COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.39 OF 2014

BETWEEN

MUKESH MANCHAND SHAH……..……...1ST APPELLANT

HARISH RAICHAND SHAH …….....……2ND APPELLANT

AND

PRIYAT SHAH …….....……..1ST RESPONDENT

MONA SHAH ……..……..2ND RESPONDENT

(Being an appeal from the ruling and order the High Court of Kenya at Mombasa (Odero,J.) dated 23rd July, 2014

In

H.C.C.C No.37 of 2013(0.S))

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JUDGMENT OF THE COURT

The sole issue for our consideration and determination in this appeal is the construction of **Order 37** of the Civil Procedure Rules and its application to the facts presented in the **High Court** by an originating summons procedure.

Chandrakant Devchand Meghji Shah died tostate on 7th August, 2013 having appointed in his last will and testament dated 25th July 2011 as executors, Mukesh Manchand Shah and Harish Raichand Shah, the appellants. The deceased was survived by a daughter, Mona Shah and a son, Priyat Shah, the respondents as the only immediate beneficiaries, his wife having predeceased him. The respondents were at the time of his death minors. In the will, the deceased directed the appellants to hold in trust 40% and 60% of the residue of the estate for Mona Shah and Priyat Shah, respectively. The respondents having attained the age of majority and on the advice of their advocate formed the opinion that the will of the deceased was ambiguous and uncertain, and therefore incapable of being properly interpreted for implementation. For this reason alone the respondents brought in the High Court an originating summons seeking answers to some six questions and a prayer that they, being adults, be appointed administrators of the estate of their deceased father.

The aforesaid six questions raised in the originating summons are;

"1. Whether the deceased's will dated 25th July 2011 is valid;

2. If found to be so, whether the heirs to the deceased can be ascertained from the will.

3. Whether the subject of the trust created under the will can be ascertained.

4. Whether the apportioned bequests of the remainder of the estate to the respective heirs to the deceased/beneficiaries can be ascertained.

5. Whether the trust created under the will is in breach of the rules against perpetuity.

6. Whether, as adults and only beneficiaries to the trust, the beneficiaries can by mutual consent dissolve the trust created in their favour."

The respondents verily believed that the will was uncertain as to the object of the gift and, the identity of the gift to be vested. They also averred that the gift created under the will violated the rule against perpetuities. It was further their view that being adults and as the only beneficiaries under the will, they were entitled to seek the dissolution of the trust and thereafter seek a grant of probate on intestacy. Before directions could be taken in terms of **Order 37 rule 17** of the Civil Procedure Rules, the appellants objected to the procedure of originating summons by filing a notice of preliminary objection, in which it was contended that the **High Court** has no jurisdiction to entertain the originating summons on the question of the validity of the will and the appointment of the respondents as administrators; that the questions and declarations sought, being serious and controversial were unsuitable for determination through the procedure of an originating summons. The respondents for their part maintained that originating summons was the proper vehicle for the nature of questions they wished the **High Court** to determine.

Determining the question, the learned Judge (**Odero, J)** agreed with the appellants that indeed the originating summons seeks a determination of serious and disputed facts. The learned Judge, was however of the opinion that the fact of raising serious and disputed questions in an originating summons cannot of itself divest the High Court of its jurisdiction.

Relying an **Order 37 rule 19 (1)** aforesaid and **Article 159 (i) (h)** of the Constitution, the learned Judge thought the objection was merely technical and proceeded to convert, in terms of the former provision, the originating summons into a plaint.

This decision aggrieved the appellants who instituted this appeal seeking its reversal on five grounds. They have invited us to find that the learned judge:

i) erred in overruling the preliminary objection, even after finding that it had been improperly brought.

ii) ought to have found that she had no jurisdiction to hear the originating summons

iii) ought to have dismissed the originating summons as Order **37 rule 19** could not cure the defect

vi) made an error by failing to appreciate the effect of her finding that the questions raised in the originating summons could be determined under the Law of Succession Act and then going ahead to convert the originating summons into a plaint, a procedure known only in matters brought under the Civil Procedure Rules, but not applicable in probate matters.

v) committed an error by converting the originating summons into a plaint without application by any of the parties and then awarding costs to the respondents.

We need to point out that the appellants' cross-appeal was expunged from the record for having been filed out of time and without leave.

