



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 77 OF 2014 (OS)

CYRIL J. HAROO.....1ST PLAINTIFF/RESPONDENT
SONJA KAREN ANDERSON.....2ND PLAINTIFF/RESPONDENT
=VERSUS=
UCHUMI SERVICES LIMITE.....1ST DEFENDANT/APPLICANT
**PETER KINYUA MUCHENDU t/a KINYUA & CO. AUCTIONEER....2ND DEFENDANT/
APPLICANT**
NATIONAL LAND COMMISSION.....3RD DEFENDANT/ APPLICANT
SHAKOOR H. AHMED.....4TH DEFENDANT/PPLICANT

R U L I N G

Introduction:

1. This suit was commenced by way of Originating Summons. In the Originating Summons, the two Applicants, whom I shall refer to as the Plaintiffs for ease of reference, are seeking for a mandatory injunction restraining the 1st and 4th Respondents (Defendants) from evicting them from land known as Kilifi/Madeteni 536 or interfering with their quite possession and occupation. The Applicants are also seeking for a declaration that the 1st Defendant has no legal interest in Kilifi/Madeteni 536.

2. The 1st, 2nd and 4th Defendants have now filed an Application dated 28th May, 2014 seeking for the following orders;

- (a) The Honourable Court be pleased to strike out the suit herein as the same is bad in law, it is scandalous, frivolous, vexatious and otherwise an abuse of the court's process.**
- (b) Further and in the alternative to the foregoing, the suit be stayed pending the hearing of Misc. App. No. 7 of 2014 and Misc. App. No. 8 of 2014.**
- (e) The costs of this Application be provided for.**

The Defendants'/Applicants' case

3. According to the Affidavit by the 4th Defendant, who is also a director in the 1st Defendant's company, the Originating Summons filed herein is defective because the procedure adopted by the Applicants is not intended for the determination of complex issues that the Applicants have set up in this action.

4. It is the deposition of the 4th Defendant that the Registered Land Act (repealed), being the Act that governed the suit property together with Civil Procedure Rules expressly prohibited the use of this procedure as a method of cancellation of titles and that the procedural flaw in the parent suit is so fatal as to affect the jurisdiction of the court and render the proceedings void *ab initio*.

5. The 4th Defendant further deponed that the Plaintiffs/Applicants have also commenced the following actions in respect to the suit property. BPRT case number 105/2012, Misc. Application Number 39/12, Misc. Application Number 7/2013, Misc. Application Number 8/2014 and Malindi CMCC No. 322/2012.

6. According to the 4th Defendant, the issues in Misc. Application NO. 7 of 2014 which is pending determination raises the same issues that have been raised in this suit. Consequently, it was deponed, it is an abuse of the process of the court to have these matters litigated by the same parties in two different courts with jurisdiction to deal with them.

The Respondents' Case

7. Cyril Jean Haroun, on his own behalf and on behalf of the 2nd Plaintiff/Respondent deponed that the overriding objective principle extols the proposition that courts shall not be guided by technicalities, and that no application shall be defeated on a technicality of form that does not affect the substance of the application.

8. According to the Plaintiffs/Respondents, Order 37 Rule 19 (1) of the Civil Procedure Rules allows the court to order proceedings, commenced by way of an Originating Summons, to continue as if the cause had been so begun and may, in particular, order that any affidavits filed to stand as pleadings.

9. The 1st Plaintiff/Respondent further deponed that the proceedings mentioned in the Applicants' affidavit did not benefit from the subsequent material disclosures by the Ministry of Lands; that the new disclosure relates to the validity of title held by the 1st Defendant and the same lie within the exclusive jurisdiction of this court.

Submissions

10. The Defendants/Applicants' counsel submitted that it is necessary to consider the nature of the Originating Summons and the scope of its functions as a means of determining disputes between parties. Counsel relied on the **case of Kibutiri Vs Kibutiri (1983) KLR 62** in which it was held that **the** Originating Summons procedure is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way and not to enable the court to determine matters which involve a serious question.

