which also related to a WAKF, which had been created by a will and of which the validity was disputed, in which the same preliminary objection was raised.

Windham, C, J. said, at page 701:

> "I accept his "(the advocate's)" assurance, that a number of the facts upon which the plaintiffs rely in support of their claim will be contested. Thus the questions raised are neither simple or clear-cut ones, nor can they be determined, even if the summons is adjourned into court, with that expedition which the procedure by originating summons was designed to achieve. It was pointed out in In re Giles (2) (1890), 43 Ch. D. 391, that such procedure.
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> "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."
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> The last part of this passage was cited with approval by SIR ERIC LAW, J.A. in

JAMES NJORO KIBUTIRI v ELIUD NJAU KIBUTIRI Civil Appeal, 30 of 1982 in which he said:

> "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 point; it occupied 7 full hearing days, spread over 3 years, many witnesses were called and exhibits produced, and the hearing was followed by a long "judgment" (which should have been a ruling) and a "decree" (which should have been an order) the effect of which was to dissolve the partnership entirely (which was not a relief claimed in the summons) and to partition the land on which the firm carried on its farming activities amongst the two plaintiffs and the defendant."

That case in turn referred to an earlier decision of this court, KENYA COMMERCIAL BANK LTD v JAMES OSEBE, Civil Appeal 60 of 1982, in which the law and practice relating to, and the scope of, originating summonses were extensively reviewed. That case referred to OFFICIAL RECEIVER v SUKHDEV (1970) E.A. 243, which was also cited to Bhandari, J., in which MADAN, J. as he then was, refused to deal with that which he referred to as a mass of facts in dispute by way of originating summons. The English case cited by Mr. Magan to us, Re SIR LINDSAY PARKINSON & CO LTD's RUST DEED, BISHOP & OTHERS v SMITH & ANOTHER (1965) I.A.E.R. 609 a decision of BUCKLEY, J., is to the like effect. He said at page 61:

> "I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, ought normally to be commenced by writ and not by originating summons; for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them. The appropriate form of proceedings therefore, in my view, are proceedings by writ in which parties can, if they wish, seek further and better particulars of the matters alleged by their opponents, and in which there is full discovery, for where allegations of this kind are made against trustees, it is right that they should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, to discover precisely what the charges Buckley, J.

went on, however, to say that he did not necessarily criticize the plaintiffs for going by way of originating summons in view of the fact that that course would ensure that the matter came before the court more speedily, a result that by no stretch of the imagination could be said to have been achieved in this case. In another recent case involving an application for summary judgment, STANDARD CHARTERED BANK v WALKER (1982) 3 A.E.R., 938, it was held that the matters of disputed fact in

that case should not have been resolved on Affidavit evidence.

The foregoing authorities are sufficient to show, as Mr. Malik eventually accepted, that complex issues of disputed fact such as are raised here, are not appropriate for decision by way of an originating summons. It may be, as Windham, C.J. said in KULSUMBHAI v. ABDULHUSSEIN, that the question to be determined is covered by the letter of sub-rule (g) of Rule (1) of the Order but those are not the only points to be considered in deciding whether to proceed by way of originating summons or by regular action. For these reasons I would allow the appeal against Bhandari, J.'s decision and set aside his order of May 24th, 1983.

That is not, however, an end of this matter, for there is still the vexed question of costs. True it is that the respondents instituted the inappropriate proceedings, but it cannot be again said that the appellant not only acquiesced in the course taken but allowed and even encouraged the respondents to continue in their mistaken course. It did not raise this preliminary point until the 3rd May, 1983, despite the matter having come up several times before the court, and on one occasion directions being sought and obtained before Schofield, Ag. J. It was just as incumbent upon them to direct the courts' attention to the proper course to be followed as it was upon the respondents, possibly even more so, for it was they who knew for certain that the matters alleged were going to be disputed. For this reason I would order that the appellant pay all the respondents' costs in the High Court up to an including the date of the application Bhandary, J. as well because they were not apprised of their mistaken course until they were faced with this objection.

However, the same considerations do not apply to the costs of the appeal to this court. Once he had had time to consider the authorities it must have been obvious to Mr. Malik that the preliminary objection was well taken. Yet the appeal was allowed to proceed to hearing and he abandoned the respondents' mistaken stand. Had he informed Mr. Magan earlier that this would be his attitude, considerable costs might have been saved. I would therefore allow the appellant the costs of this appeal.

One other final matter remains. The respondents did not initially obtain the Attorney General's consent required under Section 62 of the Civil Procedure Act. It was given for "institution of this suit" by the then Attorney General on 4th June, 1977. Despite the wording of that consent it is manifest that as a result of this court's order, a fresh suit will now have to be instituted. Although I would incline to view that that consent is sufficient to cover the fresh suit, provided it relates wholly to the same matter as the originating summons, I do not think it would be right for me to express a firm conclusion which would, or might, have the effect of fettering or inhibiting a future decision by this court, whether similarly constituted or not. For this reason I declined to include a decision on this last question as part of my judgment in this appeal.

Dated at Mombasa this 23rd day of February, 1984.

A.R.W. HANCOX

JUDGE OF APPEAL