



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 103 OF 2017 (OS)**

**JOSHUA ODENYO OKOTH.....APPLICANT**

**= VERSUS =**

**OMOTO OCHANJI KESA.....RESPONDENT**

**R U L I N G**

1. I am asked to determine the Preliminary Objection raised by the Respondent – **OMOTO OCHANJI KESA** – vide a notice dated and filed on 22<sup>nd</sup> May 2018. The Respondent seeks to have the suit dismissed on the following grounds:

- The Applicant's Amended Originating Summons dated 21<sup>st</sup> May 2018 was filed without leave of Court; is therefore irregularly on record and should be struck out.
- The land sale agreement giving rise to the claim and cause of action is null and void in view of the provisions of Sections 3, 4 and 6 of the Land Control Act Cap 302 Laws of Kenya as no consent was given for the transaction within the prescribed 6 month period post-agreement.
- The relief sought of specific performance based on contract cannot be granted vide Originating Summons but should have been by way of a Plaintiff.

2. The Preliminary Objection was responded to vide the Replying Affidavit of the Applicant – **JOSHUA ODENYO OKOTH** - filed on 23<sup>rd</sup> October 2018. He deems the Preliminary Objection to be a delaying tactic as he was granted leave to file the Amended Originating Summons by the Court in the presence of the Respondent's counsel which leave was not challenged nor contested. He also contends that the Respondent in his Defence filed on 19<sup>th</sup> July 2017 made an admission that he had received a total of Kshs.138,000 as part-payment of the purchase price of the suit property which he sought to refund over a period of one year. On the issue of the Land Control Board Consent the Applicant asserted that steps were taken to obtain it and annexed a copy of the Application for Consent to the Butula Land Control Board which was approved on 12<sup>th</sup> February 2015. Interestingly, the name of the proposed purchaser or transferee is blank.

3. Parties opted to canvass the Preliminary Objection by way of written submissions. The Respondent's submissions were filed on 15<sup>th</sup> November 2018. The Respondent argued that the Amended Originating Summons was incurably defective both in substance and for want of form. The cause of action being breach of an agreement for the sale of land could not be brought by way of an Originating Summons. Moreover, the Amended Originating Summons was filed without leave of Court and did not have a supporting affidavit annexed thereto.

4. Further, the earlier Originating Summons dated 18<sup>th</sup> May 2017 had contradictory factual issues pertaining to the identity and description of the suit property. The earlier Originating summons describes it as half an acre from **LR MARACHI/KINGANDOLE/2396** while the Amended Originating summons stipulates **LR MARACHI/KINGANDOLE/2397** with a matching mutation form hence the property spoken of is unclear. Moreover, **LR MARACHI/KINGANDOLE/2397** was mutated on 14<sup>th</sup> October 2016 and no longer exists.

5. The Respondent further submitted that the suit was filed without a copy of the official search of the suit property to back it up and consent of the Land Control Board permitting the purported transfer was not granted. The Respondent opined that the only remedy available to the Applicant was for a refund of the purchase price advanced and not by way of adverse possession whose statutory 12 year period has not yet lapsed.

6. The Applicant's submissions were filed on 30<sup>th</sup> November 2018. The Applicant mostly rehashed the narrative in his Replying Affidavit, specifically that the Court gave directions allowing the amendment of his Originating Summons. He restated his case for specific performance of the sale agreement having paid the purchase price for the suit property which fact was admitted by the Respondent. Further,

he contended that it was the Respondent who declined to perform his obligations of attending the Land Control Board meetings and signing the relevant transfer documents after receiving the purchase price which the Applicant should not be penalized for. He prayed for the Preliminary Objection to be dismissed with costs.

7. I have read both parties' submissions, reviewed the pleadings, the court record and applicable law. The Court is guided by the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors** [1969] EA 696 where the Court defined a preliminary objection as follows:

**“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.**

8. The basic issues for determination are as follows:

- Whether the Applicant's Amended Originating Summons is properly on record
- Whether the Applicant's choice to move the Court by way of an Originating Summons as opposed to a Plaint is incurably defective and bad in law
- Who shall bear costs

9. I have scoured the Court record and found that it does not reflect the Applicant's assertion that he orally sought and was granted leave to file an Amended Originating Summons. On 15<sup>th</sup> May 2018, when the matter was scheduled for the hearing of the Respondent's initial Preliminary Objection dated 26<sup>th</sup> April 2018 that seems to have been abandoned, the Applicant sought time to have a fresh look at his suit which he was considering to file afresh. This would have amounted to a withdrawal of the present suit, not amendment. Counsel for the Respondent did not object and parties were referred back to the Court Registry for fresh dates once the position is regularized. The Applicant did not withdraw suit, took mention dates for directions on two occasions and when parties appeared in Court on 7<sup>th</sup> November 2018, directions taken were on canvassing the current Preliminary Objection by way of written submissions.

10. The law on Amendment of pleadings is set out in Order 8 of the Civil Procedure Rules 2010. Rule 1 thereof provides as follows:

**“(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”**

In this case, the Amended Originating Summons was filed without leave, after the close of pleadings 14 days after the Defence was filed way back in 19<sup>th</sup> July 2017. Moreover, it was filed in an attempt to cure the anomaly of the identity of the suit property pointed out by the Respondent in his initial Preliminary Objection. It is therefore irregularly on record.

11. On the issue of moving the Court by way of Originating Summons as opposed to a Plaint, I am convinced that the Respondent's Counsel is misguided in making the assumption that only matters of Adverse Possession are brought by way of Originating Summons. Order 37 Rule 3 of the Civil Procedure Rules Provides as follows:

**“Summons by vendor or purchaser of land**

**A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”**

12. However, the Applicant has thrown a spanner in the works by quoting Order 37 Rule 1 of the Civil Procedure Rules that caters for certain matters pertaining to administration of estates and trusts of deceased persons which is worlds away from the cause of action at hand. It is not lost on me that the Applicant is acting in person and does not have the fair advantage of legal representation. Further, fundamental admissions, admitting liability were made by the Respondent in his defence.

13. I have dealt with issues of law, the others issues of fact on land identity to be proved by way of evidence at trial cannot be dealt with at this stage. Without further ado, the Respondent's Application is hereby upheld in the following terms:

- a. The Amended Originating Summons amended on 21<sup>st</sup> May 2018 is struck out
- b. Parties to proceed with the hearing of the main suit relying on the original pleadings as filed but should the Applicant wish to amend, let him follow procedure and do the amendment properly. The amended originating summons on record is improperly amended as it is without a supporting affidavit.
- c. The Applicant should pay costs of the application.

**Dated, signed and delivered at Busia this 28<sup>th</sup> day of May, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Present

Respondent: Absent

Counsel of the Respondent: Present

Court Assistant: Nelson Odame