11. According to counsel, the Plaintiffs have sought for orders of mandatory injunction, canceling of the 1st Defendant's title and an order directing the 3rd Defendant to allocate the 1st Defendant's land to the Plaintiffs together with serious allegations of illegal and corrupt conduct on the part of the 1st, 2nd and 4th Defendants. Consequently, it was submitted, there will be need for a detailed discovery, issue of interrogations and cross-examination of various witnesses to establish such facts.

12. Counsel submitted that because of the complex nature of this case, the objection raised is not a mere technicality but one that goes to the very root of the case. Counsel submitted that a suit instituted contra statute is a nullity and it cannot be saved by a transfer. Counsel relied on the cases of **Ngomeni Swimmers Ltd Vs Commissioner of Lands & 18 others (2013) e KLR**, **Siasi Pashua & another Vs Mbaruk Khamis Mohammed & another (2012) e KLR** among others to buttress his arguments.

13. The Plaintiffs'/Respondents' counsel submitted that the Application should fail because the overriding objective is aimed at enabling litigants to obtain justice affordably, expeditiously and appropriately pursuant to Sections 1A and 1B of the Civil Procedure Act. Counsel quoted extensively the holding in the case of **Deepak Chamanlal Kemani & Another V KACC & 3 others (2010) eKLR** which supports the proposition contained in the oxygen principle.

14. Counsel submitted that in any event, Order 37 Rule 19 (1) of the Civil Procedure Rules allows the court to continue the cause as if it had been begun by filing a Plaintiff.

15. The Respondents' counsel further submitted that the suit ought not to abate merely because the 1st, 2nd and 4th Defendants are uncomfortable with the form in which it was brought before the Court. Counsel relied on the case of **Richard Ncharpi Leiyagu, Civil Appeal No. 18 of 2013** in which it was held that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty for not having his case heard on merit.

Analysis and findings

16. The issue that I am supposed to determine in the current Application is whether the Plaintiffs'/Respondents have moved this court in accordance with the law, and if not, whether this court can save the suit pursuant to the provisions of Sections 1A and 1B of the Civil Procedure Act, Section 159 of the Constitution and Order 37 Rule 19 (1) of the Civil Procedure Rules.

17. This court has been moved by way of Originating Summons filed on 24th April 2014.

18. Order 37 provides instances when the court may be moved by way of Originating Summons, returnable before a Judge sitting in chambers.

19. Order 37 Rule 8 of the Civil Procedure Rules provides instances when an Originating Summons may be filed in relation to land registered under the Registered Land Act. The Rule provides that all applications under the Registered Land Act other than under Section 120, 128, 133, 138, 143 and 150 thereof shall be made by Originating Summons unless there is pending a suit involving the same land when the applications may be made in that suit.

20. It is not in dispute that the suit property is registered under the repealed Registered Land Act and the applicable law is that Act.

21. The Plaintiffs are seeking for the cancellation of title registered in favour of the 1st Defendant, on the ground that the same was issued to the Defendant irregularly and illegally.

22. The other orders that the Plaintiffs are seeking in the Originating Summons are: a mandatory injunction directed to the 1st and 4th Defendants restraining them from evicting, harassing or interfering with the Plaintiffs possession of Kilifi/Madeteni 536; a declaration that the title in respect of the suit property is invalid, defective and fictitious and the same is void and voidable; a declaration that the 1st Defendant has no legal interest in the suit property and an order directed to the 3rd Defendant to grant a new lease in respect to the suit property to the Plaintiffs.

23. In the grounds on the face of the Originating Summons, the Plaintiffs have stated in detail why the said orders should issue including the particulars of irregularity and illegality of the title that was acquired by the 1st Defendant.

