



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 245 OF 2018

IDD MUNGA JUMA (Suing as the administrator of the Estate of

JUMAA NZAKA MUNGA)..... PLAINTIFF

VERSUS

LWAMBI NZAKA MUNGADEFENDANT

RULING

(Preliminary objection seeking to have suit struck out; suit wrongfully commenced by way of an Originating Summons; preliminary objection allowed and suit struck out)

1. This ruling is in respect of a preliminary objection filed by the respondent in this suit which objection is drawn as follows :-

- (i) The court lacks the requisite jurisdiction to entertain the Originating Summons taken out.*
- (ii) The Originating Summons pleads mistake and/or fraud as such incapable of being entertained by the court.*
- (iii) The Originating Summons as filed is fatally defective and incurable.*
- (iv) The Originating Summons as taken out ought to be struck out*

2. To put matters into context, this suit was commenced through an Originating Summons filed on 19 October 2018. The Originating Summons (O.S) is said to be brought pursuant to the provisions of Sections 1A , 1B, and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Section 80 of the Land Registration Act, Act No. 3 of 2012, and under any other relevant provision of the Laws of Kenya. The O.S is drawn as follows :-

LET LWAMBI NZAKA MUNGA, within FIFTEEN (15) days after service of this summons on him enter appearance to the summons which is issued on the application of IDD MUNGA JUMA for the following orders; namely

- a) THAT title of the Respondent to the Parcel of Land No. Mgumopatsa/Mazeras/852 was improperly procured and the same be cancelled or revoked.*
- b) THAT the register of the Parcel of Land No. Mgumopatsa/Mazeras/852 be rectified so as to remove the entries in favour of the Respondent and the Title be registered in favour of the Applicant herein IDD MUNGA JUMA as the owner without gazettelement.*
- c) THAT the costs of this originating summons be provided for.*

3. There are various grounds listed in support of the O.S and the same is supported by the affidavit of the applicant. Briefly, the case of the applicant is that the land parcel Mgumopatsa/Mazeras/852 (the suit land) belonged to Jumaa Nzaka Munga (deceased) and that he was issued with title on 5 May 2008 though he had not collected the title deed at the time of his death on 19 July 2008. The applicant avers that he got shocked when he went to obtain a copy of the title deed only to discover that the respondent is also indicated as proprietor of the suit land. He has claimed that this must be by mistake and/or fraud as the land exclusively belonged to the deceased. He has further averred that the respondent is a stranger to him.

4. The respondent filed a replying affidavit where he inter alia deposed that the suit land was purchased by Nzaka Munga Chihuto and upon his death, the land was transferred through transmission to the applicant's father and himself in the full knowledge of all the children of Nzaka Munga Chihuto. He has denied any fraud.

5. In arguing the preliminary objection, Mr. Nyange, learned counsel for the respondent, inter alia submitted that the applicant is seeking a cancellation of title yet he has approached the court by way of an O.S. He submitted that cancellation of title is not a simple matter to be done through an O.S and averred that an O.S is supposed to be for simple or uncontested matters. He relied on the case of *Mwalimu Kalume Charo vs Kitsao (2016) eKLR*. He further submitted that one cannot convert an O.S into a plaint.

6. Mr. Shimaka, learned counsel for the applicant, submitted inter alia that a preliminary objection needs to be grounded by a provision of law but none has been given. He submitted that the court can give directions on how the O.S is going to be heard. He submitted that there have been cases where titles have been cancelled by way of O.S and he stated that the case *Kericho ELC No. 51 of 2014 (OS)* is one such case. He submitted that the respondent has already filed documents an indication that they have submitted themselves to the process and that it will be in the interests of the parties that they be heard. Mr. Nyange responded that the issue of procedure was not taken up in *Kericho ELC No. 51 of 2014 (OS)*.

7. I have considered the matter.

8. The starting point is to appreciate that there are many ways of originating suits. One can commence suit by way of a Petition, or an Originating Summons, or a Plaint, or even through a Miscellaneous Notice of Motion. The Civil Procedure Rules, do prescribe what procedure is to be employed for the particular type of suit. Generally suits are commenced through a plaint unless the Civil Procedure Rules, prescribe for a special procedure. In respect of what may be commenced by way of an Originating Summons, these are set out in Order 37 and they are various. In this suit, the applicant has not stated what Rule or Sub-Rule of Order 37 he has utilized to file this suit. What he has cited is Section 80 of the Land Registration Act, but Section 80 aforesaid only provides for the power of the court to rectify the land register by making an order of cancellation of an entry, and does not provide for the procedure of an Originating Summons. One therefore needs to fall back to the Civil Procedure Rules for the procedure.

9. I have gone through Order 37, and I am unable to see where the applicant can fit his case, meaning that this suit, ought to have been commenced by way of a plaint. I agree with Mr. Nyange, learned counsel for the respondent, that an O.S is generally meant for uncomplicated cases, and I also agree that this suit is ill suited to be heard by way of O.S. There are certainly allegations of fraud and the claim that the title that is in the name of the respondent was not properly acquired. It is a suit that can only be properly heard by way of clear pleadings, where any allegations of fraud and/or mistake are properly pleaded and admitted or traversed through a defence, and the suit can only be properly heard through oral evidence. I am aware that Mr. Shimaka relied on the case of *Kericho ELC No. 51 of 2014 (OS)* where a title was annulled after the applicant had filed an O.S but the issue of whether or not the suit could properly be heard through O.S was never canvassed and indeed, the case was considered fit to be heard by way of affidavit evidence. That is not the situation that we are facing here.

10. I am aware of the provisions of Order 37 Rule 19, which allows for the court to give directions for the suit to proceed as if it was commenced by way of a plaint. I think that the said provision should cover a case properly commenced by way of O.S, but the matter can only be heard as if commenced by way of a plaint and the court thus directs the O.S and the supporting affidavit to be deemed a plaint and the replying affidavit a defence. Alternatively, where the court, in a case which improperly commenced by O.S, is of the view that no prejudice has been caused to the other party by the O.S, can deem the O.S a plaint and the pleadings be retained rather than being struck out.

11. In all cases, the court has discretion, and like every other discretion, the aim is to do justice to the parties. Where no prejudice is caused to the respondent, the court can allow the O.S to remain and be deemed a plaint, but where it is apparent that there is going to be injustice to the respondent, the court has discretion to strike out the O.S and have the applicant commence a fresh suit. Each case will need to be decided within the confines of its facts and circumstances. Just because the court has allowed one case to proceed where wrongly commenced by O.S, does not mean that the court is bound to allow every other case to proceed in that fashion. Each case is unique and must be considered in light of its circumstances.

12. In our case, the respondent has already complained of prejudice. There are allegations of fraud that he is facing and he feels that he cannot encounter them if they are not properly pleaded to allow him an opportunity to respond to them. The allegations against him are certainly weighty and I think it is only proper that the respondent be allowed a level playing field in this litigation. I am persuaded that the respondent has demonstrated that he will suffer prejudice if these pleadings are allowed to stand and he will not be able to ventilate his case properly with the type of pleadings before this court. I am thus persuaded to allow this preliminary objection and strike out this Originating Summons. The law was there for the applicant to follow when commencing his suit but he opted not to follow it. He will thus pay the costs of this struck out O.S.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 13th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Nyange for the defendant.

No appearance on the part of M/s Marende, Necheza & Co for the plaintiff.

Court assistant; David Koitamet.