It is necessary, given its centrality in the determination of the question before us, to set out the pertinent provisions of Order 37 of the Civil Procedure Rules which defines the scope of inquiry that can be made by an originating summons procedure,

> ***"37 (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) …***
>
> ***(e) …***
>
> ***(f) …***
>
> ***(g) the determination of any question arising directly out of the administration of the estate or trust.***
>
> ***2. Any persons named in rule 1 may in like manner apply for and obtain an order for-***
>
> ***(a) the administration of the personal estate of deceased;***
>
> ***(b) the administration of the real estate of the deceased;***
>
> ***(c) the administration of the trust……***
>
> ***II. Any person claiming to be interested under a deed, will or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested." (****our emphasis****)***

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) exparte 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**."*

Locally **Hancox JA**, as he then was, in **Wakf Commissioners** v **Mohamed Bin Umeya Bin Abdulmanji Bin Mwijabu & another**, Mombasa, Civil Appeal No.83 of 1983 in a leading judgment of the Court reviewed the case law both local and those decided in England as well as texts, some of which were cited to us in this appeal, namely **Atkin's Court Forms** 2nd Ed.Vol.29, **Kulsumvhai v Abdulhussein** (1957) EA 699, **James Njiro Kibutiri** v **Eliud Njau Kibutiri** Civil Appeal No.3 of 1982, **Kenya Commercial Bank Ltd** v **James Osebe** Civil Appeal No.60 of 1982 **Official Receiver v Sukhder** (1970) EA 243, **Sir Lindsay Parkinson & Co.Ltd's Trust Deed, Bishop & others** v **Smith & another** (1965) I EAR 609, **Standard Chartered** v **Walker** (1982) 3 EAR 938. The learned Judge concluded that;

> ***"The foregoing authorities are sufficient to show, as Mr.Malik eventually accepted, that complex issues of disputed fact such as are raised here, are not appropriate for decisions by way of an originating summons. It may be, as Windham CJ said in Kulsumbai v Abdulhussein, that the question to be determined is covered by the letter of sub-rule (g) of Rule (1) of the order that those are not the only points to be considered in deciding whether to proceed by way of originating summons or by regular action."***

No doubt, from the foregoing analysis of the law, both English and local courts exhibit the same reticence in regard to the procedure by originating summons.

But why originating summons?

Section 19 of the Civil Procedure Act provides that;

> ***"19. Every suit shall be instituted in such manner as may be prescribed by rules."***

A 'suit,' on the other hand is defined in Section 2 to mean,

> ***"…all civil proceedings commenced in any manner prescribed"***

"Prescribed" is clarified to mean prescribed by rules. Order 3 of the Civil Procedure Rules directs that;

> ***"1(1). Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed."***

Apart from a plaint or petition, and depending on its nature, a suit may also be commenced by an originating summons.

Actions which must, in terms of **Order 37,** be commenced this way are specific and we have reproduced them at the beginning of this ruling.

We observe only by way of passing that a number of statutes make provisions in their rules for institution of actions by means of originating summons. For instance, the Children Act, the Married Women's Property Act, 1882, and the Arbitration Act.

In the originating summons under our review, we reiterate that the respondents raised six very specific and direct questions. They are questions to do with the construction of the will, namely,

(i) Whether the will dated 25th July, 2011 is valid. Dependent on this question are the questions;

(ii) Whether the heirs to the deceased can be ascertained from the will.

This is a fairly simple question that does not require any factual evidence to be presented and the answer should readily be apparent from the content of the will itself. The answer can be yes – the heirs may be ascertained from the will – or - no – it is not possible to ascertain them from the will.

(iii) Whether the subject of the trust created under the will can be ascertained. Again, by just looking at the will, the answer should be available without much effort, or calling oral evidence.

(iv) Whether the bequests of the remainder of the estate to the respective heirs can be ascertained from the will. A mere reading of the last will should provide a quick answer.

(v) Does the trust, created under the will violate the rules against perpetuity? This will also involve the juxtaposition of the contents of the will against the provision of law of trusts. Again this should not involve protracted arguments.

This approach may sound simplistic but we firmly believe that the questions are not complex and the issues involved not serious enough to warrant the invocation of the usual procedure of plaint under the Civil Procedure Rules or by the procedure provided for under the Probate & Administration Rules.

Perhaps the last two questions posed in the originating summons are the most difficult. But again the rules provide the answers to the apparent difficulty. The respondents seeks the intervention of the High Court to find that, as adults and the only beneficiaries to the trust and estate, they have the capacity, after dissolution of the trust, to be appointed administrators of the estate. This question is plainly premised on the fact that when the trust was created and the appellants appointed executors of the respondents'

father's last will, the respondents were minors and the only dependants, their mother too having died. They are adults today and are inquiring from the court if they are qualified to take over. The High Court can find without calling oral evidence, on the law and fact contained in the affidavits that they are either qualified or not.