24. According to the particulars of irregularity and illegality of the title that have been stated on the face of the Originating Summons, the title that was issued to the 1st Defendant is freehold whereas all valid titles issued within Madeteni Settlement Scheme are leasehold; the title document does not have a serial number, stamp or markings; the necessary legal and essential process of acquiring a valid title in the area were not followed and that no evidence or documents exist to show that the procedures relating to

settlement were followed either at Kilifi land adjudication offices or the Ministry of Lands.

25. This court can indeed cancel a title by ordering for the rectification of the register where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake pursuant to the provisions of section 143 (1) of the RLA (repealed).

26. However, Order 37 Rule 8 of the Civil Procedure Rules expressly prohibits this court to entertain a claim for cancellation of a title registered under the Registered Land Act by way of Originating Summons.

27. The simple explanation for this provision of the law is that a title can only be cancelled by the court after evidence has been tendered to show that the same was procured fraudulently, or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions.

28. It therefore follows that cancellation of a title deed or a Certificate of Lease is not a simple issue which can be decided by way of an originating summons thus the provisions of Order 37 Rule 8.

29. Other than the express provisions of Order 37 Rule 8 of the civil Procedure Rules which prohibit a party from moving the court by way of an Originating Summons for an order of cancellation of a title issued under the Registered Land Act, it has been held by the courts that a suit may be commenced by way of an Originating Summons to enable simple matters to be settled by the Court without the expense of bringing an action in the usual manner (See **Kibutiri Vs Kibutiri (1983) KLR 1** and **Re Gilas (2) (1990) 43 Ch.D 391**). In the Kibutiri case, Law J.A held as follows:

“The scope of an inquiry which could be made on an Originating Summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit.”

30. In the present case, the Plaintiffs have sued the 1st, 2nd and 4th Defendants for orders of mandatory injunction, prohibitory injunction, declarations both invalidating the 1st Defendant’s title to the suit property and an order directing the 3rd Defendant to allocate the suit property to the Plaintiffs.

31. In support of their case, the Plaintiffs have raised serious allegations of illegal and corrupt conduct on the part of the 1st, 2nd and 4th Defendants. The grounds that the Plaintiffs have set out in the Originating Summons to support their quest to have the title document currently registered in the name of the 1st Defendant are complex in terms of the applicable law and serious in terms of the bundle of proprietary rights that arise from such a title.

32. For the Plaintiffs and the Defendants to prove their respective positions, there will be need for detailed discovery, issue of interrogatories and cross-examination of witnesses to establish the truth.

33. Because of the complex and serious issues raised by the Plaintiffs, a full hearing founded on a Plaint is required.

34. The Plaintiffs have asked the court to save this suit by converting the Originating Summons into a Plaint and order that the affidavits filed be considered as pleadings pursuant to the provisions of Order 37 rule 19 (1) of the Civil Procedure Rules. Order 37 Rule 19(1) provides as follows:

“Where, on an Originating Summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as

pleadings, with or without liberty to any of the parties to add, or to apply for particulars of those affidavits.

35. The above provision contemplates that the proceedings were lawfully commenced by way of an Originating Summons. In that case, the court may for any reason convert the proceedings to continue as if the cause had been begun by way of filing of a Plaint. The provision does not say that an Originating Summons may be converted into a Plaint even where it has been commenced as such wrongly. The cause must have been begun in accordance with the provisions of Order 37 before the same can be converted into a Plaint for one reason or the other.

36. This court is governed by the provisions of the Constitution, the Environment and Land Court Act, the Civil Procedure Act and the Rules made thereunder amongst other statutes while discharging its mandate.

37. Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by rules. For this court to have the requisite jurisdiction to handle a suit, that suit must be filed in accordance with the rules. For example, a party cannot commence a suit by way of a letter, and where that happens, the court will not have the jurisdiction to handle such a matter because a “suit” would not be said to have been instituted in accordance with the rules in such a case. The court will have no option but to declare such “a suit” a nullity.

