



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISC. APPL. NO. 1374 OF 2013 (O.S)

DR. KENNEDY MUYESU MUNAVU.....APPLICANT

VERSUS

WANGALWA OUNDORESPONDENT

RULING

Introduction

The Applicant herein filed an Originating Summons dated 11th November 2013 seeking an order that the Respondent to be evicted from the suit premises being apartment B2-2 Parkview Apartments, South C. in Nairobi, pending the hearing and determination of the suit, and be ordered to pay mesne profits. Further, that the Officer Commanding Station at Industrial Area Police Station be ordered to supervise the said eviction and deliver vacant possession to the Applicant. The Applicant claims to be the registered owner of the suit premises, and that he has given the Respondent several notices to vacate which have been ignored, neglected, and not adhered to. Further, that the Respondent is a trespasser on the said premises.

The Applicant filed a supporting and further affidavit he swore on 11th November 2012 and 2nd December 2013, as well as a further affidavit sworn by Anne Sereta Munavi on 2nd December 2013. The Applicant claims to have allocated the said premises to the said Anne Serta Munavi who is his daughter, which fact was confirmed by the said daughter in her further affidavit. The Applicant's counsel fled submissions dated 24th January 2014, wherein she reiterated the grounds stated hereinabove, and submitted that the Respondent will not vacate the suit premises unless eviction orders are granted by this Court.

The Preliminary Objection

The Respondent's Advocate responded by filing a replying affidavit and Notice of Preliminary Objection both dated 22nd November 2013. He raised the following grounds of objection:

1. The Originating Summons as commenced is incurably defective as it offends the mandatory provisions of Order 37 Rule 1 and Rule 14 of the Civil Procedure Rules 2010.
2. That the matters in issue herein are directly and substantially in issue in a previously instituted suit known as Nairobi CMCC No. 4605/2013.
3. The Supporting Affidavit dated 11th November 2013 and deponed by the purported Applicant Dr. Kennedy Muyesu Munavi offends the provisions of Order 19 Rule 4 of the Civil Procedure Rules (2010).
4. The proceedings herein are couched in a manner calculated to obstruct justice and to abuse the Court's process.

The Court directed that the Respondent's Preliminary Objection be heard and determined first. The Respondent's counsel in submissions dated 26th March 2014 argued that it is not every matter that can be commenced as an Originating Summons, and that Order 37 Rule 1 of the Civil Procedure Rules was clear as to the parties who can validly take out an Originating Summons. Further, that the present suit does not fall within the jurisdiction of the provisions of Order 37 of the Civil Procedure Rules, nor is it presented in the required format as required under Rule 14 of the Order, and should have been commenced by way of Plaint.

The counsel further submitted that this Court cannot proceed with this suit since there is a pending suit instituted in Milimani CMCC No. 4605 of 2013 wherein the Applicant is litigating under the names of his agent, wife and children, and in which the subordinate court directed that he be joined as a party. Further, that the subject matter herein is the same as that being litigated in the subordinate court, and the issue therein is a tenancy dispute. The counsel relied on section 6 of the Civil Procedure Act and the decision in **Theluji Dry Cleaners Ltd vs Muchiri and 3 Others** in this respect.

The Determination

The issues before the court for determination are firstly, whether the Applicant's Originating Summons is competently before this Court, and secondly, whether it is *res judicata*. These are issues this Court found to be the issues of pure point of law raised by the Respondent, as is required by the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**. This is for the reasons that fact of the suit herein having being filed by way of Originating Summons is not disputed, and neither is the existence of the previous suit being Nairobi CMCC No. 4605/2013 disputed. In **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd, (supra)** the Court of Appeal explained when a preliminary objection can be raised as follows:

“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.”

The other grounds in the Respondents Preliminary Objection were found to raise issues of disputed facts and could therefore not be the subject of a preliminary objection.

On the first issue as to whether the Originating Summons is competently before this Court, Order 37 Rule 1 of the Civil Procedure Rules provides as follows with respect to who may take out an originating summons and the matters in respect of which such a summons may be filed:

“1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as *cestui que* trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que* trust;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

(d) the payment into court of any money in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

(f) the approval of a sale, purchase, compromise or other transaction;

(g) the determination of any question arising directly out of the administration of the estate or trust.”

There are no provisions under Order 37 Rule 1 for the filing of a suit for mandatory injunctions for eviction as those sought by the Applicant by way of originating summons. Such relief can only be granted by way of an application be filed by way of a Notice of Motion pursuant to Order 40 Rules 1 and 2 of the Civil Procedure Rules. It is also evident from the wording of the prayers in the Applicant's Originating Summons that his application is for a mandatory injunction of eviction pending the hearing and determination of the suit. However, the suit referred to is non-existent and/or not specified, and it is evident that what the Applicant is seeking through Originating Summons is a temporary injunction and he has no substantive suit. The said Originating Summons is therefore not competently before this Court.

In light of the finding hereinabove I will not belabour with the second issue as to whether the Applicant's originating summons is *res judicata*. I therefore uphold the Respondent's Preliminary Objection dated 22nd November 2013 for the foregoing reasons, and accordingly order that the Applicant's Originating Summons dated 11th November 2013 and filed herein on dated 13th November 2013 be and is hereby struck out for being incompetently filed before this Court.

The Applicant shall meet the costs of the Respondent's Preliminary Objection and of his Originating Summons.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____September____, 2014.

P. NYAMWEYA

JUDGE