



**REPUBLIC OF KENYA**

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

**CASE No. 197 OF 2013 (O.S)**

**FRANCIS KAGUNDA MWANGI..... 1<sup>ST</sup> APPLICANT**

**SAMUEL NGUGI..... 2<sup>ND</sup> APPLICANT**

**SUSAN NJERI KARURI..... 3<sup>RD</sup> APPLICANT**

**(Suing on behalf of themselves and 118 others)**

**VERSUS**

**DAMARIS NJOKI KARIUKI.....RESPONDENT**

**RULING**

***(An application for leave to join additional defendants to an Originating Summons; applicants also seeking orders of stay of a judgment issued by the Environment and Land Court sitting in Nairobi in another case; applicants finally seeking an order of transfer of the Nairobi case to Nakuru; application opposed; held that in a suit commenced by way of originating summons extra caution is needed before allowing an amendment or introducing new parties; also held that the court has no jurisdiction to grant stay or to order transfer of the suit as sought; application dismissed)***

1. This ruling is in respect of applicants' Notice of Motion dated 18<sup>th</sup> September 2014. The application is brought under sections 3 and 3A of the Civil Procedure Act and Article 40 of the Constitution of Kenya. The applicants seek the following orders:

*1. Spent*

*2. THAT this Honourable Court do order that the following persons be enjoined in this [sic] proceedings as defendants Samuel Karanja Ngumo, Isaac Njoroge Gikera, Cyrus Nganga Kamau t/a Nyakairu Double Thirteen Self Help Group, Peter Njuguna and Leonard Mbugua.*

*3. THAT this Honourable Court be pleased to order stay of the consent order entered by the defendant herein and the other proposed defendants in Nairobi ELC No. 652 of 2013, on the [sic] 17<sup>th</sup> June 2013 Hon. Lady Justice Gacheru whose main effect and objective is to evict the plaintiffs herein who were not made parties to the said suit which is withdrawn.*

*4. THAT this Honourable Court do call up the file No. Nairobi ELC No. 652 of 2013 for purpose of setting aside the consent order.*

*5. THAT costs of this application be provided for.*

2. The application is supported by the affidavit of Francis Kagunda Mwangi the 1<sup>st</sup> applicant who deposes that the applicants filed the present suit on 20<sup>th</sup> February 2013 and the respondent, upon being served, filed a replying affidavit on 27<sup>th</sup> March 2013; that despite knowing about the existence of this suit, the respondent filed Nairobi ELC No. 652 of 2013 on 31<sup>st</sup> May 2013 against the proposed additional defendants; that the latter suit also concerns LR. No. 1556/238 (Original Number 1556/30/2) which is the suit property in the present suit; that on 17<sup>th</sup> June 2013, the respondent and the proposed additional defendants recorded consent in Nairobi ELC No. 652 of 2013 pursuant to which LR. No. 1556/238 (Original Number 1556/30/2) was to be subdivided and new titles issued to the proposed additional defendants; that the suit was also marked withdrawn vide the consent; that the applicants were not aware of the existence of Nairobi ELC No. 652 of 2013 or of the orders made therein on 17<sup>th</sup> June 2013 until 22<sup>nd</sup> August 2014 when policemen and surveyors descended on the suit property and started erecting beacons. That the manner in which Nairobi ELC No. 652 of 2013 was filed and consent orders issued as well as the fact that the orders affect the applicants herein are all reasons why the orders should not stand.

3. The application is opposed by the respondent through replying affidavit filed on 9<sup>th</sup> October 2014 and further affidavit filed on 16<sup>th</sup> September 2016. The respondent maintains that the consent recorded in Nairobi ELC No. 652 of 2013 on 17<sup>th</sup> June 2013 was validly recorded and that the applicants want to review or appeal against the consent without following the correct procedure.

4. The proposed additional defendants were also served with the application. They responded to it through the replying affidavit of George Ndungu Mwaura filed on 7<sup>th</sup> November 2016. Mr. Mwaura deposes that he is the current Chairman of Double Thirteen Self Help Group, a body registered with the Ministry of Labour, Social Security and Services as a self help group and that the proposed additional defendants are variously former chairman of the group and persons who bought portions of the suit property from the respondent; that in deed judgment was validly entered in Nairobi ELC No. 652 of 2013 on 17<sup>th</sup> June 2013 pursuant to the consent and if the applicants wish to revisit the order then they should apply for setting aside in the said case or appeal against the order.

5. Parties agreed to dispose of the application by way of written submissions. Consequently, the applicants filed submissions on 6<sup>th</sup> June 2017, the proposed additional defendants on 18<sup>th</sup> July 2017 and the respondent on 19<sup>th</sup> July 2017. I have considered the submissions and the authorities cited.

6. The issues arising for determination are firstly, whether the proposed additional defendants should be joined to this suit; secondly, whether the order granted in Nairobi ELC No. 652 of 2013 on 17<sup>th</sup> June 2013 should be stayed; and finally, whether Nairobi ELC No. 652 of 2013 should be transferred to this court.

7. Regarding the first issue as to whether the proposed additional defendants should be joined to this suit, it is not clear whether or not the applicants wish to amend the originating summons. I note that there is no prayer for leave to amend. Instead, what is sought is an order that they be enjoined as defendants. It is not stated what relief will be sought against them or what case is being pleaded against them. Ordinarily when an amendment is sought, a draft of the proposed amended pleading is exhibited show the court and the parties the nature and scope of the amendment. No such draft has been availed by the applicants. The application is brought under sections 3 and 3A of the Civil Procedure Act and Article 40 of the Constitution of Kenya, which provisions do not provide any avenue for amendment. Whereas the law is clear that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side, the reality here is that no amendment has actually been sought.

8. The suit herein is a claim for adverse possession and was commenced by way of originating summons. Originating summons is a procedure that allows for simple matters to be determined by the court without the expenses and complexities of bringing an action in the usual way. The procedure is not appropriate for determination of matters which involve serious or complex questions. The Court of Appeal discussed at length the nature and scope of claims that can be commenced by way of originating summons in the case of **Mukesh Manchand Shah & another v Priyat Shah & another [2015] eKLR**. The court stated in

part as follows:

Before we consider how these provisions apply to the question before us, we need to emphasise that it is perfectly well-settled, and indeed engrained in practice as repeatedly stated by a legion of judicial authorities that unrestricted use of originating summons procedure is discouraged. It follows that the application by originating summons has never been a substitute for initiating claims involving contentious issues of facts looking at the history of its evolution. Until 1962 when the Rules of the Supreme Court (Revision), 1962 (Orders 5, rule 1) took effect in England, there was no absolute right to proceed by originating summons. A plaintiff coming by way of originating summons was under obligation to show that the use of the procedure was required or permitted by a rule or statute. As a matter of fact the term “originating summons” was first used by the Chancery Procedure Act, 1852 replacing the outdated procedure of “bill”, before it was changed to “claim”. Later in 1883 the Rules of the Supreme Court were recast and the term “originating summons” was, for the first time introduced. See Re Holloway (A Solicitor) ex parte Pallister (1894) 2QB163 at P 167-per Lindley L.J.

The sole object of the procedure has always been to provide simplicity of the process and to eliminate prolonged pleadings. All the actions identified in Order 37 are to be brought by originating summons in a simple Form No.26 or 27 of Appendix A. Facts and evidence are set forth in an affidavit or affidavits, unless in terms of rule 19 it appears to the court, at any stage of the proceedings that the originating summons should be converted into a plaint in which case the affidavits so far filed shall be regarded as pleadings. Once directions on the summons have been taken as to trial it shall be listed for hearing before a single judge in chambers.

As long ago as 1885 Cotton L.J. in Re Powers, Lindsell v Phillips (1885) 30 Ch D 291 reaffirmed this strict application of the procedure stating that;

*“As regards the view taken by the Vice-Chancellor, it is true that it is not a right course to take out an originating summons to obtain payment of a disputed debt, where the dispute turns on matters of fact”*

Lindley L.J. in the same case expressed very similar views. He said;

*“I think the Vice-Chancellor can hardly have understood that in this case there are no facts in dispute. A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact, but where there is no dispute of fact, the validity of the debt can be decided just as well on summons as in action.”*

In the repeatedly cited decision of Cotton, L.J. in Re Giles & Personal Advance Co. v Michell (1890) 43 Ch D 391 the law Lord explained the purpose of the procedure of originating summons as follows:-

*“..to enable simple matters to be settled by the court without the expenses of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.”*

9. In claim such as the one before the court, extra caution is therefore needed before allowing an amendment or introducing new parties. I am therefore not persuaded that the proposed additional defendants should be joined to this suit.

10. The second issue whether the order granted in Nairobi ELC No. 652 of 2013 on 17<sup>th</sup> June 2013 should be stayed and the finally issue whether Nairobi ELC No. 652 of 2013 should be transferred to this court are interrelated. The answer to both turns on the whether or not this court has jurisdiction to grant those orders. ELC No. 652 of 2013 was filed in the Environment and Land Court at Nairobi. The orders of 17<sup>th</sup> June 2013 were issued by a judge whose jurisdiction is concurrent to that of this court.

Section of the Environment and Land Court Act provides:

***Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.***

This court has no supervisory or appellate jurisdiction in the matter. A court must down its tools as soon as it finds that it lacks jurisdiction. This position was made abundantly clear in the Court of Appeal case of the **Owners of Motor Vessel "Lillian S" -Vs- Caltex Oil (Kenya Ltd[1989] KLR 1.**

11. It is also important to note that the orders of stay and transfer of the Nairobi case are being sought in this case. The applicants have made it clear that transfer of the Nairobi matter to this court is sought for the purpose of setting aside the orders of 17<sup>th</sup> June 2013. Clearly, this court cannot grant such an order.

12. Though the Nairobi matter was settled and withdrawn, the record should still be available in Nairobi and there would be no reason to bar an application for setting aside, stay or some other relief being made in the file. Even if there were to be any difficulties in locating the record, there are options for addressing that before the Nairobi court. In the end, Notice of Motion dated 18<sup>th</sup> September 2014 is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of September 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the applicants

No appearance for the respondent

Mr. Makau holding brief for Mr. Gichuki for the proposed additional defendants

Court Assistant: Gichaba