38. The Civil Procedure Rules allows parties to commence suits in certain circumstances by way of Originating Summons. The only other mode of initiating suits recognised by the Civil Procedure Rules is by way of a Plaint pursuant to the provisions of Order 3. The Constitution and the Rules thereunder on the other hand provides that matters raising constitutional issues may be commenced by way of a Petition.

39. There are several other pieces of statutes which provide the mode in which the court may be moved in particular circumstances. For example, section 55 of the Anti-corruption and Economic Crimes Act provides that where the Commission seeks to have an individual’s assets forfeited to the State, it shall move the High Court by way of Originating Summons.

40. It therefore follows that the mode of instituting a suit has to be in accordance with the law for a proper and just determination of the issues that arise therefrom.

41. Where a party, whether intentionally or by mistake, moves the court contrary to the provisions of the law, the court may call upon such a party to move the court appropriately by nullifying what was filed contra-statute in the first place. A proper suit may be filed again.

42. A suit filed contra-statute cannot be saved by the Oxygen Principle or the provisions of Article 159 of the Constitution. In the case of **Siasa Pasua & 2 Others Vs Mbaruk Khamis Mohamed & Another (2012) eKLR, Ojang J** as he was then had this to say about the provisions of Article 159 (2) (d) of the Constitution.

“The obligation placed upon the courts by the Constitution's requirement (article 159 (2) (d)), that they render justice without undue regard to procedural technicalities, does not, in my opinion, negate the orderly scheme of litigation provided for by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified.”

43. I am in agreement with the above holding of the Judge. Where a party does not comply with the express provisions of the law in terms of how he should move the court, and where the court does not have discretion to rule otherwise, the provisions of Article 159(2) (d) cannot come to the aid of such a party. A suit which has been filed contra-statute is incompetent and cannot be allowed to proceed because it should not be there in the first place. This court cannot be called upon to rectify the register in respect to the suit property by cancelling the title which was issued to the 1st Defendant in the manner by way of an Originating Summons. The law expressly prohibits that.

44. It is true that deviation from lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to vitiate a suit.

45. The objection before me is not one of lapses in form and procedures but a substantive issue of how a court is supposed to be moved.

46. Other than it being a legal requirement that a title registered under the Registered Land Act cannot be canceled by the court by way of an Originating Summons, the holder of a title that ought to be cancelled by the court is likely to be prejudiced if a suit raising serious issues of fraud and corruption is to proceed by way of an Originating summons. A respondent in an Originating Summons may have difficulties in joining other parties in such proceedings or seeking for indemnity against the government in case the title document is eventually cancelled by the court. Such proceedings are therefore likely to be injurious and prejudicial to a party whose title is under challenge and would certainly not be in conformity not in with the objectives of the double 'OO' principle.

47. In the case of **Hunker Trading Company Limited Vs Elf Oil Kenya Limited, Civil appeal No. 6 of 2010**, the Court of Appeal stated as follows:-

“It seems to us that in the exercise of our powers under the “Oxygen principle”, what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are Oxygen compliant so as to maintain consistency and certainty. We think the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the Oxygen principle could easily become an unruly horse.....”

48. In the case of **Mradura Suresh Kenteria Vs Suresh Nanalal Kentevia, Civil Appeal No. 277 of 2005**, the same court stated as follows:

“While the enactments of the double OO Principle is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian Case of Purpose Pty Limited Vs Council of the City of Sydney (2007) NSWLEL, 63 where the court underscored that in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable foundation.”

49. For this court to rule that a title document registered under the Registered Land Act can be cancelled by way of an Originating Summon, when the law states otherwise, just because the Oxygen Principle provides that matters before the court should be dealt with justly and proportionately, would amount to this court acting injudiciously and without proper and explicable foundation.

50. For the reasons I have stated above, I find that the proceedings before this court are contra-statute and incompetent. Consequently, the Originating Summons dated 23rd April 2014 is hereby struck out with costs.

Dated and delivered in Malindi this 12th day of **September**, 2014.

O. A. Angote

Judge