REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2002 OF 1974

RE NOOR BIBI (DECEASED)

JUDGMENT

This is a further preliminary objection by Mr Khanna which really goes to the substance of this originating summons. I may say that I think it a pity that, when the matter came before Chanan Singh J on 19th February 1975, who was the judge in *Mayers v Akira Ranch* [1971] EA 56, the point was not taken then either by Mr Khanna, or possibly, by the Court of its own motion. The result of the matter being stood over is that more than another year has now elapsed to the prejudice of, at least, most of the beneficiaries.

Mr Pall, who appears for the administrator of the estate, concedes, as I think he must, that the summons should have been drawn *inter partes*, that is to say, that the administrator should have been named as plaintiff and the beneficiaries, other than Mr Khanna's client, named as either coplaintiffs or as defendants. Mrs Kurshid Jamal, who might seem to have some interest in prolonging the proceedings, should, in any event of course, have been designated a defendant.

Forms 13 and 13A in Appendix B to the Civil Procedure Rules, to which Mr Khanna referred me, clearly envisage that an originating summons shall be *inter partes*, either between plaintiffs and defendants or between the applicants, and the respondents. The essence of this is, as Mr Khanna stresses, to enable all parties whose rights may be affected, adversely or otherwise, to have an opportunity of entering an appearance to the summons. Mr Khanna also referred me to the present order L II, rule 9, which deals with the Advocates Act, and which does not require a formal memorandum of appearance but provides that the parties may appear directly before a judge and be heard. Indeed in *Mayers v Akira Ranch Ltd* the question was not whether the summons was such that no appearance at all need be entered, but whether the formal entering of an appearance was necessary before actual attendance before the judge. It is quite clear

in my opinion that, without specific authority, no originating summons may be taken out which is either *ex parte* or which does not require someone, however non-contentious the proceedings may be, to appear to it. Examples of such summonses are given in the *White Book* 1973 at page 59. The reasons is, as I have said, the protection of the rights and interests of all those who may be affected by the application. The non*inter partes* form, the use of which is given at page 1397 of the *White Book* 1963, disappeared in England after 1st January 1974. That applied to certain applications under the 1925 property legislation and certain wardship applications. Such is not the position here.

Being of the opinion that the summons is not in proper form, what is the correct thing to do now? Mr Pall urges that the defect is curable; that there can be no prejudice as Messrs Khanna & Co were named as the advocates to be served in the summons and thus the only beneficiary objecting to the sale has had her interests protected. She is, in effect, before me, as are the other beneficiaries who have each filed affidavits, consenting to the proposed sale of land reference No 209 1935 for Shs 110,000 and to being joined in those proceedings. The administrator has also, as I read his affidavit of 6th March 1976, given his consent.

Regrettable as it is, I am bound to say that I agree with Mr Khanna. The matter is not cured by the filing of affidavits, by persons who are, as of now, in law strangers to the case. Neither can the administrator now completely change the nature of the defective summons by naming parties therein. Who should be made plaintiff and who defendants must be decided after due consideration by those legally advising the administrator. I have noted Mr Pall's reference to the text at 12 *Encyclopaedia of Court Forms and*

Precedents 589, but it is quite clear from it that what is there envisaged is the additions to or substitution of new parties to, or for, the "previously existing parties." Again at page 580 of the same volume, which sets out the former (English) RSC order 53, rule 3, and which is similar to our order XXXVI, rule 1, the authors state that the summons must be *inter partes.* Finally in *Prabudhass & Co v Standard Bank* [1968] EA 670 the question before the Court of Appeal was whether the Kenya Court could set aside the service of the summons out of the jurisdiction pursuant to its own previous order, and as to the distinction between the summons and a notice of the summons, and had nothing to do with the question of whether the vehicle chosen by the plaintiff to bring his case before the Court was itself bad. To my mind, this is more than a procedural matter and Mr Khanna is entitled to have this originating summons dismissed with costs.

Summons dismissed.

Dated and Delivered at Nairobi this 22nd Day of June 1976.

A.R.W. HANCOX

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JUDGE