



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 471 OF 2017 (OS)**

**(Formerly Machakos HCCC No. 87 of 2015 – “OS’)**

1. JOHN MUTUA MUTISYA
2. KENNEDY KIMIYU
3. ESTHER KITUKU
4. BERNARD MUSYOKA
5. JOEL MASAI
6. MULINGE KILUNGU
7. DISHON MWONGELA KILONZO.....PLAINTIFFS

VERSUS

1. KURANI ENE MUIKAI (SUED ON HER BEHALF  
AND AS TRUSTEE OF ALFINA MATIMBAI MOIKAI)
2. KIRISUA MOIKAI
3. SHADRACK MOIPIA MOIKAI
4. MOSES KITIRMAN MOIKAI
5. NDERITU MOIKAI
6. GEDION LENANA NAKUO
7. STEPHEN KISAMPEI MOIKA.....DEFENDANTS

**RULING**

What is before Court for determination is the Respondents’ Notice of Preliminary Objection dated the 2<sup>nd</sup> June 2015 where they seek the following:

1. That the Application and suit as filed is incompetent, bad in law and ought to be struck out.
2. That the Applicant has approached this Honourable Court improperly by way of an Originating Summons rather than by way of Plaint yet:
  - i. The Respondents are desirous of lodging a Counterclaim but cannot do so without a Plaintiff.

ii. The Applicants have raised issues of forcible eviction, cancellation of title deeds and fraud, which issues can only be determined by way of Plaintiff.

iii. The sale agreements are contested/disputed by the Respondents and therefore the Applicant ought to have approached this Honourable Court by way of Plaintiff.

3. That the issues being raised herein are complex in nature and therefore inappropriate for an Originating Summons following the decisions in;

i. Floriculture Limited versus Central Kenya Limited & 3 others Civil Appeal No. 121 of 1995.

ii. Kibutiri Vs Kibutiri Civil Appeal No. 30 of 1982.

iii. Wakf Commissioners Vs Mohammed (1984) KLR 346

iv. Kirit Babulal Bakrania Vs Champuben w/f Govindi Muwi Dodha & 2 others Civil Appeal No. 123 of 1993

4. That the Application as filed is an abuse of the Court process.

All parties filed their respective submissions that I have considered.

### **Analysis and Determination**

The main issue for determination is whether the Application and suit as filed should be struck out for being incompetent and bad in law.

It is the Applicant's contention that the Respondents herein approached the Court improperly by way of an originating summons rather than by way of Plaintiff, and hence they have a challenge to file a counterclaim. They relied on various cases including the case of Siasa Pasua & 2 others DNM Mbaruk Khamis Mohamed & Another (2012) eKLR and Kibutiri Vs Kibutiri (1983) KLR 62.

The Respondents admitted there was an error on the face of their application, which they averred could be cured by an amendment. They stated that the error was due to an oversight and submitted that there is a related pending ELC Case No. 3 of 2017 in which the 1<sup>st</sup> Defendant has sued the Plaintiffs seeking to evict them from the suit land. They relied on section 6 of the Civil Procedure Act and the case of Thiba Min Hydro Co. Ltd Vs Josphat Karu Ndwiga (2013) eKLR.

On the issue of the error on the face of the application, Order 8 rule 3, 4 and 5 of the Civil Procedure Rules provide as follows: **'3 (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.**

**(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.**

**(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.**

**(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.**

**(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.**

**5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.**

**(2) This rule shall not have effect in relation to a judgment or order.**

In relying on these provisions, I find that the error was indeed a genuine mistake and concur with the 1<sup>st</sup> Respondent that the same can be cured by way of amendment.'

On the issue of the Plaintiffs' approach to Court by way of OS instead of Plaint rendering the suit incompetent and bad in law.

Section 19(1) of the **Environment and Land Court Act** stipulates that *'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.'*

Further article 159 (2) (d) of the Constitution states that *' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.'*

In the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR Justice Ochieng held that .. **to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

In relying on the case above and Article 159 (2) (d) of the Constitution and Section 19 (1) of the Environment and Land Court Act, I find that the Applicant seeks to rely on technical procedures and in the interest of justice, I will decline to strike out the instant suit since the OS raises substantive issues that need to be heard and determined. I have already made a finding above that the error on the face of the record of the OS can be cured by an amendment.

In the circumstances, I dismiss the PO in its entirety. Costs will be in the cause

Since there is already a pending related suit vide ELC No. 13 of 2017, which are both before this Honourable Court, I find that it is in order for the two suits to be consolidated. I hereby order that ELC Case No 471 of 2017 and ELC Case No. 13 of 2017 be and is hereby consolidated.

**Dated signed and delivered in open court at Kajiado this 12<sup>th</sup> day of February, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**

**Present**

**Cc Mpoye**

**Wachira for Applicant**

**Wathani holding brief for Olonde for 1<sup>st</sup> Respondent**

**N/A FOR Ocharo for Defendant**