



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: TUNOI, O'KUBASU AND WAKI, J.J.A)

CIVIL APPEAL NO. 310 OF 2002

BETWEEN

JOHN W. WEPUKHULU.....APPELLANT

AND

SECRETARY, BOARD OF GOVERNORS

BURUBURU SECONDARY SCHOOL.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Githinji, J.) dated 20.12.2001

in

H.C.C.C. NO. 658 OF 1996)

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**JUDGMENT OF THE COURT**

This is an appeal from the decision of the High Court of Kenya at Nairobi (*Githinji, J as he then was*) made on 20th December, 2001 whereby the learned Judge declined to grant the orders sought by the plaintiff, the appellant therein, in an application by way of Originating Summons stated to be under **Order XXXVI rule 3** and **Order XXXIX rule 1** and **section 3A** of the Civil Procedure Act.

The reliefs sought in the application were:

**(a) An injunction to restrain the defendant (the respondent in the appeal) from selling or transferring LR NO. 209/12116/56 to any third party other than the applicant (appellant in the appeal).**

**And**

**(b) The defendant do sign transfer forms and do transfer and deliver title of LR 209/12116/56 to the applicant or his advocate.**

The factual background to the dispute giving rise to this appeal are largely not in dispute and may briefly be stated as follows: By an Agreement of Sale dated 20th June, 1994, the respondent agreed to sell to the appellant a residential plot L.R. NO. 209/12116/56 measuring 1/8 of an acre or thereabouts situate at Plainsview Estate, Mombasa Road, Nairobi, the suit property, at the agreed purchase price of Shs. 400,000/= of which 10% had been paid to the respondent's selling agents, **Metra Investments**. The completion date was stipulated to be 20th September, 1994 and the sale was subject to the Law Society Conditions of Sale, 1982, in so far as they were not inconsistent with the conditions contained in the Sale Agreement. The appellant paid the purchase price by instalments between 2nd September, 1994 and 15th February, 1996. He also paid further sums in respect of survey and planning fees, stamp duty, legal fees and registration fees.

However, by letters dated 12th August, 1994 and 17th January, 1996, the respondent unilaterally hiked the purchase price for the sale of the suit property to Shs. 500,000/= due to what it termed "*contractors' high fees for providing the services*". It is apparent that the appellant did not approve of this and refused to pay any additional sum on top of the agreed purchase price. He contended that as he had fulfilled his part of the Agreement of Sale there was no way he could pay the respondent more than what they had agreed. On the other hand, the respondent deemed the appellant to be in breach of the Agreement of Sale by not completing payment of the purchase price and proceeded to renegotiate and sell the suit property to some third parties. This was the genesis of the suit in the superior court which yielded the appeal now before us.

It is manifestly clear that while the dispute between the parties simmered, the suit property was sub-divided on 24th May, 1995 into two separate plots – L.R. No. 209/12116/63 and L.R. No. 209/12116/64. The original land reference number was therefore extinguished on sub-division before the suit was filed. In his judgment the learned Judge held: -

***"There is overwhelming evidence that the suit land does not exist on the ground. Plaintiff did not commission a surveyor to verify whether or not the suit land physically exists after Hellen Chelanga Kemei filed her replying affidavit. There is no expert evidence to rebut the evidence of Rahab Karei Mukiriama that (sic) title for LR. No. 209/12116/56 exists by error as it ceased to exist when the suit property was sub divided and two new titles issued instead. There is official confirmation by the Registrar of Titles vide the letter dated 20.11.97 (Ex D3) that title for LR. NO. 209/12116/56 among others would be cancelled. It appears that (sic) plaintiff obtained the Abstract of LR 209/12116 before the cancellation was effected. In the circumstances, the remedy sought in prayer 2 of the Originating summons cannot be granted."***

It was argued by **Mr. Munyu**, learned counsel for the appellant, that it was erroneous to say that the suit property did not exist after its sub-division and that the transfer of the suit property to third parties was void.

The respondent's uncontroverted evidence is that, at the request of the appellant, the suit property – L.R. No. 12116/56 was sub-divided into two sub-plots, namely L.R. Nos. 209/12116/63 and 209/12116/64. It is not disputed by the appellant that he even paid Kshs.6,000.00 survey fees and Kshs.2,000.00 planning fees for this sub-division.

These two sub-plots were duly registered on 24th May, 1995. It would appear, therefore, that on the date of filing this suit – on 15th March 1996, there was no property the subject matter of this suit known as L.R. No. 209/12116/56, and this fact was known to the appellant. In the circumstances, the appellant was bound to state the true position clearly as is depicted by the official documents of titles. The omission, in our view, was deliberate and meant to mislead. Moreover, the fact that due to an error of the Registrar of Titles, both the old title and the two new titles are in existence today, does not alter the fact that the sub-division was duly effected. As there was no encumbrance on the titles so created, their transfer to third parties was valid in all respects.

It is common knowledge that the two sub-divided plots have since been sold - and resold - to third parties,

some of whom may be *bona fide* purchasers without notice. Ownership titles have been issued to them and yet they were not made parties to the suit now between the appellant and the respondent. We would loathe making orders in vain.

*Mr. Munyu* further submitted that the learned Judge erred in finding that there was a dispute affecting the existence or validity of the contract of sale and thus affecting the determination of the prayers sought in the Originating Summons.

The learned Judge held:-

***“An originating summons can only be brought under order XXXVI Rule 3 CP Rules to determine questions arising between vendor and purchase connected with contract of sale not affecting the existence or validity of the contract of sale. It is clear in this case, that disputes have arisen as to whether or not the contract of sale was in existence the sale having not been completed. A dispute has also arisen as to whether or not plaintiff is in breach of the contract of sale for not paying the additional shs.100,000. Those disputes cannot be determined through an originating summons.”***

Before trial, the court was given some issues to determine. These were, inter alia, whether there was a valid Agreement of Sale upon which either party can rely on as the basis for the reliefs sought; whether the suit property did exist and whether the respondent was entitled to increase the purchase price. The suit was then set down for hearing and *viva voce* evidence was taken.

The procedure of Originating Summons is designed for the summary or ad hoc determination of points of law, construction of certain specific facts or obtaining of specific directions of the court such as trustees, administrators or the courts execution officers. The procedure should not be used for the determination of matters that involve a serious question or determination of disputed questions of fact. See **KENYA COMMERCIAL BANK LTD VS. OSEBE [1982] KLR 296**. What happened in the trial court is that the issues of fact were fully determined by way of trial by production of oral evidence. Though no objection was raised as to the appropriateness of the Originating Summons before the trial commenced or at the first instance, the fact remains that the dispute before the learned Judge was outside the ambit of the Originating Summons and the procedure was wrong. There was no point, therefore, for the learned Judge to allow the parties to waste their time and canvass their dispute through a faulty procedure he disapproved of. However, we agree with the learned Judge that the dispute between the parties herein could not appropriately be determined by way of an Originating Summons.

In the result this appeal is ordered dismissed with costs.

**Dated and delivered at Nairobi this 10th day of June, 2005.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**