As heirs the respondents are permitted, first by **rule 1** of **Order 37** to seek by originating summons any relief, not amounting to administration of the estate, and raise any question affecting their rights or interests as heirs, ascertain the class of heirs, to be furnished by the executors or trustees with accounts and the determination of ***"any questions arising directly out of the administration of the estate or trust"***

Secondly under rule 11, the respondents are claiming under a will of their late father as beneficiaries and are as such permitted to apply using the procedure of originating summons to seek "the determination of any question of construction arising under the instrument, and for a declaration of" their rights.

It is important also to note two other things; that under rule 13 the single judge is not bound to determine any question of construction if, in his opinion, it ought not to be determined on the originating summons; that under rule 19 (3) where the court determines that the an originating summons ought to be converted into a plaint, it is immaterial that the case could not have been began by way of a plaint.

Bearing all these things in mind we find that the question whether or not the court was moved by the correct procedure is not a jurisdictional question but only goes to the competence of the matter before the court. That is why in appropriate cases the judge may convert the cause or make the necessary amendments to the summons to accord with the existing facts in order to raise the matter in issue between the parties. See **Order 37 rules 18 & 19.** Where it is found that issues raised in the summons cannot be so raised, the High Court will nonetheless have jurisdiction to entertain these very same questions if brought properly in a plaint.

In **Kibutiri** v **Kibutiri** (Supra) Potter, JA dealing with an appeal arising from the dissolution of a partnership and distribution of its property observed on the question of costs that;

> "***It is difficult for this Court to decide the question of costs in a case like this where the trial judge and the advocates on both sides (in the lower court) are jointly responsible for the waste of litigants' money …The advocates for the plaintiff in this case should not have proceeded by way of originating summons. The advocate for the defendant should have objected. And the trial judge should have struck out the summons and ordered the plaintiff to proceed by ordinary suit. I would like to give one piece of advice to ingenious lawyers. Short cuts are fine, as long as you are absolutely sure they won't land you in the ditch."***

We cite this authority to demonstrate that a court has jurisdiction where the procedure adopted is inappropriate and also to show that it is the responsibility of the advocates and the judge alike to ascertain at an early stage, say at the directions hearing, whether the issues involved deserve the summary procedure of originating summons. There is no doubt that the mischief of this summary procedure is not intended for matters which involve serious and complex questions of law and fact. The procedure is intended to enable simple matters to be settled without the expense of bringing an action in the usual way. The dispute in **Kibutiri** did not meet that standard. It was heard in the High Court for seven days, many witnesses were called and several exhibits produced, spread over three years' period at the end of which a long judgment followed.

We find on the law and affidavits that this is not a case where it could be said that there is a likelihood of substantial or protracted dispute or that facts are highly disputed, controverted or contentious. The learned judge therefore erred in finding that the issues were serious in nature and disputed. Her conversion of the summons into a plaint was premature and done without full appreciation of the issues to be canvassed at the stage of directions.

As we conclude we note that, the questions raised in this originating summons are not comparable in terms of seriousness, complexity and acrimony, to questions raised in originating summons, say, in claims

for adverse possession and those raised under the Married Women's Property Act, 1882 which has ceased to apply upon the enactment of Matrimonial Property Act, 2014, and yet the law requires such claims to be brought by originating summons. Until recently the Courts have been extremely strict in applying this procedural requirement, insisting that a claim for adverse possession can only be instituted through an originating summons. See **Bwana** v **Said** (1991) 2 KAR 262 and **Maina Njuguna** v **Paul Njuguna Mwangi**, Civil Appeal No.151 of 1999. Of course that has since changed and the claim for adverse possession can today be pleaded in the plaint (**Lusenaka** v **Omocha** (1994) LLR 578 (CAK) or defence (**Wabala & Another** v **Okumu** (1997) LLR 608 (CAK) or even in a counter-claim.

The disputes brought under **Section 17** of the Married Women's Property Act, 1882 are some of the most acrimoniously contested cases, at least from our experience and from the law reports **R.M.M** v **B.A.M,** Civil Appeal No.267 of 2011, a five-Judge bench of this Court demonstrates the protracted nature of such disputes. The originating summons was filed in 2007, eight witnesses testified before the **High Court** and the decision of this Court (5- Judge bench) rendered on 20th February, 2015. Although the Court did not deal with the question of whether in light of the nature of the dispute it would have been appropriate to proceed other than by originating summons, it nonetheless noted the delay that had been occasioned and directed that the summons be heard afresh within six(6) months of the judgment.

We conclude and state that being, an interlocutory appeal we have deliberately avoided making any definitive conclusions. We ultimately find that the questions posed for determination in the originating summons before the High Court are suitable for determination in a summary way by an originating summons. For this reason the order converting the summons into a plaint is set aside. Otherwise the appeal fails and is dismissed with costs.

Dated and delivered at Malindi this 17th day of July,2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR