IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter JJA & Hancox Ag JA

CIVIL APPEAL NO. 30 OF 1982)

KIBUTIRI.....APPELLANT

AND

KIBUTIRI.....RESPONDENT

JUDGMENT

This appeal arises out of proceedings instituted by way of an originating summons taken out under order XXXVI rule 4, by two plaintiffs against a defendant, all of whom are the partners in a firm known as Kiambaa Young Farmers, praying for the determination of the following questions:

1. "By his conduct is the defendant entitled to continue as a partner in the said firm.
2. If he is not entitled to continue as a partner, are the applicants entitled to carry on the partnership thereof.
3. In the event of the defendant being retired from the partnership, what if any share is he entitled to.
4. Who shall be responsible for the costs in this matter."

The procedure by way of originating summons is intended:

> "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."

This was said in *Re Giles (2)* [1890] 43 Ch D 391, a decision cited with approval by this court's predecessor in *Kulsumbhai v Abdulhussein* [1957] EA 699.

See also *Bhari v Khan* [1965] EA 94 in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. 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; it occupied seven full hearing days, spread over three 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. This purported partition was completely irregular, for two reasons –

> 1) it is and always was common ground that the land was not the property of the firm, and
> 2) the court below had no jurisdiction to partition the land, even if it had been the property of the

firm. Furthermore, the summons contained no prayer for partition. The judge embarked on this exercise entirely on his own initiative.

The jurisdiction of a court on an originating summons taken out by a partner under order XXXVI rule 4 is specifically limited to the following purposes

a) having the partnership dissolved;
b) taking the accounts of and winding up such partnership.

In purporting to partition what he thought was partnership property, the judge acted in excess of his jurisdiction. The first appellant has appealed against the whole decision of the learned High Court judge. The defendant is the respondent. The appeal presents no difficulty, as Mr Karanja for the respondent does not seek to support that decision. The appeal is accordingly allowed, and the purported "judgment" and "decree" set aside.

The problem which now has to be faced is the vexed question of costs. The learned judge made no order as to the costs of the summons, although this was one of the specific questions in the summons. It may have been an oversight, or the judge may have intended to leave the parties to bear their own costs. If so, he should have made this clear. My personal view is that both parties are equally to blame for the deplorable course of events in the High Court. It must have been obvious at an early stage that the dispute between the parties could not be resolved on an originating summons. One or other of the advocates involved, or both of them, should have invited the judge to refuse to pass any order on the summons, under rule 10 of order XXXVI, and to refer the parties to a suit in the ordinary course. I would order that the parties bear their own costs of the proceedings in the High Court.

As regards the costs of this appeal, Mr Gautama for the appellant submits that the appellant should get his costs, as he had to come here to have the High Court's order reversed. He also pointed out that the appeal was filed in July last year, but it was not until he had completed his argument before this court that Mr Karanja for the first time indicated that he was not opposing the appeal. Had he informed Mr Gautama earlier that this would be his stand, some costs would have been saved. At the same time, it must be remembered that it was the appellant (then represented by another advocate) who instituted the inappropriate proceedings which necessitated the bringing of this appeal, and is largely responsible for the irregular course taken by the proceedings in the High Court. I would make no order for costs in the appeal.

To summarize, I would allow this appeal, and leave the parties to bear their own costs both in this court and in the High Court.

Finally, I would like to advise judges who have to deal with an originating summons to consider the judgments of this court in *Kenya Commercial Bank Ltd v James Osebe* (Civil Appeal No 60 of 1982) and in particular the judgment of Hancox Ag JA in which the law and practice relating to originating summonses, and their scope, are extensively reviewed.

Potter JA. I fully agree with the judgment of Law JA, which I have had the advantage of reading in draft, and I concur in the orders proposed by him.

It is difficult for this court to decide the question of costs in a case like this where the trial judge and the advocates on both sides (in the lower court) are jointly responsible for the waste of the litigants' money. This is not the first time in recent months that this court has had occasion to recall to mind that the limited scope of the procedure by way of originating summons was clearly defined little less than a century ago, in *Re Giles (2)* (1890) 43 Ch D 391. The advocate for the plaintiff in this case should not have proceeded by way of originating summons. The advocate for the defendant should have objected. And the trial judge should have struck out the summons and ordered the plaintiff to proceed by ordinary suit. I would like to give one piece of advice to ingenious lawyers. Short cuts are fine, as long as you are absolutely sure they won't land you in the ditch.

Hancox Ag JA. I have had the advantage of reading in draft the judgments prepared by Law JA and by Potter JA, with which I wholly agree.

It was stated in the appellant's supporting affidavit to the originating summons heard by Nyarangi J that a partnership had been formed between his brother, the respondent, his sister, the second plaintiff, who is not a party to this appeal, and himself on July 7, 1971. This was the Kiambaa Young Farmers Association. The second plaintiff was not however registered as a partner under the Registration of Business Names Act (cap 499).

The document exhibited to the appellant's affidavit was not formally expressed as a partnership agreement, but one under which the parcel of land at LR 165/9 Kiambu, comprising 127 acres, was to be transferred by the two brothers, who then owned it as tenants in common, to the three parties to the action, that is, including their sister, in shares proportionate to their respective stated contributions, or agreed contributions, namely Kshs 118,900, Kshs 9,000 and Kshs 12,000. The only formal partnership document in the appeal record is the Deed of Partnership made on September 10, 1964 between the appellant and the respondent and two people each called Kinuthia, the Kiambaa Young Farmers, whereby, *inter alia*, the property was to belong to that Partnership, and the business was to be carried on from there. In fact the land in question had been conveyed about a month earlier by the widow of Arthur Kenneth Baxendell to all four of these partners as tenants in common in equal shares. The two Kinuthia's then conveyed their undivided share in the land to the appellant and the respondent for an expressed consideration of Kshs 44,169.80 by an indenture dated September 30, 1967. However the appellant testified that his sister "became a partner in 1964 when the other two left." Loice herself said that she was a partner in the petrol station business at Kilimani. Her name does not appear in any of the partnership's accounts for the four years ending December 31, 1975, 1976, 1977 or 1978 respectively. The Tax Returns produced for the years of income 1976 to 1979 inclusive, are those of the respondent.

However it seems that there was a *de facto* partnership between the three parties, from Mr Gautama's statement in his address that that was an undisputed fact, was not refuted by Mr Karanja, on behalf of the respondent. Otherwise it might have been open to question as to whether even the basic established fact was that there was a partnership between the parties, which could be the basis of an originating summons.

Nonetheless, it is perfectly plain on the evidence (and it is common ground) that the Kiambu land never became the property of this partnership. Accordingly it was not, and could not have been, the subject of determination of questions by the court on an originating summons which as Law JA has said, is of limited scope as to the questions which may be determined thereon. Accordingly, I agree that this appeal should be allowed.

On the question of costs I agree with all that has fallen from Law JA. On the one hand it can be said with justification by Mr Gautama that he was left with no option but to seek to overturn the decision of the High Court, and that Mr Karanja did not indicate that he was not opposing the appeal until the last moment. Nor did he file a cross-appeal. Equally, Mr Karanja submitted, that his clients were no more at fault than the plaintiffs (if, indeed, they were at fault at all) for the course of events which took place. They had to come to court to defend the summons. And he is on record as stating quite clearly to the learned judge that the partnership did not own the land and that its ownership could not therefore be determined in the summons. As Law JA has said it was incumbent on each side to appraise the court of this situation.

In these circumstances I also agree with the order as to costs proposed by Law JA.

Dated and delivered at Nairobi this 10th day of February, 1983.

E.J. E LAW

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JUDGE OF APPEAL

K.D G.H POTTER

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JUDGE OF APPEAL

A.R.W HANCOX

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Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR