



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

LAND CASE NO. 1394 OF 2016 [OS]

IN THE MATTER OF A PARCEL OF LAND KNOWN AS LR NO.209/3383 NAIROBI

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22

AND

ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES OF THE LAWS OF KENYA

BETWEEN

JASWANT HARILAL CHUDASAMA.....PLAINTIFF

AND

SHASHIKANT HARILAL CHIDASAMA.....DEFENDANT

RULING

1. This is a Ruling on respect of a Notice of Motion dated 30th March 2017 brought by the defendant/applicant. The Notice of Motion seeks the following orders:-

- 1. That this Honourable Court be pleased to order that the proceedings herein be deemed to have been begun by filing a Plaint.***
- 2. That if prayer 1 is granted, this Honourable Court be pleased to enjoin as a defendant, the administrator of the estate of Harilal Mulji Chudasama when appointed.***
- 3. That the defendant herein be at liberty to file a defence and counterclaim.***
- 4. That parties do file witness statements, lists and bundles of documents and statement of issues.***
- 5. That the costs of this application be in the cause.***

2. The defendant/applicant is a brother to the Plaintiff/Respondent. The applicant, the respondent and their father Harilal Chudasama (deceased) were registered as tenants in common in respect of **LR No.**

209/3383(suit property) which was purchased in or around 5th July 1974. The deceased's one third share in the suit property was later transferred to the respondent in the year 2003.

3. The suit property which is situated at Parklands area was home to all the children of the deceased. The applicant married while living in the suit property. The applicant later decided to move out of the suit property into his own house which he had purchased. The applicant moved out of the suit property in 1994 upon purchasing his own property in second Parklands Avenue.

4. On 11th November 2016, the Respondent filed an originating summons in which he sought orders that he had acquired the suit property by way of adverse possession. This is what prompted the applicant to file the present application in which he among other prayers seeks that the originating summons be converted into a plaint. The applicant contends that the issues surrounding the originating summons raises complex issues of law and fact which cannot be ventilated in an originating summons.

5. The issues which the applicant intends to raise include fraud. He contends that the deceased's one third share in the suit property was transferred to the respondent in 2003 a year after the deceased had passed on. That the law requires that particulars of fraud be fully pleaded and proved and that this cannot be done in an originating summons. There is also the issue of whether property belonging to a deceased can be transferred to other individuals without there being no grant of letters of administration or probate. There is also an issue of whether there is a resulting trust. This is because the applicant contends that he contributed to the purchase of the suit property and that the transfer of one third share of the deceased to the respondent was done without his involvement as a co-owner of the suit property.

6. The applicant also contends that he will be raising issues pertaining the inclusion of the estate of the deceased once an administrator is appointed. The applicant states that the deceased had nine children. Some are deceased and some are alive.

7. The applicant's application is opposed by the respondent based on three replying affidavits. The first one is sworn by the respondent on 24th April 2017. The second one is by Ramesh Harilal Chudasama sworn on 24th April 2017 and the third one by Hasmukh Harilal Chudasama sworn on 24th April 2017. The latter two are brothers of the applicant and the respondent. The respondent contends that the deceased's one third share was transferred to him and the transfer was executed before a prominent former Chief Justice of the Judiciary. That besides the transfer in respect of the suit property, the deceased also transferred one third share of his two other properties to the respondent.

8. The other two deponents confirm that the deceased voluntarily executed the transfers. That they are aware of the same. All the three deponents seem to fault the applicant for his decision to move out of the suit property without informing them in advance. That the applicant only informed them of his new property as he was moving out. That this annoyed his parents. That he should have had the property acquired registered in the names of the deceased and the respondent as well.

9. I have carefully gone through the detailed affidavit in support of the applicant's application as well as the further affidavit which is also detailed. I have considered the three affidavits in opposition of the applicant's application as well as the submissions by the parties herein. The only main issue for determination in this application is whether the originating summons should be converted into a plaint. In dealing with this issue I have to go to the rationale behind claims being brought by way of originating summons. Originating summons were meant to deal with simple matters which the court can settle through that process. In other words originating summons are appropriate where the issues sought to be determined are simple. In the case of **Kibutiri Vs Kibutiri (1982-1988) 1 KAR 60, Law J had this to say regarding originating summons:-**

“ The procedure by way of originating summons is intended;

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

See also the case of **Mnazi Moja Estates Limited Vs Mistry and 5 others (1987) KLR 269** where the court of Appeal held that the procedure of originating summons is not an appropriate way to commence an action where issues raise complex and contentious question of fact.

10. In the instant case, the applicant has demonstrated through affidavits that there are serious issues of law and fact which need to be settled. For example there is the allegation of fraud. The law is clear that allegations of fraud need not only be particularized but also proved. This cannot be done in an originating summons. There is also the issue of whether one can deal with immovable property of a deceased before grant of letters of administration are confirmed.

11. The applicant wants to raise a counter-claim to plead fraud. There are serious contested facts as to whether the applicant made any contribution to the purchase of the property. The respondents are contending that the applicant did not make any contribution. Even where the applicant contends that he paid kshs.127502.30 towards repayment of the loan to Housing Finance Company of Kenya Ltd, the respondent claims that he is the one who gave the money to the applicant to go and pay as he was one who had the family car on that day. All these are not issues which can be dealt with in an originating summons.

12. Order 37 Rule 19 of the Civil Procedure Rules gives the Court power to convert an originating summons into a plaint. Where that is done, the parties have to comply with Order 11 of the Civil Procedure Rules which require filing of documents and witness statements. I have looked at the submissions of the respondent which dwell on what is required to sustain a claim of adverse possession. This is not the issue here. The issue here is on whether what the applicant intends to raise can be dealt with in an originating summons. It is also not an issue of whether the intended claim by the applicant is statute barred or not. This is a matter which can be addressed in accordance with the law. There is the issue of resulting trust involved. The applicant needs to be heard on all these issues. In **Mbaki & Others Vs Macharia & another (2005) 2 EA 206 at 210** it was stated as follows:-

“ The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

13. The applicant herein can only be heard properly if he is allowed to raise a counterclaim. He cannot be heard if his plea to convert the originating summons into a plaint is not allowed. There are nine children of the deceased. Some are deceased and some are alive. The estate ought to be enjoined once an administrator is appointed. This court is fully aware that it has no jurisdiction to entertain the issue on who becomes the administrator. This is the jurisdiction of the family division of the High Court. The applicant has clearly stated that the estate should be enjoined once an administrator is appointed. The respondent contends that properties of the deceased were distributed and that no complaint was raised especially regarding jewellery. All these issues cannot be determined in an originating summons.

14. On the analysis hereinabove, I find that this is a proper case where the originating summons ought to be converted into a Plaint. The result of this is that I find merit in the applicant's notice of motion which is allowed in terms of prayers **1,2,3,4** and **5**.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **7th** day of **December 2017**.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Kamau for defendant/applicant

Court Assistant: Kevin

E.O.OBAGA

JUDGE